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Texas Jails Troubled by Deaths, Negligence and Failed Inspections

by Gary Hunter

For decades Texas jails have been cesspool's of misery, medical neglect, brutality and over crowding. Class action litigation in the 1970's alleviated some of the worst aspects of the Texas jail system and led to modest improvements. By the late 1990's the jail consent decrees and injunctions had been removed thanks to the Prison Litigation Reform Act. Within a few short years, Texas jails had reverted to their old ways.

Dallas County Jail has done it again. Less than a year after the James Mims debacle, which left the mentally retarded man without water for 11 days, Dallas jailers again deprived another prisoner of water for 4 days.

Gil Martinez, 30, was arrested for misdemeanor trespassing. Mr. Martinez, who has mental health problems, plugged up his toilet and flooded his cell to get attention. Jailers responded by shutting off the water.

According to Sgt. Peritz, the water in Martinez' cell was turned off on August 3, 2005 and no one noticed, until August 7, that it had not been turned back on. Policy implemented following the Mims incident requires that both a supervisor and the jail commander be notified before a prisoner's water is turned off. The jail commander ultimately decides. If and when the decision is made to terminate the water supply policy requires that: 1) it must be restored within 24 hours; 2) face-to-face contact must be made twice an hour; 3) each of 3 8-hour shifts must flush the toilet; and 4) the prisoner must have 3 opportunities a day to drink.

Vivian Lawrence, a mental health expert, asked, "Do they have no reporting during the day? Do they just come and go? Is there no accountability to their superiors?"

Ms. Lawrence has repeatedly offered to train jailers, on her own time and free of charge. The county has resisted her offers citing overtime costs.

Attorney David Finn, who represents many injured prisoners, including James Mims, says, "It would seem high time that an outside investigation be initiated into these barbaric procedures. They've been going on for five to 10 years, and it's painfully obvious that our local leaders are unwilling or unable to change things."

Mr. Martinez was fortunate. Medical staff say his health was not affected by the

deprivation. But that begs the question, "what did he drink for four days?" For those who have never been inside here's a hint. When the water is shut off from the outside, the only water left is in the toilet.

Dallas Deaths

A September 15, 2005 edition of the *Dallas Observer* reminds readers that problems in Dallas lockups have been around for years.

Mark McLeod fought with his brother, in his grandmother's kitchen, on November 28, 2000. It was not a big fight, more like a shoving match. But police arrived and Mark was arrested. His arrest began a two year trek through Texas institutions—a two year journey that ended in death.

A man with lesser promise might have been overlooked. But Mark had talent. He was a graduate of Texas Tech University, with a degree in journalism. But the aspiring reporter was acting strangely, more volatile, more aggressive. This is what prompted the call for police the day of the fight.

McLeod's arrest prompted a medical exam. After a month of observation, Mark was diagnosed with catatonic schizophrenia, an incurable condition that includes paranoia and auditory hallucinations. On November 30, 2000, Mark went before a jury and was declared incompetent to stand trial. He was then transferred to Terrell State Hospital.

After 19 months of intensive treatment, Mark was finally stabilized. On July 22, 2002 doctors approved his release. He was returned to the Lew Sterrett Jail,

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Texas Jail Trouble (cont.)

in Dallas County Texas, where his court appointed attorney, Julie Doucet, labored to arrange his release. With a phone call to his brother Mike the misdemeanor case could be resolved and Mark could return to his grandmother's, the home he had known since he was 5-years old.

It should have been routine. Thirty-two milligrams of Trilafon 4-times a day, with a stern warning. Failure to adhere to instructions and "symptoms of schizophrenia, paranoid type will recur..." But Lew Sterrett, the death trap of Dallas County, dropped the ball again. Five days later, on July 27, 2002, Mark McLeod hanged himself in his cell, not a trace of Trilafon in his system.

A distraught Doucet tried to investigate. But District Attorney Bill Hill and Sheriff Jim Bowles closed ranks and squashed her efforts. Yet even Hill's office admits that the Dallas jail is its most troubled client.

The *Dallas Observer* calls the death of Rosa Allejo "a textbook Lew Sterrett death." Jailed for a misdemeanor prostitution charge in February 2002, Allejo died in less than 3 weeks from medical neglect.

Diagnosed with a mental disorder, Allejo was taking lithium to stay normal. She begged for her medication—oh how she begged. She started by eating toilet tissue and yelling. She graduated to eating her own feces.

She finally died of caffeine toxicity from eating the coffee grounds provided by guards. In the end, like McLeod, she never received a single dose of her medication.

One of the side-effects of lithium deprivation, in a mentally ill patient, is a spate of unusual cravings. That her behavior went undiagnosed indicates either incompetence or neglect or both. Yet the county continues its defense at-all-costs strategy instead of seeking solutions.

"It floors me," says Lawrence. "This has been going on for so long...I think there is just a culture at the jail where they just say, 'We've done this for so long, and we're not going to change.'"

What the jail has done for so long is kill prisoners, deny them medical care and house them in subhuman conditions.

"If you look at the 1998 report and the report the current consultant did in February of this year [2005], there are a

lot of the same recommendations," says Lawrence.

Even the one bright light on the commissioner's panel has dimmed. First-term County Judge Margaret Keliher, who initiated the most recent study, has now joined her colleagues' unsuccessful efforts to squash its publication. The report, by Dr. Michael Pusic, is so damaging that it has become a source of evidence for several lawsuits against the jail. The county paid over \$100,000 to the law firm Figari and Davenport for its failed effort to have the report silenced.

"We have found more complaints from the Dallas County jail about the medical care, and we have found more incidents arising from the inmates at Dallas County than any other big county jail in Texas," says Terry Julian, the executive director of the Texas Commission on Jail Standards. (TCJS)

That would include Houston's Harris County jail population of about 9,000 and an average 2,500 more prisoners than Dallas County.

"We find that the Dallas jail generates more complaints about medical and mental health conditions than all the other jails in the region put together...the Dallas jail presents by far the greatest problem in the region with regard to jail medical and mental health care," he said.

"I was surprised just how sick the patients are at Dallas County," says Dr. Owen Murray, chief executive of University of Texas Medical Branch (UTMB) Correctional Care. "You have three times the rate of diabetes in the jail as you do in prison and twice the rate of hypertension."

The gravity of Dr. Murray's statement can only be properly understood if you understand that he is comparing Texas Department of Criminal Justice (TDCJ), with a population of over 150,000, to Dallas County's 7,000 prisoners. Until recently UTMB managed the health care of both jails and had come under fire for the deplorable conditions of Dallas jails. Murray admits that UTMB underestimated the scope of Dallas County's needs when they took the job in 2001.

In reality, however, UTMB's predecessor contributed much to the present problem. Investigations of Dallas County Health and Human Services (DCHHS) in 2002 alone revealed shocking situations. Health care providers punished suicidal prisoners by stripping them naked and

Texas Jail Trouble (cont.)

leaving them in their cells alone and often without medication. One problematic prisoner gouged out his own eye and tried to flush it down the commode. Medical staff responded by wrapping his hands to prevent further injury.

WFAA-TV and the *Dallas Morning News* exposed DCHHS's problems in 2002 which included the daily practice of the jail's mental health director, Rita Moss, leaving work early everyday to run her private practice.

Former criminal judge Jim Pruitt called the DCHHS employees "damn lazy."

Attorney Finn describes a medical practice in the jail that he still can't explain. "Hundreds of thousands of dollars in meds are just getting flushed down the toilet," he says. "...We're talking about prescriptions written by physicians licensed by the state of Texas."

This is exactly the situation Mark McLeod found himself in those five fatal days before he died. His life literally flushed down the toilet by "damn lazy" employees.

Survivors

Michael Scott was arrested and jailed in March 2004. Several weeks later he began to have asthma attacks. When he couldn't get adequate treatment he began to call home daily. On August 2, Scott, struggling to breathe, was rushed by ambulance to Parkland hospital where he was eventually stabilized.

On September 3, Scott again required emergency treatment at Parkland. This time doctors prescribed specialized treatment to strengthen his lungs. But instead of the prescribed drugs the jail medical staff issued Scott a standard inhaler used for treating mild asthma. His phone calls home got more frantic.

On September 14, Scott was hospitalized again. This time he required treatment for ten days. His father and mother, Donald and Shirley, arrived at Parkland to find their son hooked to a respirator, connected to tubes and bloated out of proportion.

"The doctors couldn't guarantee us he was going to live," said his father.

Even after his 10-day ordeal the jail still refused to give him the drugs prescribed by the hospital doctors. Only after one more visit to the hospital did he get relief. With the help of a pulmonolo-

gist, who personally ensured that the jail medical staff provide the exact treatment prescribed, did Scott eventually recover.

"The doctor told us the bill he accumulated in intensive care was a lot more expensive to the county than the medication he should have been getting," said his father. His mother told reporters that months later Scott's speech was still slurred, he walked unsteadily for weeks and was still at risk for memory loss.

Jerry Wayne Mooney languished in Lew Sterrett for over three years as guards abused him, medical staff neglected him and lawyers fought fiercely to save his life.

Mooney was hospitalized after a shootout with Irving police, in which he sustained almost a dozen bullet wounds. His stomach was so severely shredded that his intestines pushed through the muscle and over his waist. After a month of treatment Mooney was released from Parkland hospital and taken to the jail.

Mooney spent his first 62 days in solitary confinement where his colostomy bag was not replaced for 11 days. Neither did jail medical staff provide abdominal support binders. The result was a hernia so distended it reaches from breast-bone to groin. Even after doctors scheduled the operation to repair the damage, the jail failed on multiple opportunities to provide him access to treatment.

"The quality of care is abysmal," says Tona Trollinger, Mooney's attorney. "They know that his attorneys were watching him, and they still haven't been giving him quality medical care. They don't give him colostomy bags; the administration of the medication is erratic; they don't allow him to see a doctor when he asks."

"I was put in solitary and left to rot," says Mooney.

Recommendations

A scathing report decrying the medical conditions in the jail was submitted by Dr. Michael Pusic in February 2005. A follow-up report was recently issued in mid-September to bolster the original findings. The second report proposed specific recommendations from a committee of health care experts as well as Dr. Pusic.

Recommendations include: the construction of 20 new examination rooms; a 40-bed infirmary with bed-side electrical outlets for IV-pumps and line of sight access, a 120-bed clinic for chronically ill patients, a 50-to-80 bed unit for mentally

ill patients and 24-hour nursing care. The new report also details a plan for more efficient distribution of medication and recommends that medical assessment and living assignments be taken out of the hands of jail guards.

Judge Margaret Keliher was openly pleased at the recommendation that guards be relieved of the job of making medical assessments at booking. The new report recommends that two medical staff and two mental health staff be available to assess incoming prisoners.

Health expert Vivian Lawrence applauds the changes but is worried that the only implementation plan by commissioners is two years away. "That's two years down the line," she said. "We need some things implemented now."

District Attorney Bill Hill is fighting the release of this latest report saying that it "contains comments by consultants... never intended to be a part of the final copy of the Recommendation Report." Hill also fought the release of the original report citing concerns that its contents would support lawsuits leveled at the jail. He lost that effort.

Pusic still voices concerns that the city refuses to buy a more advanced X-ray machine designed to more efficiently detect tuberculosis. His concerns also include the city's ability to hire adequate medical staff.

Prisoners of Paperwork

Lowest on the list of Dallas' abused are the prisoners of paperwork. Scott Williams looked so bad when he appeared in court or, DUI charges that Criminal Court Judge Lisa Fox turned him loose.

When a new computer system failed to integrate properly, in early 2005, Williams was one of hundreds lost in the shuffle. Williams tells of a week of human misery.

"I was in hell buddy. There was shit on the toilets...I'm talking an inch of shit. I just squatted over it and pushed and tried to aim as best I could."

Williams said he was stripped naked and placed in a cold suicide cell for 12 hours because he wasn't eating the sandwiches provided by the jail. Naked and shivering, Williams said he occupied his time trying to avoid the broken glass on the cell floor.

Judge Fox has been commended by both defendants and lawyers for exercising wisdom by releasing prisoners. She said she released Williams because, "[he]

wasn't getting his medication. I believed he was suffering and that he didn't need to be in jail."

But the problems with the jail is stated more eloquently by the guard who, in spite of Judge Fox's order, decided to keep Williams an extra day.

He said, "Fuck Judge Fox; she didn't call my mama, so why the fuck should I give a shit what she says?"

Anyone who has spent time in a jail, working or living, can tell you that this attitude is not as rare as many would like to believe.

Three other prisoners would consider Williams fortunate. Elizabeth Davis, Ronald Weathers and Billie Sue Byrd have filed charges against the Dallas jail for the same computer foul-up that trapped Williams.

The three former prisoners are asking \$100,000 apiece in damages. On October 4, 2005 county commissioners unanimously denied the request for damages. The judges based their denial on records produced by the same computer system responsible for the foul-up, Adult Information Systems (AIS).

"That speaks for itself," retorted G. David Smith, attorney for the former prisoners.

Records show that Ms. Davis was arrested December 30, 2004, her case was dismissed February 22, 2005 but she was not released until March 29, thirty-five days later.

The county defended itself saying it was holding Ms. Davis on other charges.

Smith pointed out that "waiting 35 days extra is way longer than anyone would have to stay in jail over a traffic ticket, which is what these other charges amounted to."

The Sheriff's department identified 30 prisoners held past their release dates. The *Dallas Morning News* identified over 40 and even the commissioners believe the number is higher than that. But commissioner Mike Cantrell, who championed the installation of AIS, said the claims were denied because "As you whip up hysteria, we get more of these claims filed. We analyzed the claims and the claim was denied based on the facts."

"That's such hogwash," said Smith. "Typical tactic for the county -deny liability and run up legal costs. I hope we can spank them in court."

AIS originally cost \$3 million to install. The county paid Microsoft an

additional \$460,000 to clean up the mess and recommend improvements. Complete clean-up is not expected until sometime in 2006.

Micah McDaniel may have been most fortunate of all. McDaniel was not just worried about getting out. Had his attorney Ray Jackson not enlisted the help of Judge Creuzot no record would have existed that McDaniel was even in jail.

The City Next Door

Pus oozed from the infected wound on James Wright's head; gnats fed on the seeping fluids. Wright was a prisoner in Fort Worth's Tarrant County jail. The wound was from recent brain surgery to have an abscess removed.

The relentless gnats infested the jail infirmary waiting room.

These are the conditions faced by Wright and other prisoners in Tarrant County jail. Thirteen times, between April 2 and April 25, 2005, Wright had requested treatment. By the time he was finally seen, on April 26, his incision was infected and another abscess had formed. Months of missed medication left Wright unable to walk unaided. Still, Wright was more fortunate than others.

Just before he died Christopher Brown wrote, "I have full blown AIDS... I am starting to get sick now. I don't know what the problems is in medical, but for the last two or three weeks I have been told that I would see the doctor the following Monday, and I don't." In another letter Brown said, "...if they had seen me from the beginning, things wouldn't be as bad, because I would have my meds." Brown died in custody.

Kendric Carter, 30, had received medical treatment. But when he returned for a follow-up on June 17, 2004, his medical chart was missing.

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Texas Jail Trouble (cont.)

"I cannot adequately [treat] patient without chart!" the doctor noted. "Find chart and show me—today!!" Carter died, in custody, from hepatitis B on August 5, 2004.

Mario Paschall, 19, was diagnosed with Marfan syndrome at age 5. Marfan is a condition whereby tearing in the aorta allows blood leakage. Shortly after his arrival at the jail, in August 2004, Paschall developed severe stomach and chest pain accompanied by vomiting. He was first treated for gas, then was diagnosed for gall bladder trouble. He was sent to John Peter Smith (JPS) Hospital, the same hospital that had monitored him since he was 5-years old, but instead of assistance the doctors misdiagnosed him and sent him back to jail with some nausea medication. When Paschall continued to complain the next day he was given Pepto-Bismol. He was found dead on his cell floor the next morning. A nurse tried unsuccessfully to revive him with a defective defibrillator.

Conditions at the jail are so unconscionable that medical staff often jump ship or mutiny. Employees routinely

complain about inadequate staffing, defective equipment and out-of-date meds. When Thomas Williams, a registered nurse, went to work at the jail in October 2003 he found 20-year-old defibrillators and expired IV's.

Consultants with the American Jail Association found the jail in need of drastic changes. An audit revealed that tests ordered by doctors were often not performed or performed improperly. Equipment was inaccessible, prescriptions went unfilled, backlogged and at times were illegally filled by pharmacy technicians. Life-sustaining drugs went unprovided. The jail was consistently short of doctors and nurses while medical requests went unanswered and medical files were unavailable up to 50% of the time.

Prisoners reported broken arms that went unset. One prisoner was given a laxative to treat his diarrhea. A diabetic prisoner received no insulin for three days. It would have been longer except he was released from jail.

Another prisoner, incontinent due to colorectal surgery was forced to live in his own excrement for ten days because the jail would not provide him diapers. His mother was finally allowed to bring some

into the jail. The doctor's response was, "you can go call your mommy and tell her you've seen the doctor now."

Just as in Dallas, the problems in Fort Worth jails are not new.

Christi Ball's life had been full of promise. A degree in biology from Texas Wesleyan University promised possibilities far beyond the mild mental problems she began to experience in 1989. But with time her illness worsened and her life crumbled. That's how Ms. Ball eventually ended up one of ten deaths in Tarrant County jail in 2004. Sadly, Ball was in jail for trespassing

on the grounds of JPS hospital—where she was trying to get help—where she was eventually pronounced dead. At the time JPS also ran the medical department in Tarrant County jail.

Ball visited the Mental Health Mental Retardation (MHMR) facility in Bedford, Texas on October 4, 2004 suffering from lightheadedness, irritability and mood swings. Doctors adjusted her medication but on October 7 Ball returned in worse condition.

On October 11 Ball announced her engagement to a 73-year-old man and informed her family that the two were living together in a retirement home. She charged \$6,000 worth of wedding accoutrements and hundreds more for an armpit wax and eyebrow shaping. On October 12 MHMR again adjusted her medication.

Later that same day, feeling lightheaded, Ball went to Harris Methodist H.E.B. Disheveled and distraught, Ball became angry when a doctor said she was manic. On October 13 Ball visited Baylor Medical Center, at Grapevine but eventually refused treatment and left. Her elevated blood pressure and heart rate prompted a nurse to note "hypermania" in her file.

On the evening of October 14, Ball went to Baylor Medical Center in Fort Worth. She again refused treatment but this time refused to leave.

"I will kill you and the people inside this hospital," she told the policeman who approached her. He shot her with a Taser.

Early Friday October 15 Ball was sent to the 10th floor psychiatric unit at JPS. Ball became physically aggressive with hospital staff screaming, "I am Jesus Christ Almighty and you will burn in hell. You don't know who you are detaining."

She was medicated by staff and placed in seclusion. But unexplainably, less than two hours later, she was released from seclusion and told to leave. She refused, stripped naked and was placed in seclusion again. But by 9:00 a.m. she was discharged again and given a ticket for trespassing.

Ball would be hospitalized, released and arrested several more times over the next few days for her increasingly erratic behavior caused by her mental illness.

On her final arrest, Ball was booked into the Tarrant County Jail. Silent and stoic, Ball signed no paperwork and answered no questions. Her only noted

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disruption that day was when she went to the dayroom naked to use the phone. Guards told her to get dressed.

"NEVER!" she screamed.

On October 17 Ball's incoherent yelling prompted jail staff to request mental health assistance.

On October 18 frantic family members finally located Ball after filing a missing persons report. They tried to see her but were not allowed because Ball had not signed a signature card. Jailers assured the family that Ball was safe and receiving treatment.

"The only reason we did not take her out is because we thought she would get the help she needed," says her mother.

On October 21 Ball was found dead, face-up on the floor of her cell, blood oozing from the corner of her mouth as the result of a seizure. She was 35 years old.

The Tarrant County jail also claimed the life of 46-year-old Christopher Waller. On August 15, 2005 Waller complained of breathing problems due to his asthma. Medical staff determined to send him to JPS for treatment. The guard who accompanied him said that Waller grew impatient while waiting and asked to return to the jail.

About 2:00 a.m. Waller's breathing became labored again. He was taken back to JFS where he died at 3:43 a.m. on August 16 of undetermined causes.

Jails Decertified

Less dramatic but problematic are the conditions that make these jails dangerous. No less than 5 county jails in Texas have been decertified in 2005 for various reasons, the most common being overcrowding and staff shortages.

Houston's Harris County Jail came under fire when they refused to allow federal inspectors inside the jail. Advocacy Inc. is a watchdog agency commissioned by congress to ensure that state jails stay in compliance with federal standards for treating the mentally ill. When they showed up on Harris county jail's doorstep, on August 16, 2005, jail officials turned them away.

The visit was prompted when the agency received 32 complaints of sub-standard healthcare of mentally ill and disabled prisoners. On September 19, 2005 Advocacy Inc. filed a lawsuit requesting a preliminary injunction be issued by U.S. District Judge Keith Ellison. If granted, the group would gain unhindered access to the jail.

Concern stems from complaints that medication is not being issued promptly enough. Even after orders by a state district judge some prisoners have still waited six weeks for medication.

The lawsuit, which names both the county and Sheriff Tommy Thomas as defendants, claims the group was turned away because they did not have an "access agreement" on file. Jail officials referred inspectors to the county attorney's office which stonewalled for two more weeks. On September 19 the suit was filed.

"They can't put on a dog and pony show forever," said Beth Mitchell, senior attorney for the group. "I wasn't going to wait around and allow inmates to be injured or deprived of adequate medical care because we can't get in."

Concerns also stem from extreme overcrowding due to staff shortages in the jail. For the second straight year Harris County has been decertified by the Texas Commission on Jail Standards. (TCJS). Nearly 1,300 prisoners are sleeping on the floor even though much of the jail is unoccupied. Even guards fear potential violence from the present conditions.

Two separate studies have also revealed another reason for overcrowding in the jail—Harris county judges. Justice Management Institute (JMI) and the American Civil Liberties Union (ACLU) recently conducted independent studies of the Houston facilities and both studies concluded that local judges were

ignoring a provision provided to prevent overcrowding. The provision dictates that low-risk defendants, who pose no danger to the public, be granted free, or low-cost bonds.

Harris County maintains a Pretrial Services department specifically designed to identify low-risk offenders. The department was created as part of the "Alberti decision," a 23-year-long lawsuit initiated in 1972, by prisoner Lawrence Alberti, for extreme overcrowding in the jail.

The ACLU study also notes that judges are exploiting a legal loophole that allows them to place felons in the county jail instead of sending them to treatment programs.

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Texas Jail Trouble (cont.)

that it's actually the judges' sentencing practices that are causing overcrowding," said Ann del Llano of the ACLU.

While the *Alberti* suit ended in 1995 some fear that the jail may be ripe for a new legal battle.

"It's deja vu all over again," said Gerald Birnberg, an attorney involved in the original *Alberti* suit.

Overcrowding also plagues the Hopkins County jail bringing a second failed inspection from the TCJS in less than a year. A September 13, 2005 inspection revealed that the jail had more prisoners than beds explained Hopkins County Judge Cletis Millsap. He went on to say that the Texoma, TX jail had exceeded 100 prisoners a total of six times in 2005.

"This has caused us to fail getting the certificate this time."

The district attorney's office recommended building a new jail. Millsap said the county would likely put it to a vote. The county has also considered housing prisoners elsewhere long enough to get certified but Millsap says it's too expensive.

"You figure \$40 a day for 10 prisoners, that would be \$400 a day...the sheriff does not have that kind of money set up in his budget."

Scrutiny of jail records shows over 30 people in the jail who have not been indicted by a grand jury but are currently unable to post bond. "There are some problems here..." Millsap conceded.

Potter County jail was cited for overcrowding during their September 22, 2005 inspection by TCJS. Both male and female populations were too large noted TCJS inspector David Cisneros.

"We knew we were going to be in noncompliance on a couple things," said Sheriff Nike Shumate. "Our biggest problems is the state has no room...There's nowhere to put them."

State standards require one guard per 48 prisoners. Potter county fell short. Also written up were hygiene deficiencies stemming from torn mattresses which could not be properly disinfected before reuse.

"Dirty mattresses are no surprise," said Shumate. "We're not the only ones out of compliance."

Nueces County Jail is also overcrowded. October 2005 found police and court officials scurrying to bond out low-risk prisoners to make room for the upcoming

holidays. The jail is presently at 90% capacity and arrests usually double during the holiday season.

Jail officials complained that 83 of the nearly 900 prisoners were awaiting pick-up by Texas Department of Criminal Justice (TDCJ). The prison suspended pickups temporarily because of the threat posed by Hurricane Rita. But Mike Viesca pointed out that TDCJ, which is allowed 45 days to collect new convicts, is averaging just over 20 days per pickup.

A more acute problem appears to be an abundance of prisoners who have been jailed anywhere from 30 to 90 days without being charged and without bond. Corpus Christi Police Officers Association has threatened Nueces County Sheriff Larry Olivarez with a lawsuit if he doesn't solve the problem soon. The union says intake problems are preventing police from properly doing their job.

Bexar County Judge Nelson Wolff has proposed a new department to relieve the overcrowding of San Antonio jails. Budget officer David Smith is under pressure from county commissioners to find a solution without exceeding a \$625 million budget. Wolff says sweeping changes are needed in the entire justice system including the courts and the district attorney's office.

One immediate change will be the demise of the Justice Support and Human Services Department. Joe Castillo, who has worked for the county "off and on for 25 years," says he plans to retire.

Tommy Hall was discovered missing from Miller County jail on Saturday October 8, 2005. Hall, a repeat drug offender, was last seen during count time on Friday night. His escape is particularly embarrassing since it occurred at a new, more secure facility.

"He will be found," assured warden Picky Hunter. "He will have to come back here."

Hall's escape is the second to occur at the new jail. Hunter indicated that "updated security" was being installed.

"As long as I am warden, I will do what I can to make sure people don't get out of here unless we release them for the right reasons."

Escape from jail is a serious thing. What does it say when an escaped prisoner is the least of problems troubling Texas jails?

There is no hope on the horizon that anything will change for the better in the near future. No lawsuits are currently challenging these conditions on a systemic basis and political leadership and will to address the problems caused by mass imprisonment on the cheap is totally absent at the state and local level. Texas jail prisoners are being left in misery for the foreseeable future. ■

Sources: *Amarillo Globe-News, Corpus Christi Caller-Times, Dallas Morning News, Dallas Observer, Fort Worth Star Telegram, Houston Chronicle, San Antonio Express News, Texarkana Gazette*

From the Editor

by Paul Wright

By now all subscribers should have received PLN's bi annual reader survey and fundraiser letter. We have not received that many responses back to the survey which may mean everyone is happy with *PLN's* content the way it is. If you have not yet returned it please do so. Among the changes we are planning to make if readers do not object, is move our coverage of suicide, crime victim, employee and juvenile litigation to our website where it can be accessed by interested parties there and leave our print pages open for more prison and jail related news and legal information. Let us know your thoughts on this.

PLN's website continues to grow as we add more cases, articles and news information to it on a daily basis. It is available

to those with internet access and has been designed so the contents can be easily printed for mailing to prisoners. It contains a wealth of information on prisons and jails and detention facility litigation found nowhere else. In addition, PLN has launched its free list serv where we post news and court rulings about prisons and jails on a regular basis. Anyone can sign up for it. Prisoners should let friends and family on the outside and anyone else interested in criminal justice issues know about these tremendous resources.

We got behind our regular publishing schedule last year but we are slowly catching up. We apologize for any inconvenience this has caused our subscribers. Enjoy this issue of *PLN* and please encourage others to subscribe. ■

Federal Judge Enforces “Valdivia Remedial Plan” for California Parole Violators

On June 8, 2005, the United States District Court enforced its order in *Valdivia v. Davis*, 206 F.Supp.2d 1068 (E.D. Cal. 2002) [*PLN*, Jan.2003, p.16] and its March 9, 2004 Stipulated Permanent Injunction implementing the ensuing “Valdivia Remedial Plan” (VRP) [*PLN*, Apr.2004, p.24], after California’s Secretary of Corrections Roderick Hickman unilaterally announced (“Hickman Memo”) that effective April 11, 2005, California would no longer offer alternatives to re-incarceration for technical violators of parole.

In so doing, Hickman buckled under political pressure from the powerful prison guards union (CCPOA) and its puppet victims’ rights organizations who, emboldened with six-figure CCPOA cash infusions, ran TV and billboard ads in central California claiming the VRP threatened “public safety” and that all parole violators should simply be imprisoned—even if that meant violating their court-affirmed constitutional rights to prompt and fair parole revocation hearings.

The enforcement came swiftly after the prisoners’ attorneys Donald Specter of the San Quentin, California, Prison Law Office (PLO) and Michael Bien filed a motion for enforcement and civil contempt against Hickman on April 13, 2005. The court addressed two areas of VRP non-compliance. First, Hickman’s fiat abolished the remedial sanction options (i.e., in lieu of revocation) of Electronic Monitoring [ankle bracelets] and Substance Abuse Treatment Control Units (SATCU) [90 day voluntary residential drug programs]. Second, Hickman eliminated the alternative of Community Correctional Reentry Centers (CCRC) [“Halfway Back” program]. The questions before the court were whether these two actions violated the VRP and if so, did they constitute civil contempt.

Structured Care Programs Ordered Reinstated

Hickman argued to the court that there were really two instruments, the Permanent Injunction (PI) and the VRP, and because the language of the PI did not detail the remedial sanctions, the state was free to unilaterally drop them. The court rejected this narrow interpretation. Focusing upon the plain language of the

PI, the court noted that it specified that “[t]he Policies and Procedures will provide for implementation of the August 31, 2003 Remedial Outline.” In other words, the VRP was literally attached to and became a part of the PI. Applying Federal Rules of Civil Procedure 65(d) [the “four corners” rule], the court held that such attachment and reference made it inescapable that Hickman was bound by both the PI’s and VRP’s terms.

Reviewing what was made mandatory by the VRP, the court found that the PI commanded Hickman to “(1) consider remedial sanctions throughout the new parole revocation process, and that the remedial sanctions include (2) ‘the Substance Abuse Treatment Control Units, Electronic Monitoring, Self-Help Outpatient/aftercare programs and alternative placement in structured and supervised environments.’” Since the Hickman Memo “creates a new policy and practice which prohibits...” all of the above, it violated the PI. The court granted the plaintiffs’ motion in part and ordered that the defendants were “in violation of the Permanent Injunction Order by virtue of the elimination of remedial sanctions of Electronic Monitoring and SATCUs.”

Residential Care Programs Not Protected

Closing the CCRCs was a “closer question.” Parsing the PI’s language, the court determined that if Hickman would still keep the “Self-Help” and “alternative placement in structured and supervised environments” available, potential parole violators could still avail themselves of this option. The court accepted Hickman’s explanation that these options include the Substance Abuse Recovery and Treatment (STAR) program, a classroom alternative available at local parole offices. Valdivia’s counter-argument that STAR was unacceptable because it was not a “residential” program was not persuasive because “residential” was nowhere announced in the VRP or other authority. This gave Hickman “discretion” to tailor such programs, and since the court must “accord deference to the appropriate prison authorities” (citing *Turner v. Safley*, 482 U.S. 78, 85 (1987)), the closure of the CCRCs was deemed not in violation of the PI.

Finally, the court found that Hick-

man’s actions were at most “erroneous, [but] arguably reasonable,” and as such, did not rise to the level of bad faith necessary to constitute civil contempt.

Political Controversy Continues

But the court’s enforcement did not end the political controversy. Of California’s 114,000 parolees, 19,380 (7,000 in Los Angeles County alone) were reported in June 2005 as being “at large,” that is, not having reported to their parole agents. Daniel Macallair, director of the Center on Juvenile and Criminal Justice in Oakland, opined, “We have too many inmates and not enough (rehabilitation) programs. The most neglected area is the entire field of parole. We are not able to provide any kind of meaningful re-entry services to help them make the transition from prisons to the streets. You couldn’t invent a worse system.” Los Angeles County Assistant Police Chief George Gascon concurred, “we are failing miserably ... in the ability to provide people coming out of institutions the opportunity to rehabilitate themselves. Parole agents are overwhelmed.”

Whenever a parolee not returned to custody (or kept there) per the VRP thereafter commits a new crime, the CCPOA and its victims’ rights mouthpiece raise a hue and cry. When parolee Daniel McEvoy of Auburn, California, a sex offender, was released on May 6, 2005 because his VRP due process rights had not been timely met, it was alleged that three days later he raped a woman (but no charges were filed). He was at last reported a parolee-at-large, having not reported nor filed sex-offender registration notices giving his current whereabouts. Another

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Valdivia Remedial Plan (cont.)

“poster-boy” was five-time parolee Royce Timmons, who upon being released to a substance abuse treatment alternative program in January, 2005, failed to attend and instead went on a six-day crime spree of drug abuse, robbery, stabbing, carjacking, and multiple kidnaps and rapes in San Bernardino County.

Guards Union Calls VRP “Public Safety Failure”

Not missing the opportunity, CCPOA Vice President Chuck Alexander said that “without the [long-established *Morrissey v. Brewer*, 408 U.S. 481 (1972) constitutionally based] time constraints, the Board of Prison Terms could have continued [McEvoy’s] hearing to find the [no show] witnesses,” adding, “this is a good illustration of one of the major flaws of the *Valdivia* decree.” Or, restated more bluntly, “Forget the parolees’ constitutional rights.” Ray McNally, CCPOA political consultant, was more honest, noting the possibility of political fallout that might harm Governor Schwarzenegger. Between January 1 and May 1, 2005, at least 231 parolees had been released from custody due to missing the 35-day VRP due process deadline, according to the *Sacramento Bee*.

The “Big Lie” underlying the CCPOA—spawned hype about the danger of not simply re-incarcerating every parole violator [to fill empty prison beds] was blindly accepted in recent California Senate hearings. At the end of 2004, there were 2,529 (4.1%) fewer technical parole violators in California’s prisons than there were at the end of 2003, but 2,141 parolees with new crimes had been added back to the prison population.

From these statistics, the CCPOA—in television ads paid through their funded agent Crime Victims United of California president Harriet Solarno—inverted the logic and argued that not having incarcerated those now re-committed violators only served to spawn that many new avoidable crimes against the public, and that therefore the experiment of alternative sanctions was a public safety failure.

The Statistics Tell Another Story

The fatal flaw in this argument is that the prison population in California is physically capped at about 165,000, and thus any new bodies coming to prison

numerically absorb the variable “slack” of bed-vacancy-driven parole violators who would have otherwise been purposefully swept up by union parole agents to fill those beds. In fact, California’s parole-agent controlled technical-violator return-to-custody occupancy has declined from 74,000 (50% of the total prison population) in 2000 to about 41,000 currently, due solely to increasing non-violator population growth connected to harsher sentencing laws [e.g., “Three Strikes”] and California’s vaunted no-parole policy for lifers. (See: *PLN*, Mar. 2005, pp. 1-8, *California’s Corrections System Officially Declared Dysfunctional; Redemption Doubtful*.) Things got so bad that on June 10, 2005, CDC parole administrator Ed Carnegie issued a memo to parole supervisors to cut back on parole sweeps “due to major overcrowding in State Prison Reception Centers,” adding, “things are really ‘tight’ in the institutions.” It does not look good for the department. It is California’s national shame that it returns more parolees

to custody on technical violations than the total from 39 other states—but it is no accident.

Victims’ and Governor’s Interests Mold Policy

While the CCPOA circled its mobile billboard around the state Capitol, attacking Hickman as being soft on crime, an excited Solarno exclaimed about the Hickman Memo, “You’re kidding! You mean my commercial did it? This is step one, but we have a lot more to do.” PLO attorney Specter’s assessment of the Hickman Memo was more candid: “I certainly hope they’re not caving in to pressure from the unions based on the fact that the governor’s poll ratings seemed to be declining.” See: *Valdivia v. Davis*, U.S.D.C. (E.D. Cal.) No. CIV S-94-0671 LKK/GGH, Order, June 8, 2005. The ruling is available on *PLN*’s website. ■

Other sources: *Sacramento Bee*, *Los Angeles Times*, *Associated Press*, *Los Angeles Daily News*.

California Parole Board Lax In Contracting For Foreign Language Interpreters

The watchdog California Office of Inspector General (OIG), when investigating the case of a foreign language interpreter who bilked the Board of Prison Terms (BPT) out of \$11,862 in false claims, found the BPT’s contracting and accountability procedures for such services woefully inadequate.

Between August, 2000 and June, 2003, Estella Gaines submitted 261 false claims allegedly for interpretation services at parole revocation hearings at R.J. Donovan Correctional Facility. The OIG found that Gaines had inflated travel expenses and the hours worked, and often double-billed. She pled guilty to violation of Penal Code § 487 (grand theft), and was sentenced to a 120 day suspended jail term, probation and an order for full restitution.

Worried how this crime could even occur, the OIG investigated BPT contracting practices for its interpreters. In fiscal year 2003-04, the OIG noted that interpreters were required in 911 of the 49,000 parole hearings (5,000 for lifers and 44,000 for parole violators), incurring \$360,000 in billed costs among the 57 interpreters so employed.

After investigating parole records for R.J. Donovan as well as for the nearby Ch-

ula Vista Parole Revocation Unit, the OIG found first that the BPT’s contracts did not specify in writing the terms and conditions of the services to be provided.

Second, it found that invoices were paid without verification that the services had been provided. The bills were automatically paid so long as they included a signature, address or Social Security number of the contract employee. Third, the OIG found that the BPT did not keep copies of approved invoices or other records that would permit detection of fraudulent claims, in spite of the use of a computer spread sheet which could have provided the needed screening.

Fourth, the OIG noted that there was no time limit for submission of interpreters’ invoices. This exacerbated the problem, permitting Ms. Gaines’ eight-month-old duplicate invoices to easily escape scrutiny.

Accordingly, the OIG recommended a set of corrective actions to address the deficiencies, which the BPT agreed to put into place within 45 days. See: *Special Review of the Board of Prison Terms Interpretive Services Procedures*, OIG, March, 2005. ■

Indiana State Courts Have Jurisdiction In Prisoner Phone Contract Case

by Bob Williams

In a suit challenging excessive collect call rates charged to prisoners' families, friends and attorneys, the Indiana Court of Appeals has reversed a lower court's dismissal for lack of subject matter jurisdiction.

Chanelle Alexander and others (the Class) pay for collect calls from prisoners in Indiana's state prisons and county jails. On June 16, 2000, the Class filed a suit in state court claiming the state and the county sheriffs entered into contracts with telephone companies AT&T and Ameritech Indiana, respectively. The suit claimed (1) a breach of the common law duty of reasonableness; (2) the unauthorized taxing of a sum of money; (3) the unauthorized imposition of a licensing fee; (4) an unreasonable and unjust rate or service charge; (5) an unjust enrichment; (6) money had and received; (7) the combination to restrain and carry out restrictions on trade; (8) a combination to increase price; and (9) inadequate services and facilities to class members. In exchange for its contract, AT&T agreed to give the state of Indiana a 53 percent commission on long-distance calls from all state pay phones, including state owned buildings such as prisons. Ameritech Indiana agreed to pay Sheriff Jack Cottey a commission of 40 percent of the gross revenue from all jail calls plus a \$262,000 signing bonus.

The defendants moved to dismiss the complaint for lack of subject matter jurisdiction or on the grounds that the Indiana Utility Regulatory Commission (IURC) has exclusive jurisdiction pursuant to Indiana code § 8-1-2-38 because the class was challenging the reasonableness of telephone rates and charges. The trial court granted the dismissal on November 7, 2002, based on this statute and § 8-1-2-54 containing a legislative established process for complaints to be brought to the IURC. The trial court found this appropriate by reclassifying the Class's claims as direct or indirect challenges to the reasonableness of rates within the meaning of §8-14-54. The trial court further held that it lacked subject matter jurisdiction since the class failed to first bring

their challenges directly to the IURC, thus failing to exhaust administrative remedies.

On de novo review, the Indiana Court of Appeals focused on the sheriff's Ameritech contract, comparing its profit to the sheriff with statutes prohibiting the sheriff from profiting from meal allowance [§ 36-2-13-2.5(b)(4)(B)] and statutes limiting collection fees for tax warrants to ten percent [§ 8.1.8- 3(c)(3)], unless a salary contract is in place pursuant to § 6-1-8-3(1)(4). With no such statutes regulating prisoner's phone calls, the Court could not determine if the phone contracts were permissible or enforceable.

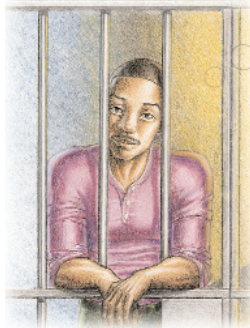
The defendants argued that this is a mere rate-making case. But the Court, while agreeing that if that were the case the courts should not interfere with the contract because that would undermine the ability of the state to regulate and supervise the provision of phone services to prisoners, found this case to revolve around a discrimination by a utility. The Court noted that state courts have long held that a public use business is "under a common law duty to serve all who apply ... without discrimination" and that such duty "is without discrimination, not only as to service, but also as to person, and prices charged. The duty to serve could be nullified if there were not the attendant duty also to serve at a reasonable charge. If a business 'affected with public interest' could make exorbitant charges for its services, it could thereby serve only whom it saw fit, and when it saw fit, by manipulating its charges and prices." More importantly, "[a] consumer may sue to recover damages at common law resulting from discrimination by a utility as to services or rates," quoting *Foltz v. City of Indianapolis*,

234 Ind. 656, 130 N.E.2d 650 (1955).

Based on *Foltz*, the Court declared that the trial court must exercise its jurisdiction with respect to the Class' common law claims. The trial court must first determine whether authority exists for the state and sheriff to enter into these contracts and to reap such a substantial profit. If so, the trial court may either determine the reasonableness of the rates and profits or refer the case to the IURC for this determination. On remand, the class was certified, the Sheriff's motion to join the telephone companies as defendants was denied, and the case is currently in discovery. See: *Alexander v. Cottey*, 801 N.E.2d 651 (Ind. App. 2004), on rehearing 806 N.E.2d 315 (Ind. App. 2004) (rehearing to clarify the Court did not implicitly hold profits were for the sheriff's personal use). ■

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Michigan's Dirty Little Secret: Sexual Abuse of Female Prisoners Pervasive, Ongoing

by Michael Rigby

Despite reports of sexual abuse dating back 20 years ... despite a tumultuous decade of lawsuits that cost millions of taxpayer dollars ... and despite a promise by state officials to implement sweeping reforms, the sexual victimization of women continues unabated in Michigan prisons, according to a five month investigation by the *Detroit News*.

Details of the investigation, published May 22-24, 2005, put in stark relief Michigan's ongoing failure to protect the state's 2,000 female prisoners from abuse by guards and other employees. Sexual misconduct complaints are routinely dismissed on dubious grounds. Investigations are often superficial and incomplete. And guards who sexually assault prisoners are rarely punished.

The victims have little recourse. Women who report predatory guards face punishment and retaliation. State lawmakers have exacerbated the problem by stripping prisoners of their right to sue, ensuring that guards--many of whom have lengthy criminal records--will continue to view female prisoners as their personal sex slaves. Faced with these hurdles, many women conclude there's only one way to end the abuse.

Suicide

"We're going to use this," guard Albert Moon told a terrified Tina McGraw as he showed her the first of two condoms plucked from his shirt pocket. Handing her the other one, he said, "This is for the second time." The rape occurred in McGraw's cell at the 860-bed Robert Scott Correctional Facility in Plymouth. Days later, on October 17, 1997, McGraw tried to commit suicide by ingesting a bottle of Haldol, a potent antipsychotic drug.

McGraw wasn't the first woman Moon had driven to suicide. In October 1992, Katherine Finzel, 22, complained that Moon was sexually harassing her and that he tried to assault her in the prison infirmary while another guard acted as lookout. That same year, Finzel's cellmate told prison officials a guard had assaulted Finzel in their bathroom. Still, prison officials did nothing. With no help and no hope, Finzel hanged herself in her cell on February 9, 1993.

Unbelievably, Moon was never disciplined or charged even though he was a known predator around the prison. "He's got a long reputation here," former guard Julie Kennedy Carpenter stated in a 1999 deposition. "When I first got here, they warned me about him. He figured he was going to get away with things forever. He used to brag about that all the time."

It was a year before McGraw felt safe enough to report the rape. She had been reluctant, McGraw told the State Police after she had been transferred to the 820-bed Huron Valley Facility in Ypsilanti, because when she reported another guard, Larrick Reed, for assaulting her years earlier he was not investigated but merely transferred to another prison. (After talking to McGraw, the State Police did investigate Reed, and in 1998 he was convicted.)

Moon, who was accused of attacking four other women, was ultimately convicted of sexually assaulting McGraw and another prisoner, Karen Fournier, in October 1998. His punishment? Two years probation and 139 days in jail--the amount of time he had already served.

Suicide is one of the leading causes of death among prisoners, according to the National Institute of Corrections. Prisoners who have been sexually assaulted are especially vulnerable. Since 1990, at least eight women have attempted suicide in Michigan prisons after complaining of sexual abuse. The abuse can also lead to post-traumatic stress disorder or rape trauma syndrome; heighten pre-existing mental disorders, cause depression, anxiety, and other psychiatric disorders; and increase the risk of committing crimes--especially violent ones--upon release. Interestingly, violent attacks on staff rapists rarely if ever seem to occur.

Legacy of Abuse, Suppression

Michigan has a long and sordid history of sexual abuse in its female prisons. In 1993, the Michigan Women's Commission expressed concern over the level of sexual assault and harassment. In 1996, a Human Rights Watch (HRW) report detailed a pattern of rape and sexual assault by male guards. A subsequent

HRW report in 1998 noted high levels of retaliation against prisoners who reported abuse--a practice that still exists.

For years, politicians and prison officials have worked to keep the abuse hidden. When the U.S. Justice Department launched an investigation in 1994, for example, Governor John Engler, who left office in 2003, responded by banning investigators from the state's female prisons. In June 1998, the United Nations also planned to visit the prisons in connection with a report on U.S. women's prisons in general. The day before the scheduled visit, however, Engler refused investigators access to the prisons, calling the U.N. "an unwitting tool in the Justice Department's agenda to discredit the State of Michigan."

Without official cooperation, a U.N. investigator still managed to talk with current Michigan prisoners and to meet with guards and former prisoners. Afterwards, the investigator said she "was astonished that the prisons that she saw on video in Michigan and the prison that she toured in Minnesota were in the same country." Since then, prison officials have restricted media and investigative access to the prisons and prisoners, and in 2000 banned tape recorders and cameras.

Not surprisingly, the barbarous conditions have spawned a number of lawsuits. Two were filed in 1996. One, reported already in *PLN*, brought by 32 female prisoners alleging endemic sexual abuse, settled on July 31, 2000, for \$3.8 million. The other, which involves about 440 female prisoners, is still pending. In 1997, the Justice Department also sued the Michigan Department Of Corrections (MDOC) after its investigation revealed pervasive sexual abuse. The MDOC settled the Justice Department's suit in 1999 by agreeing to institute broad reforms.

Justice Denied

Many of the promised changes, however, have either not been implemented or only partially implemented. Instead, Michigan lawmakers, have sought to silence the victims of sexual abuse by eliminating any legal recourse they may have.

The latest move came in 2003 when the legislature voted to kill the Corrections Ombudsman Office, which investigated

claims of sexual assaults and other prisoner complaints. Created in 1975 as an independent fact finder, the office had been steadily weakened since its inception. Lawmakers had already cut the agency's staff and restricted its investigative powers, allowing it to open investigations only at the request of a legislator.

But Michigan lawmakers have taken other steps to quell prisoner complaints as well. In 1999, they revamped Michigan's Civil Rights Act (CRA) to specifically exclude prisoners after March 2000. The same year, legislators imposed a physical injury requirement for sex assault victims to obtain damages. Now, guards can grope or rape prisoners to their heart's content, so long as their careful not to injure them. "If you stood the women up naked like the guy did in Abu Ghraib, under the law in Michigan, they couldn't make a claim," said attorney Deborah Labelle, lead attorney in a class action lawsuit against the MDOC.

In February 2005, Michigan's Appeals Court, in an unpublished opinion, upheld the CRA change, which could obliterate the claims of about 150 of the more than 440 prisoners involved in a current class-action suit. See: *Neal v. Department of Corrections*, 2005 WL 326883 (Mich.App.).

"By stripping imprisoned women of this basic civil right, the state has emboldened sexual predators who may be attracted to prison work," said Michael Pitt, an attorney in one of the class-action suits. "The state has turned its back on our mothers, sisters, and daughters at a time when they are most vulnerable and unable to protect themselves from the men the state hired to oversee them."

Four women in danger of having their suits dismissed are involved in a pending criminal case against Stephen L. Davis, a former prison warehouse worker. Davis, 44, is charged with 1 count of indecent exposure and 5 counts of criminal sexual misconduct involving 5 female prisoners. In their statements to police, the women said Davis assaulted them between May 1998 and June 2000. Three of the women said Davis forced them to touch his genitals or fondled them. The other two said he forced them to perform oral sex. Davis failed to show up for a scheduled hearing in March 2005 and is now a fugitive.

Supporters argue the law changes protect the state from frivolous lawsuits. What they don't say is that they also provide immunity from legitimate claims.

Supporters also wrongly maintain that state prisoners are protected by federal law. But like the current Michigan law, the Prison Litigation Reform Act (PLRA) also requires prisoners to prove lasting physical injury to recover damages for mental or emotional harm.

What's more, the onus of prosecuting sexually abusive guards is increasingly left up to the Attorney General's Office--the same entity tasked with defending the state against prisoner lawsuits seeking damages. Wayne County, for instance, where half the state's female prisoners are located, quit prosecuting guards accused of sexual abuse in March 2005 citing a shortage of prosecutors. As a result, the prosecution of these predatory guards is less than diligent, with many escaping prosecution altogether.

Take the case of Henry Lloyd Rockey, a prison maintenance worker. In 1998, three women accused Rockey of repeatedly groping them and forcing them to perform oral sex. After a State Police Investigation corroborated a portion of the women's stories, Rockey was charged with five counts of misdemeanor criminal sexual contact. Though he lost his job, Rockey never stood trial. A judge threw the case out in April 2000 after prosecutors failed to timely submit their witness list.

Rockey's case is far from exceptional. In fact, of the state's 31 prison employees charged with sex crimes, 28 ended as misdemeanors. At least four had their charges reduced from criminal sexual conduct to assault and battery--meaning they won't have to register as sex offenders. And no one has been charged under a new 2000 law that makes any sexual contact with prisoners a felony punishable by 15 years in prison.

See No Evil

The problem is so entrenched that sexual abuse can continue for years unchecked as prison officials and co-workers turn a blind eye to the assaults. In the case of former guard Michael Everett, the abuse went on for a decade despite several investigations.

Prisoner Angela Curtis, 36, said she first had sex with Everett in 1992 after he resolved a major disciplinary ticket another guard had written her. "It was just a barter for sex," Curtis said. "I was young, I was very scared, and all I wanted was to go home. If I had that ticket on my record, I would have been flopped for parole. If it

took exchanging sex with a guard [to get home], that's what you did." After that, Curtis said she began to develop feelings for Everett, who wrote her romantic letters and vowed to help her raise her 4 kids.

The length of Everett's involvement with Curtis is especially telling since he survived three investigations during that time. In 1993, Everett was informally reprimanded after prisoner Ann Denny complained that his harassment, threats, and ogling her in the shower caused her to have a panic attack. In 1994, prisoner Sally Jackson accused Everett of sexually harassing her. Investigators closed that case as unfounded. Everett's involvement with Curtis was first noted in October 1998 when another prisoner wrote a grievance alleging Everett had written her a disciplinary ticket for insolence after she commented on his relationship with Curtis. Curtis denied the relationship and the case was closed.

It wasn't until she was released on parole in November 2002 that Curtis realized she had been used. "For a long time, I kept quiet because I felt like I was responsible for the situation," she said. "I came to realize after a while that he was really using me for sex, and he didn't really mean anything he wrote or told me."

On July 16, 2004, State Police questioned Everett after Curtis turned over the letters he had written her. Two days later, Everett, 53, walked out in his front yard and shot himself in the head. He was the second Michigan prison guard accused of sexually abusing female prisoners to commit suicide. Guard Bernard Rivers Jr., 40, also shot himself at his home in February 1990 after he was charged with raping prisoner Jacqueline Urbina in her cell.

Curtis concurred with the notion that sexually abusive guards tend to prey on weak or vulnerable prisoners. "Women

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Female Prisoner Abuse (cont.)

in prison have major issues and are very needy," she said. "Most have drug problems or emotional problems from prior abuse." For her part, Curtis said she was particularly vulnerable because she was still mourning the death of her first husband, who died in 1990, the year before she was sent to prison.

Speak to Evil

Often, the MDOC skirts protocol when investigating complaints of sexual abuse by employees--especially high-ranking ones. Willis Chapman, Assistant Deputy Warden at the Robert Scott prison is one example. He was accused of having sex with a prisoner in 2002. Yet, without even interviewing Chapman, and despite overwhelming evidence, investigators concluded the case was unfounded. Tammy LaCross, the accuser, was punished for lying.

Chapman came under scrutiny in June 2000 when prisoner Joyce Van Norman informed two guards that she had acted as look out for Chapman while he was having sex with LaCross. It was the, second time a prisoner had notified officials of the deputy warden's sexual misconduct. In September 2001, Velvet Farley Johnson, 20, told 5 guards she had been having sex with Chapman, then 45. None of the guards, however, reported Johnson's admission--a violation of both state law and MDOC policy.

After Van Norman's allegation, guards Bradford Laird and Paul Raymond, who worked in the prison's control center, began monitoring Chapman's interaction with the prisoners. Later, the pair informed Assistant Deputy Warden Patricia Rodgers that they suspected Chapman was having sex with prisoners. Rodgers then notified Richard Stock, another assistant warden, and Warden Clarice Stovall.

At this point--according to MDOC policy--the probe should have been handed over to Internal Affairs because allegations of intercourse were involved. Prison officials should have also limited Chapman's access to prisoners. Neither action was taken. Instead, Chapman continued to work with the women he was accused of raping--as well as potential witnesses--and MDOC regional director Steven Wendry was called in to run the investigation.

At first, Wendry interviewed only LaCross and two other prisoners. All three denied anything happened, and Wendry closed the investigation two days later. On July 10, 2002, Warden Stovall rejected Wendry's initial report and ordered him to interview the other witnesses. Wendry then interviewed guard Laird--but not Raymond or Ms. Van Norman--and a week later again closed the investigation as "unfounded." This time his report was accepted. Van Norman was punished for making a false statement and confined to her cell for 7 days, and Chapman was allowed to continue prowling the prison.

Eight months later, the mailroom intercepted a letter from LaCross to another prisoner, Sally Jackson. In her correspondence, which contained personal details about Chapman and his family, LaCross confided to Jackson that she and the warden had a 2-year relationship and that he was "really good to me." When interviewed, Jackson admitted LaCross and Chapman were having sex. Jackson said she had become so concerned about LaCross at one point that she wrote a letter to MDOC Director William Overton but never got a response. This time, the matter was turned over to Internal Affairs.

The ensuing investigation sustained allegations that Chapman had sex with LaCross and Farley Johnson. (Accusations made by three other women were not pursued because they had been released from prison.) Chapman was subsequently fired for violating 5 MDOC rules--including sexual misconduct--but not criminally charged. In fact, he didn't even stay fired. Ten months after his August 28, 2003, firing, arbitration hearing officer Benjamin Wolkinson determined LaCross and Johnson weren't credible, and ignoring all of the other witnesses and evidence, ordered Chapman reinstated with back pay.

Evidence Ignored

Prosecutors and prison officials are typically quick to dismiss prisoner complaints of sexual abuse, assuming that because they're in prison they must also be liars. "Your witness is not going to be as credible because ... they were convicted of a crime," said Branch County Prosecutor Kirk Kashian. "If it comes down to the credibility of the two witnesses, the scales are not really going to tip [in the prisoner's favor]." Unless of course they are testifying for the government.

But even when the evidence is incontrovertible, guards are rarely punished

appropriately, if at all. Take the troubling story of T'Nasa Harris, 29. In 2000, Harris was raped and impregnated by guard Edward Hook at Camp Brighton, a 440-bed boot camp in Pinckney. She initially denied the attack because she feared Hook would harm her family. Harris later revealed she had been threatened by Hook and a female corporal.

Hook was a known deviant. Three years before he raped Harris, prison officials received an anonymous letter calling him a "sexual predator." Four months later, 18 women complained that Hook groped them during pat downs or ogled them in the shower. The response was laughable. On May 25, 1999--the day the Justice Department's suit was settled--prison officials admonished Hook in a memo to "exercise better judgment." Eight months later, Hook forced prisoner Tiffany Gilmore to touch his penis. The following month, he raped Harris. In 2003, Hook pled guilty to two counts of misdemeanor sexual assault. He was sentenced to 1 year in jail.

Harris, who has since been released, said she tried several times to abort the fetus. She remains angry with Hook, whom she calls a monster, and with prison officials for failing to stop him. "I was wrong for what I done and I'm still doing time for my wrongful doings," she wrote in a letter to prison officials. "But nothing, nothing on this planet could make me believe I deserve to be raped and violated of my privacy."

Criminal Guards

Ironically, while prosecutors and prison officials invariably cast doubt on prisoner allegations by referencing their criminal pasts, many MDOC employees are ex-convicts themselves.

As part of the Justice Department settlement, the MDOC stopped hiring ex-felons in March 1996. But the rule change didn't apply to those already employed or to those convicted of misdemeanors. This allowed guards like Leroy Nelson--whose record was probably longer than most of the prisoners he guarded--to remain on the job.

Nelson's life of crime began in June 1957 when he was convicted of burglarizing a car. Then 19, he spent 10 days in jail. Three years later, Nelson was convicted of exposing his genitals in public. This time he was fined \$100 and sentenced to one year of probation. In 1969, Nelson tried to rob a bar and was shot in the leg by an

off-duty cop. He was convicted of armed robbery and served five years in prison. Shortly after his release in 1974, Nelson was convicted of larceny and sentenced to 15 days in jail and another year of probation. He was again back on the inside four years later--this time as a prison guard.

In 2000, Nelson was accused of another crime: carrying on a sexual relationship with a woman at the Robert Scott prison. When confronted by investigators, Nelson and the prisoner denied the allegations. He was never charged. Nelson retired with a pension in 2002 at age 65.

Experts familiar with Michigan prisons contend that the MDOC's reluctance to monitor or ferret out guards with criminal backgrounds undermines their pledged reforms. Of particular concern are guards who have been convicted or accused of domestic violence. "Officers with a history of domestic abuse are especially disturbing," said Ernest A. Costa, a former professor of criminal justice at Wayne State University. "What are the dynamics of domestic violence? It's power and control. That's the pattern you see in rapists."

And the prison is full of them. In 1998, after the MDOC performed criminal background checks, director Kenneth McGinnis "expressed his amazement" at the number of guards who had been previously convicted of domestic abuse or other felonies. *[Editor's Note: Federal law makes it illegal for anyone convicted of domestic violence, even misdemeanor charges, to possess or carry a firearm and this applies to police officers and jail and prison guards. Hence DOC employees with domestic violence convictions cannot legally carry a firearm in performance of their duties.]*

Guard Thomas Portman, who began working at the Robert Scott prison in 1989, is a prime example. When his wife

divorced him in October 1996, she noted in divorce papers that she had been forced to get a restraining order after Portman threw their 18-year-old daughter down the stairs. Portman was subsequently jailed for domestic violence. When the police notified prison officials they had a guard in jail, Warden Joan Yukins recommended a 30-day suspension. According to prison records, however, the sentence was reduced to 10 days on February 2, 1997.

By then Portman was already accused of assaulting two female prisoners, Tracy Neal and Stacy Barker. Guard Orlinda Mallet-Godwin, who uncovered the abuse, said he threatened to accuse her of selling drugs if she reported him. Portman was fired but acquitted on charges of third-degree criminal sexual conduct.

Changes Opposed

In August 2000, the MDOC decided to ban male guards from holding certain positions in female prisons. The U.S. Sixth Circuit Court of Appeals upheld the policy change on December 3, 2004, in *Everson v. Michigan Department of Corrections*, 391 F.3d 737 (6th Cir. 2004). The guards' union, which challenged the policy, apparently can't understand why male guards shouldn't work in female housing and shower areas.

Male guards were not actually removed from female prisoner living areas in Michigan prisons until December 29, 2005. "They are finally taking steps toward ensuring the safety of women in their care," said Deborah LaBelle, "I hope they will continue to take steps to end the degrading treatment of women in our prisons."

Tom Tylutke, president of the Michigan Corrections Officers Association, contends the number of sex-related convictions is not shocking considering about 200 male guards work in the state's

female prisons. "Every profession has their bad apples," he said. "We feel (in our membership) they are very few and far between."

One wonders if Alisha Smith would agree. In a letter to her parents, the 32-year-old prisoner said she was being sexually harassed and begged for help. "I'm not doing good," Smith plaintively wrote in the September 16, 2002, letter. "I am experiencing some sexual harassment from staff. I need you to please send me the internal affairs address. Would you please do this for me?"

Unfamiliar with the prison bureaucracy, Smith's parents were unable to help her. Five months later, on February 13, 2003, Smith was found dead in her cell. The victim of a few bad apples, she had hanged herself with a sheet.

[It's worth noting that sexual abuse is not limited to Michigan, or even to females. Prison rape is common in state and federal prisons nationwide and affects both men and women. Dedicated to exposing the abuse, PLN reports extensively on this issue. See indexes or visit online at prison-legalnews.org for more.]

Source: *The Detroit News*

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President Bush Orders Compliance With World Court Order, Withdraws From Optional Protocol

by Matthew T. Clarke

President Bush has ordered the states to comply with a March 2004 decision of the International Court of Justice, also known as the World Court. In that decision the World Court ruled that fifty-one Mexican national prisoners that are incarcerated on various death rows in the United States who had been denied their consular notification rights under the Vienna Convention on Consular Relations be given a hearing on whether the denial affected their cases. [PLN, Sept. 2004, p. 12]. Bush's administrative decision was announced in a brief filed February 28, 2005, in the United States Supreme Court, in the case of one of the fifty-one Mexican nationals. One week later, Secretary of State Condoleezza Rice announced that the United States was withdrawing from the Optional Protocol to the Vienna Convention, the enforcement mechanism that allows the World Court to rule on alleged violations of the treaty.

The Optional Protocol was proposed by the United States in 1963. It and the rest of the Vienna Convention were ratified by the Congress in 1969, making them binding international treaties. The rest of the Vienna Convention spells out the rights of citizens of a foreign country (including U.S. citizens, when they are abroad) to have their country's consular officials notified and receive help from those officials when they are arrested. The Optional Protocol makes the World Court the final arbiter when foreign nationals claim to have been denied their consular rights under the Vienna Convention.

The United States touted the Optional Protocol as a method of protecting its citizens while they are abroad when it introduced the treaty. The U.S. was the first country to invoke the Optional Protocol before the World Court when it successfully sued Iran for holding 52 American citizens hostage in 1979.

The Supreme Court heard oral arguments in *Medellin v. Dretke*, Case No. 04-5928, the consular-rights case of one of the Mexican citizens from the World Court case, on March 28, 2005. It dismissed the case on May 23, 2005 holding it had improvidently granted review and that Medellin should first bring his claims in the lower courts. The move by the administration in ordering states to grant the

fifty-one World Court plaintiffs a hearing was seen by many as an attempt to moot the Supreme Court case. Apparently it was successful. However, in the 5-4 decision, the Supreme Court reserved the right to reconsider the case after Texas grants the hearing as directed by President Bush. Justice Sandra Day O'Connor filed a dissenting opinion chastising the court for failing to address failing to the issue of compliance with international treaties.

"It seems to me unsound to avoid questions of national importance when they are bound to recur," said O'Connor. "Noncompliance with our treaty obligations is especially worrisome in capital cases."

It didn't help that Jose Ernesto Medellin's case is particularly gruesome. In June 1993, he was a member of a petty street gang known as the "Black and Whites" attending initiation rites near a railroad track in Houston, Texas. Jennifer Lee Ertmann, 14, and Elizabeth Pena, 16, were hurrying home late after attending a party. They took a shortcut along the railroad tracks and ran into the gang. The gang members raped, tortured and murdered the girls. Five of them, including Medellin, were sentenced to death for the crimes.

Nor was Medellin's guilt at issue. He confessed to his participation in the crimes and bragged about them, telling about having to use a shoelace to strangle one girl for lack of a gun and describing how he had to "put his foot on her throat because she would not die."

In Texas, Governor Rick Perry and Attorney General Greg Abbott have vowed to fight Bush's order to give Medellin and 16 other Mexican nationals on death row in Texas hearings on violations of their Vienna Convention rights. When asked by Justice Souter whether Texas would honor Bush's administrative determination and grant Medellin a hearing, R. Ted Cruz, the Texas Solicitor General arguing the case for Texas, skirted the issue.

"There are significant constitutional problems with a unilateral executive decision displacing state criminal law," said Cruz. Cruz urged the Supreme Court to ignore the questions of international law and decide the case on the issue the lower courts used to refuse Medellin a ruling on the merits. Those courts held that he failed to raise the issue of the Vi-

enna Convention on his appeal and therefore waived it for future litigation.

One problem with that convenient determination is that Medellin claims that he didn't learn of his consular notification rights until four years after he was convicted. That was long after his appeals had run their course. Furthermore, the Vienna Convention also requires that foreign prisoners be notified of their consular rights under the treaty. Therefore, it could be seen as the fault of the United States (and Texas) that Medellin was ignorant of his rights for so long.

Meanwhile, there is a looming constitutional crisis on whether a federal president has the power to order state courts to hold hearings. Deputy U.S. Solicitor General Michael R. Dreeben urged Texas to give the defendants hearings. Otherwise, the Supreme Court will have to decide the "very sensitive and delicate questions" of whether a president can enforce the World Court's judgment "as a matter of U.S. foreign policy" and make that decision binding on the states. He also warned of "extraordinarily broad and detrimental foreign policy consequences" if the defendants didn't receive the hearings.

Oklahoma Governor Brad Henry has already taken a more enlightened approach. He commuted the death sentence of Osbaldo Torres, an Oklahoma death row prisoner affected by the World Court order, to life soon after the World Court announced its decision. In March, 2005, in response to President Bush's determination, an Oklahoma state district court conducted a hearing on the Vienna Convention rights issue and ruled that Torres should have been informed of his consular rights. It is now up to an Oklahoma state appeals court to uphold the conviction or order a new trial.

Whatever happens regarding the hearings ordered by the World Court, this situation is unlikely to repeat itself. The Bush administration has learned its lesson well: simply refuse to allow international courts to oversee matters of international justice and it won't matter whether you live up to your treaty obligations or not. ■

Sources: *New York Times*, *Seattle Times*, *Washington Post*, *Los Angeles Times*, *Houston Chronicle*.

North Carolina Pays \$43,500 to Women Strip-Searches By Prisoners

by Michael Rigby

The North Carolina Department of Corrections (DOC) has paid \$43,500 to four women who were subjected to strip and body-cavity searches performed by other prisoners and to a fifth who was beaten when she refused to undress.

The assaults occurred in a disciplinary housing wing at the state's Correctional Institution for Women after one of the assailants discovered money missing from her personal property, said Michele Luecking-Sunman, a staff attorney with North Carolina Prisoner Legal Services (NCPLS), which represented the victims. The woman singled out the five victims, then enlisted the aid of several other prisoners and proceeded with the strip and body-cavity searches. After four of the victims were searched and probed--some more than once--the assailants turned to the fifth victim and began beating her. Eventually, another prisoner was able to hit the call button and request help.

Though the women were confined in disciplinary segregation, no guard was inside with the women. Rather, one guard was stationed outside the wing and another inside a control picket. Windows allowed the guards full view of the interior, yet neither guard intervened at any time during the attacks.

Typifying the official response to prison sexual assaults, Warden Anne Harvey characterized the incident as "a game" in statements to the media. Four of the victims were willing participants, she contended, until the fifth prisoner resisted and they became embarrassed. Phil Griffin, a senior attorney for NCPLS, called Harvey's statement "incredibly crass and inhumane."

One of the prisoners, who asked not to be identified, told a local newspaper that guard Kathy Hatley entered the wing at one point and saw the women naked but left when one of the assailants

told her, "I've got it under control." The prisoner said she and the 3 other strip search victims were left in the wing while the prisoner who was beaten was transported to the hospital. They huddled in their beds, she said, terrified they'd be attacked again.

The next day they received counseling and medical treatment for vaginal tears, rectal tears, and bruising. At least one of the victims also suffered an infection. The unidentified prisoner described the incident as rape: "It was: do it or get beat up," she said.

The assailants were relegated to several months in disciplinary isolation, but were not criminally charged. "Witnesses said that the women made statements, at the time indicating a willingness to be searched," said Wake County District Attorney Colon Willoughby. He noted that if he pursued the case, the victims' credibility would be impugned because they have criminal records. He did not say why the victims were any less credible than the attackers, whom were also prisoners.

Willoughby also declined to release a report by the State Bureau of Investigation (SBI), saying state law required him to get a judge's approval. Raleigh attorney Amanda Martin, an expert on public records law, said no such law exists. A spokesman for the SBI agreed.

Martin said Willoughby should release

the information. "This is such an outrageous sequence of events that certainly the public should have a full understanding of why the state has entered into a settlement agreement that resulted in the payment of public funds."

Prison officials apparently were not too convinced by their own version of events--they settled soon after NCPLS sent them a demand letter describing the incident. In November 2004, they agreed to pay \$11,000 each to three of the search victims and \$8,500 to the fourth. The victim who was beaten received \$2,500. In addition, the DOC agreed to station a guard inside the wing.

Notably, the October 2, 2003, strip searches occurred at a time when the Prison was overcrowded and understaffed. The prison, has a maximum capacity of 1,200 but held 1,264 prisoners. Moreover, nearly a fifth of the 424 guard positions were unfilled. Prison officials assert the conditions played no part in the assaults. But investigation by NCPLS found that Warden Harvey and other prison officials had been warned that removing a guard from the disciplinary wing (one used to be stationed inside) could invite such an assault.

Guard Hatley was eventually fired and another guard was disciplined. ■

Additional sources: *Associated Press*, *The News & Observer* (Raleigh)

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California's New Governor Has Paroled 102 Lifers, But Rejected Twice That Many

The good news is that as of September 30, 2005, California Governor Arnold Schwarzenegger has approved 102 lifers for parole since taking office two years ago, a vast improvement over former Governor Gray Davis' record of paroling just eight lifers during his five years in office. The bad news is that Schwarzenegger has rejected twice that number of parole recommendations sent to him by the state's Board of Prison Terms (BPT), recently renamed the Board of Parole Hearings (BPH). The 102 lifers who have been paroled under Schwarzenegger's watch include some who have been ordered released by state and federal courts.

But even this "good news" is muted by the stark reality that there are over 27,250 prisoners in California facilities serving indeterminate life sentences, many of whom are long past the maximum punishment set by the Board's own regulations, who collectively cost California taxpayers over \$1 billion a year in incarceration expenses (only 3,168 California prisoners with life sentences are true lifers, serving life without the possibility of parole). California law provides lifers serving indeterminate sentences the opportunity to earn their release. Instead, says Keith Wattle, a staff attorney at the Prison Law Office, a non-profit organization that advocates for prisoners' rights, given the small number of lifers recommended for parole and even smaller number who are actually paroled, "what we have is a law that holds out the illusion of redemption, but in fact denies people any fair chance of living in a free society."

Ever since Massachusetts Governor Michael Dukakis saw his political career implode in 1988 after Willie Horton—a state prisoner whom Dukakis had furloughed—committed new violent crimes while on release, every governor with further political aspirations has been loathe to grant parole to prisoners serving indeterminate sentences for violent crimes.

Former California Governor Gray Davis, whose presidential aspirations evaporated when he was recalled from office in 2003 for being beholden to special interest groups (notably the California prison guards union, the CCPOA), was particularly outspoken about not releasing lifers. "If you take someone else's life, forget it," Davis told the press. He even stated

that he believed second-degree murderers should stay in prison for life, regardless of extenuating circumstances. In 2002 the California Supreme Court upheld Davis' right to deny parole, even for prisoners with spotless records.

Prior to Davis, former governor Pete Wilson was also stingy with paroles, having a record of one-seventh the current rate of Gov. Schwarzenegger. But Schwarzenegger, with a "tough guy" public image grounded in heroic cop movie roles, has less to fear and can arguably avoid looking soft on crime, opined State Senator John Burton. "Schwarzenegger has guts ... and isn't afraid of what people think," said Burton.

In addition to reviewing all BPH lifer parole grant recommendations, the governor also nominates commissioners for the parole board. Recently, Schwarzenegger chose Margarita Perez, a Democrat and former prison guard, as the BPH's new chairperson. Another nominee, Palmdale city councilman Richard Loa (who had actively supported Schwarzenegger in the recall election), was roundly criticized for his aggressive style of questioning prisoners during hearings and stepped down upon Schwarzenegger's unprecedented withdrawal of his nomination. Some prisoners who were denied parole by Loa are now asking for new hearings.

Additionally, many prisoners voiced concerns over Schwarzenegger's nomination of Commissioner Susan Fisher to the BPH. Fisher's brother was murdered in 1987 and she became a strong advocate for victims' rights. She served for years as head of the Doris Tate Crime Victims Bureau (now known as the Crime Victims Bureau), which was financially supported by the CCPOA, and since 2000 has served as president of Citizens for Law and Order. But inclusive of Fisher, from 2003 to 2004 the Board decided to recommend parole to 217 out of 2,614 lifers it gave hearings to, and Fisher voted to grant parole in 7% of the cases she heard, only slightly lower than the Board average of 8%.

One unusual advocate for lifers—because he is himself a former prisoner—is Orange County attorney Rich Pfeiffer, who has represented hundreds of lifers before the BPH. Pfeiffer noted wistfully that Schwarzenegger was giving some prisoners more hope. "They see people getting out. In the beginning, these hear-

ings were futile," he said.

Schwarzenegger's legal secretary, Peter Sigg, credits the governor's willingness to parole lifers to a difference in philosophy, stating, "He is a governor who believes people can reform and be reformed." Indeed, in July 2005 Schwarzenegger even changed the name of the state's Department of Corrections to the Department of Corrections and Rehabilitation.

This difference in philosophy hasn't been lost on lifers who have been released during Schwarzenegger's tenure. Adam Riojas, who was paroled by the governor on April 26, 2004, and who maintains he was wrongfully convicted of murder, said the Schwarzenegger administration is encouraging prisoners to turn their lives around. Under former governor Davis, he said, there was no reason to hope. "I've seen a lot of inmates giving up," said Riojas. "They would go ahead and fight and start using drugs or alcohol ... because they said 'Hey, I'm never getting out because no matter what I do these guys are not letting me out.'"

Still, notes Donald Specter of the Prison Law Office, while Schwarzenegger is giving more hope to prisoners, he is "reversing more than 50% of cases that the board is granting parole on." And considering the thousands of incarcerated lifers who have repeatedly been denied parole, that hope is a slim one.

Regardless, Gov. Schwarzenegger's willingness to release even a small number of lifers has raised the ire of victims' rights advocates and the CCPOA, which backed Gov. Davis in the 2003 recall election. Earlier this year, Crime Victims United of California ran a series of T.V. ads attacking Schwarzenegger for releasing dangerous prisoners. Shortly after the ads were aired, on April 11, 2005 the CCPOA staged a rally at the state Capitol, complete with wall-sized photos of non criminal and non police killed victims of violent crime.

Governor Schwarzenegger scaled back the number of paroles granted to lifers in 2005, approving parole recommendations at just over half the rate he did in 2003-2004. A spokesperson with the Schwarzenegger administration denied that the governor's parole decisions were based on politics, stating, "The governor makes parole decisions on a case-by-case basis,

bearing in mind first and foremost what is in the best interests of public safety.”

In one high-profile case, on March 25, 2005 Schwarzenegger reversed the BHP's recommendation of parole for convicted murderer James Tramel, who had served almost 20 years and was ordained as an Episcopal deacon while incarcerated. In a rare move, the Santa Barbara County District Attorney's office had voiced support for Tramel's release. Upon denying Tramel parole, the governor stated his release from prison “would pose an unreasonable risk of danger to society...” Episcopal Bishop William Swing roundly criticized the governor's decision. “Governors of California are good at executions,” said Swing. “Governors of California are 90-pound moral weaklings when it comes to restoration of human beings.”

And on May 18, 2005, Schwarzenegger denied parole to a battered woman, Linda Lee Smith, saying that while she may have been a victim of domestic violence, that was no defense. The governor stated that Smith, who has served 24 years for failing to prevent her boyfriend from murdering her two-year-old daughter, still poses “an unreasonable threat to public safety.”

Schwarzenegger has also dashed the

hopes of prisoners housed on California's death row, denying clemency in each capital case that has crossed his desk. In his first capital case, on Jan. 1, 2004 the governor denied clemency to Kevin Cooper, whose execution was scheduled for Feb. 10, 2004. Just hours before he was to be put to death, Cooper received a reprieve from the U.S. Ninth Circuit Court of Appeals, which was upheld by the Supreme Court. Next, on Jan. 18, 2005 Schwarzenegger denied clemency to death row prisoner Donald Beardslee, who was executed the following day with relatively little fanfare.

Such was not the case with the next capital clemency petition, from Stanley “Tookie” Williams. Williams, who was convicted for his role in four murders, was the co-founder of the notorious Crips gang. He was also the author of children's books with anti-gang messages and a five-time nominee for the Nobel Peace Prize. Williams' case garnered national and international attention, and Schwarzenegger was presented with arguments that Williams was a reformed man who did not deserve to die.

Although the governor granted Williams a private hearing on Dec. 8, 2005, on Dec. 12 he declined to grant the

clemency petition. In his letter of denial, Schwarzenegger took the unusual step of criticizing the dedication of Williams' 1998 book, *Life in Prison*, to George Jackson among other current and former prisoners, including Nelson Mandela, Angela Davis, Malcolm X, Assata Shakur, Geronimo Ji Jaga Pratt, and Leonard Peltier. Schwarzenegger found that “the inclusion of George Jackson (a militant activist who founded the Black Guerilla Family prison gang and was charged with the murder of a San Quentin prison guard) on this list defies reason and is a significant indicator that Williams is not reformed and that he still sees violence and lawlessness as a legitimate means to address societal problems.” Stanley “Tookie” Williams was executed on Dec. 13, 2005.

Schwarzenegger denied a clemency petition filed by death row prisoner Clarence Ray Allen. Allen turned 76 the day before his Jan. 17, 2006 execution. He was wheelchair-bound and suffered from a variety of health-related problems. He was the oldest prisoner in California and the second-oldest in U.S. history to be executed. ■

Sources: *Los Angeles Times*, *San Francisco Chronicle*, *Sacramento Bee*.



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Private Prison Firms Stumble; Hire Former California Officials to Lobby for For-Profit Facilities

Private prison companies, which presently house only 2,550 of California's 165,000 prisoners, have hired a former county lawmaker, former CDC employees and the former state Finance Director in an attempt to expand into the \$7 billion California corrections market. However, the powerful prison guards union (CCPOA), which represents state-employed (but not private) guards, is using its considerable swagger to beat back this assault on union jobs.

In 2004, Maranatha Corrections Corp., a faith-based private prison operator, was on the verge of losing an \$8.1 million CDC contract for the 660-bed Victor Valley Community Correctional facility in Adelanto, San Bernardino County, in a dispute over \$1.6 million in kickbacks collected from prisoner phone calls. (See: *PLN*, Feb. 2005, p.39.) After meeting with Maranatha on November 17 and December 13, 2004, CDC set a January 31, 2005 deadline to settle or terminate the contract.

But Maranatha had another option. San Bernardino County houses 5,500 prisoners in its jails but has to release around 700 per month early due to a lack of space. Maranatha quietly negotiated a \$3.8 million annual contract with the county to lease bed space, rendering CDC's threatened termination moot. CDC would now have to relocate the 500 state prisoners housed there.

Rather than lease the private prison, however, Maranatha ended up selling it—a decision that generated even more controversy. In December 2005 the *Los Angeles Times* reported that a former California assemblyman working as a lobbyist for San Bernardino County allegedly convinced county officials to purchase the Victor Valley facility for \$31.2 million, without disclosing that he also represented Maranatha Corrections.

Lobbyist Brett Granlund, a former assemblyman and former member of the state Board of Prison Terms from 2001 to 2002, reportedly told county officials that the jail was a "quality facility" that could reduce overcrowding. The county's Board of Supervisors subsequently decided to buy the facility in April 2005. However, although Granlund was representing San Bernardino County as a client through Platinum Advisors, LLC, a Sacramento

lobbying firm, under a \$245,000 contract with the county, he neglected to mention that he also represented Terry Moreland, owner of Maranatha Corrections and Moreland Family LLC, who owned the jail and was another Platinum Advisors client.

An investigation into the county's purchase of the jail was sparked by allegations that County Supervisor Dennis Hansberger's top aide, Jim Foster, had committed ethics violations by using Granlund as an intermediary to purchase surplus county land. Foster, while denying the allegations, pointed his finger at possible improprieties in the jail purchase. He claimed that Granlund may have represented both the county as buyer and Moreland as seller, which was a conflict of interest.

Following a five-month investigation, Los Angeles attorney Leonard Gumpert, who had been retained by the county to review the jail purchase, determined that Granlund had not received a commission from the transaction and did not unduly influence county officials. He also "found nothing to indicate criminal behavior on anyone's part." However, Gumpert did find that Granlund had encouraged officials to purchase the facility, had taken part in discussions regarding the transaction and had failed to disclose in writing that he also represented Moreland, the jail's owner. According to a former county legislative director, for years San Bernardino had not enforced a requirement that the county's lobbying firms make written disclosures of their clients.

The county released only a summary of Gumpert's report, citing privacy concerns and the potential for litigation. The county rejected a public records request submitted by the *Times* and on January 10, 2006, the Board of Supervisors voted 4 to 1 to keep the report secret. County Supervisor Dennis Hansberger was critical of the statement released by the Board summarizing Gumpert's findings, calling the county's response to Granlund's conflict of interest "not even a slap on the wrist."

Granlund rejected this criticism, maintaining that he represented Moreland in dealings with the CDC and had not lobbied on Moreland's behalf for the county to purchase the facility. "The people ne-

gotiating the jail, I don't know them, they don't know me.... They wouldn't know me if they found me in their oatmeal," he stated.

The jail, now renamed the Adelanto Detention Center, was renovated and expanded to 706 beds by Moreland as part of the purchase agreement. The improvements were completed behind schedule in late November 2005 and the county docked Moreland around \$260,000 in fees for failing to meet the completion deadline. The renovations included converting large dorms with more than 100 beds each into two smaller units for security reasons, replacing porcelain toilets with stainless steel commodes, replacing drop ceilings with solid ceilings, and converting an open visitation room into a non-contact visit area.

Meanwhile two Maranatha Corrections employees, Gary Scott and Mario Gonzales, had filed suit against the company on December 17, 2004, claiming they were not paid all of their wages and were not allowed to take breaks. Their attorney, Philip Ganong, said the private prison operator may have skimmed on staff positions and couldn't allow employees to take breaks in order to keep staffing up to standard. Such labor code violations could become the basis for a class action suit with penalties of up to \$4,000 per employee.

In an unrelated matter, the CDC moved to reopen two other private prisons one year after mothballing them, by granting private prison companies no-bid, one-year contracts. One of the facilities, a 224-bed correctional center in the Central Valley town of McFarland, was contracted to Florida-based Geo Group, Inc. (formerly Wackenhut Corrections), which had run the facility for over a decade before it was closed. The other community corrections center, a 350-bed facility in Mesa Verde, was contracted to Massachusetts-based Civigenics. The McFarland contract was worth \$3.5 million while the Mesa Verde contract was for \$5.7 million.

The facilities had been closed in 2003 under the Davis administration, which claimed the state didn't need so many minimum-security prison beds. However, opponents alleged at the time that the decision to shutter the privately-oper-

ated facilities was a concession to the CCPOA, which strongly opposed prison privatization and which contributed heavily to Davis' election campaign. The Schwarzenegger administration's quiet decision to re-open the McFarland and Mesa Verde facilities with no-bid contracts, claiming the state now needed the beds, quickly ran into scrutiny by state lawmakers.

In an effort to influence the state to expand its use of private prisons, in November 2004 the Geo Group had hired former California Finance Director Donna Arduin ten days after she left her top-level job overseeing all of the state's spending. Arduin was placed on the Board of Directors of Corrections Properties Trust, a REIT (Real Estate Investment Trust) that owned the McFarland facility, which was a spin-off of the Geo Group. Correctional Properties Trust President Charles R. Jones announced Arduin's appointment by noting that "Arduin's insight into the allocation of financial resources within the government appropriation and spending process will be a valuable resource."

When challenged about her new position with a private prison company that had, soon after her hiring, received a large state contract, Arduin replied, "I don't know what conflict there would be." State Senator Gloria Romero retorted, "The Department of Finance had to be in the midst of any negotiations on the prison contracts. This is absolutely amazing; talk about revolving doors. ... This is something that I believe truly crosses the line of integrity and ethics."

However, state auditor Elaine Howle found no conflict of interest in Arduin's hiring by the Geo Group, since Arduin had not been employed with the CDC and because the company's lease for the facility began long before Arduin was hired. Senator Romero had requested the audit, saying the no-bid contract "smells bad."

The Geo Group also hired the Flanigan Law Firm, which has close ties to the previous Wilson administration, to lobby on their behalf, paying Flanigan over \$37,000 for their politically-savvy services. Geo further retained Joe Rodota, a former Wilson advisor who served as policy director during the Schwarzenegger recall campaign. Additionally, Geo Group received the no-bid contract to operate the McFarland facility just two months after making a \$10,000 donation to an initiative campaign committee tied to Gov. Schwar-

zenegger. The Geo Group had previously contributed \$58,000 to Schwarzenegger's campaign coffers according to campaign reports. Schwarzenegger has refused donations from the CCPOA.

CDC spokesman Todd Slosek denied there was any connection between the McFarland contract and Geo Group's donations, noting the Geo Group was the only bidder for the contract. Of course, that may have been due to the fact that the facility was owned by Correctional Properties Trust, a Geo Group spin-off, which leases the prison to Geo.

While finding no conflict of interest in the Geo Group's hiring of Arduin, state auditor Howle had plenty of criticism for the CDC's contract with Civigenics to run the Mesa Verde facility. The *San Francisco Chronicle* reported that Civigenics had hired two retired CDC officials to lobby on their behalf—David Tristan, a former CDC deputy director of operations, and Michael Pickett, a former warden and CDC deputy director for health services. However, the company did not disclose that it had retained Pickett and Tristan, who had left the CDC less than one year previously. California law prohibits certain officials from being involved with

state contracts for one year after they leave state employment.

Senator Romero, criticizing Civigenic's use of recently retired corrections department officials, noted that "the revolving door is spinning so fast it's now hit the [CDC] in the rear end." After Civigenic's employment of Pickett and Tristan was revealed, the CDC abruptly decided it didn't need to reopen the Mesa Verde facility after all, and canceled the Civigenics contract. Further, the company was disqualified for five years from bidding to run the facility; Civigenics has protested the disqualification. "I guess we've had the rug pulled out from under us," said Civigenics Chief Operating Officer Peter Ageropulos.

Thus, the battle line for CDC prisoners has been drawn: The influence of privately-hired former political insiders v. the multi-million dollar donations paid by the CCPOA to California's politicians. (See: *PLN*, March, 2005, p.5, *Pay to Play*.)

Sources: *Bakersfield Californian*, *GEO Group, Inc.*, *Los Angeles Times*, *San Francisco Chronicle*, *Riverside Press-Enterprise*, *Sacramento Bee*.

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Texas State Auditor Questions Necessity of Prison Health Care Oversight Board

by Matthew T. Clarke

The Texas State Auditor's Office has released a report which scathingly criticized the Correctional Managed Health Care Committee (Committee) for failing to perform its contractual duties and having several conflicts of interest with the health care providers, concluding that the committee may no longer be necessary.

In 1994, the Texas Legislature implemented a managed health care plan for Texas prisons, essentially creating a HMO for the prison system, believing it would reduce the cost of providing prisoners medical treatment. The method of health care provision was direct, fixed-rate contracts with the University of Texas Medical Branch at Galveston (UTMB) and Texas Tech University Health Sciences Center. This was later replaced with a two-tiered system of contracting whereby the prison system contracts with the committee for provision of health care services and the committee contracts with the health care providers. The cost of health care services for the approximately 150,000 Texas state prisoners in 2004-2005 was \$300 million per year.

The structure of the committee virtually ensures conflicts of interest. It consists of two representatives from each university, two employees from the prison system and three public members. The committee also employed five full-time staff members and accounted for \$636,000 in expenditures in 2003, 92% of which was spent on salaries. The fact that half the committee members are employees of the health care providers and all of the committee's staff members are paid by UTMB's payroll system makes independent fiscal oversight of the health care providers difficult. Furthermore, the committee maintains its funds in two accounts at UTMB, holds the quarterly funds used to pay for prisoners health care in UTMB bank accounts, and relies on UTMB's accounting department to maintain its accounting records.

The current contracts by the committee fail to provide for even the most basic of provisions for the evaluation of contractor performance, remedies for non-performance, and reporting of financial transactions. The contracts also often fail to specify allowed and unallowed costs.

Thus, UTMB has, for instance, spent funds intended for the medical treatment of prisoners on non-prisoner-health-care items such as a banquet and conference, moving expenses for newly-hired employees, gifts for employees attending training, the costs of a UTMB employee to take a new UTMB doctor to dinner (including tip), and flowers for employees.

The questionably-spent funds were great, totaling 17.5% of the \$2,266,072 spent in the 228 expenditures sampled from 2002 and 2003, and 11.5% of the \$8,660,342 spent in the 42 expenditures sampled from 2004. Taken as a percentage of the \$300 million per year expenditures, this means that \$121.5 million of the monies intended for prisoner health care were questionably spent in those three years. Thus, millions of dollars of the expenditures were either unreasonable or unallowable under state law.

Even greater problems arise in the proper tracking of payroll costs, which account for 54% of the overall expenditures. "The Committee's contracts with university providers do not require university providers to keep detailed payroll records that would allow them to accurately allocate payroll costs to their contracts with the Committee." The problem is that the health care providers contract for health services with jails, counties, federal prisons and private prisons. Thus, if the amount of time an employee spends on state prisoners' medical care is not tracked, the state prison system may end up paying for the other contractors' expenses so far as employee salary is concerned. Due to the lack of detailed records, it cannot be determined if this is actually occurring. A fixed payroll allocation percentage is assigned to each employee, but it does not necessarily reflect the actual percentage of work done for the prison system and cannot accurately account for ever-changing allocation of employee time among the various customers.

"The Committee does not provide sufficient fiscal oversight of the funds appropriated for inmate health care. Without monitoring how these funds are spent, the Committee cannot ensure that the funds are spent appropriately, nor can it support its requests for funding."

"The Committee relies on the Department [of Criminal Justice] to monitor inmates' access to health care and on the university providers to monitor quality of care....The structure of the Committee and the potential for conflicting loyalties" may compromise the quality of the health care given prisoners and allow for improper expenditures. The Committee should monitor both prisoners' access to health care and the quality of care independent of the prison system and universities.

The Committee failed to report the available fund balances at the end of each fiscal quarter to the governor and Legislative Budget Board as required by state statute. These available fund balances totaled \$3.9 million, \$2.7 million and \$1.98 million in the first three quarters of FY 2004, respectively. An available fund balance as high as \$31.8 million has existed at the end of each quarter since 1996. However, the Committee has either reported only a portion of the balance or reported that it had "no reserves. The Committee has no authority to carry forth such balances.

Overall, the Committee did not agree with the audit report. It complained that the audit report held them to standards applicable to state agencies.

"The Correctional Managed Health Care Committee is not a state agency," said former Committee Chair Dr. Ben Raimer of UTMB.

Of course, this is merely an attempt to divert attention from the misspent millions. Agency or not, state organs are accountable for how they spent the taxpayers' money. No wonder the State Auditor questioned whether this "committee"--that is nothing but an interested middleman in the contracting of prisoners' health care--is still necessary.

Ironically, the audit report was released only a few months after an article praising health care in Texas prisons appeared in *The Journal of the American Medical Association*. Who was that article written by? UTMB doctors. Adding irony to the pile, most of the statistics used in the article to "prove" how much the health care of Texas prisoners had improved pre-dated the creation of the managed health care plan. Thus, they dated from an era when the fed-

eral court in the *Ruiz* litigation referred to Texas health care as barely constitutional overall and miserably unconstitutional in some specific prisons.

In dismissing the *Ruiz* suit in 2001, the federal judge stated that “while the court remains deeply disturbed by the current sub-par level of medical treatment being provided by the TDCJ-ID to its inmates, a system-wide deliberate indifference to health needs has not been shown to exist.” *Ruiz v. Johnson*, 154 F.Supp.2d 975, 988

(S.D.Tex. 2001). Thus, seven years after its implementation, the managed health care plan was providing Texas prisoners at best sub-par medical care at great expense to the Texas taxpayer, a situation that continues to this day. The audit is available on PLN’s website. 📄

Sources: *Austin-American Statesman*; *An Audit Report on Management of Correctional Managed Health Care Contracts*, November 2004, Report No. 05-012,

Death Penalty for Texas Prison Horses Stirs Controversy

Between February 2003 and November 2004, the Texas prison system sold 53 horses to the Dallas Crown slaughterhouse in Kaufmann, Texas, for processing into meat for human consumption. This violates § 149.003 of the Texas Agriculture Code. The first offense is punishable by a fine of up to \$1,000 and 30 day to 2 years in jail. Subsequent offenses carry two to five years in prison. The practice of selling horses for meat has stirred controversy throughout Texas and resulted in much criticism of TDCJ.

Horsemeat has become popular in Europe due to mad cow disease outbreaks. However, it is still illegal even if the horsemeat was intended for sales overseas, according to 2002 Texas Attorney General’s Opinion No. JC-0539. The statute clearly forbids the sale of horsemeat for human consumption and the transfer of horses or horsemeat to a person intending to sale it for human consumption. Enforcement of that 1949 law has been temporarily enjoined by a federal judge hearing a suit brought by slaughterhouses.

Dallas Crown said it paid \$400 to \$500 for each horse. The horses were inspected by veterinarians from Texas A & M so they could be sold for slaughter. TDCJ has a herd of 1,700 horses that assist in the supervision of prisoners working without pay in the fields and help control its huge cattle herd.

Tom Fordyce, former director of TDCJ’s agricultural business, says it’s “an emotional deal.”

“Is it in the best interest of the state to euthanize the horse, and then go out and bury the horse?” asked Fordyce. “Or could I try to salvage some money out of this horse to lower the costs of operating the agriculture program?”

Well, what most police departments do

is adopt out their retired horses. The City of Dallas usually sells them to the family of the police officer who rode them while Houston generally gives them away.

“We don’t do any of the auctions or slaughterhouses,” declared John Cannon, Houston Police Department spokesman.

Fordyce has a typically Texan retort for that: blame the victim.

“For whatever reason, they may have been a rogue animal,” said Fordyce. “We wouldn’t want to turn around and sell that at auction to a mother and father to give to their 5-year-old kid to ride.”

The U.S. House of Representatives has addressed the general issue of sales of American horsemeat by passing legislation forbidding the government from funding the inspection of horsemeat, a necessary step before it can be sold. Unfortunately, that won’t affect TDCJ’s sales of retired work horses. Nor will it persuade Texans to show as much compassion for their state prisoners as they do for the prison system’s work horses. 📄

Sources: *Dallas Morning News*, *Houston Chronicle*.

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New York's Sex Offender Treatment Program Enjoined; Stay Issued Pending Appeal

by Bob Williams

The United States District Court for the Northern District of New York ruled that New York's program for treating convicted state sex offenders violates the Fifth Amendment's guarantee against compulsory self-incrimination and issued a preliminary injunction. The Second Circuit has issued a stay pending appeal.

In 2002, the United States Supreme Court issued its plurality decision in *McKune v. Lile*, 122 S.Ct. 2012, finding that a convicted sex offender's Fifth Amendment privilege against compulsory self-incrimination is not violated by a treatment program that requires admitting to all past sexual behavior whether or not charged for it. Lile faced only loss of privileges and transfer to a higher security facility, not the more serious consequences of an extended term of incarceration or loss of good time credits, nor was his release from prison affected. [See: *PLN*, Oct. 2002, P. 8.)

David Donhauser, a New York state prisoner, faced these more serious consequences when he refused to admit to unlawful sexual acts as part of New York's Sex Offender Counseling Program (SOCP). Donhauser had entered a plea under *North Carolina v. Alford*, 91 S.Ct. 160 (1970), which does not require admission of guilt, allowing factual innocence to be maintained. Donhauser was sentenced to three to six years imprisonment for rape and burglary.

On April 20, 2000, Donhauser was "recommended" for SOCP, a program that was not part of his plea or sentence. SOCP requires accepting responsibility for the crime underlying the current conviction and divulging any prior sexually criminal acts whether or not charges were or have yet to be brought. Any "evidence of child physical and/or sexual abuse that has occurred or is planned and any specific details of previous crimes for which the offender has not been charged" must be reported by counselors "to the appropriate authorities so that society will be protected."

Donhauser was advised in writing the same day that a refusal to participate would result "in a loss of good-time [credits]." The program manual further states that prisoners refusing the program "should be made aware of the negative im-

pact his/her decision may have on ... Time Allowance Committee decisions."

Moreover, Donhauser produced an internal memo which declared "that all good time is to be taken whenever it can be documented that an inmate has refused to participate in recommended sex offender programs." Letters from a counselor and a correction's department attorney were received in 2001 informing Donhauser that there would be a "negative impact on his earning good time" and "that he must participate in the SOCP or lose his good time and other privileges." Donhauser did not refuse participation as long as he did not have to self-incriminate. Donhauser's good time credits were subsequently withheld and affirmed on administrative review.

Donhauser filed a complaint pursuant to 42 U.S.C. § 1983 asserting claims of Fifth Amendment violations for (a) being compelled to self-incriminate or face automatic loss of good time and (b) denial of parole for refusing the SOCP. Claims for privacy, equal protection, and due process violations were also alleged. Donhauser sought declaratory and injunctive relief plus damages. A magistrate recommended complete dismissal pursuant to F.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. Donhauser objected.

United States District Judge David N. Hurd dismissed Donhauser's privacy, equal protection, and due process claims. The Court granted the state qualified immunity, thus precluding damages, finding that while "a prisoners right to be free from compelled self-incrimination has long been established ... the standard defining that right ... has not." Since Donhauser could not prove his parole denial was a direct result of his refusing treatment, that claim was also dismissed.

Leaving withdrawal of good time credits (affecting length of incarceration) as compulsion for self-incrimination, the Court acknowledged no "concise and definitive standard" exists for Fifth Amendment compulsion challenges by prisoners. The judge took a "comprehensive approach, applying the vast sea of compulsion principles applied by the various opinions in *McKune* and the federal appellate decisions that followed" to find that "the loss of good time credits

imposed automatically and directly for [Donhauser's] failure to give up his right to silence and participate in the program, violated every single one of them."

The Court first addressed whether *McKune* was even factually on point. *McKune's* plurality found important to its analysis that no extended term of incarceration was at stake nor was any eligibility for good time credits or parole. This critical area, the Court found, clearly distinguished *McKune*.

The Court also distinguished *Johnson v. Baker*, 108 F.3d 10 (2d Cir. 1997), as factually inconsistent where the privilege at issue (a family visitation program) did not affect the term of incarceration.

The *McKune* plurality adopted the "atypical and significant hardship" test of *Sandin v. Conner*, 115 S.Ct. 2293 (1995). Judge Hurd refused to apply this standard on two grounds:

(1) *Sandin* involved identifying the constitutionally protected property or liberty interest at stake. Judge Hurd agreed with the pre *McKune* Tenth Circuit decision that "nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." See: *Lile v. McKune*, 224 F.3d 1175, 1183 (10th Cir. 2000). The *McKune* dissent also agreed.

(2) By recognizing Supreme Court precedent which holds "when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." Because Justice O'Connor concurred on the narrowest grounds, her opinion rejecting the *Sandin* standard is controlling.

Nevertheless, Judge Hurd undertook an independent analysis and also rejected *Sandin*. To find an analytical framework, Judge Hurd grouped "the myriad and often overlapping Fifth Amendment principles" into four categories:

Classification of adverse consequences.

Were the loss of Donhauser's good time credits the loss of a potential benefit or a penalty? The Court found that "one can

wax philosophical all he or she wants as to the true motivations of correctional officials, but it takes little imagination to conceive that such officials would threaten or impose the loss of good time credits as a direct result of [Donhauser's] failure to participate" in a "recommended" program that "is actually an order."

The severity of the adverse consequences. In concurring in *McKune*, Justice O'Connor, cautious to exclude from her non-severe determination consequences like those suffered by Donhauser, noted that penalties such as "longer incarceration and execution ... are far greater than those ... already held to constitute unconstitutional compulsion...." Hurd found Donhauser's consequences for invoking the self-incrimination privilege were found "serious and potent."

Whether participation is voluntary. The Court found the SOCP mandatory in that New York presented Donhauser with a Hobson's choice: participate and confess or refuse and stay in prison longer.

Balancing approach. Citing the four-prong balancing test set forth in *Turner v. Safely*, 107 S.Ct. 2254 (1987), Judge Hurd found (1) there exists a valid, rational connection between the SOCP and the

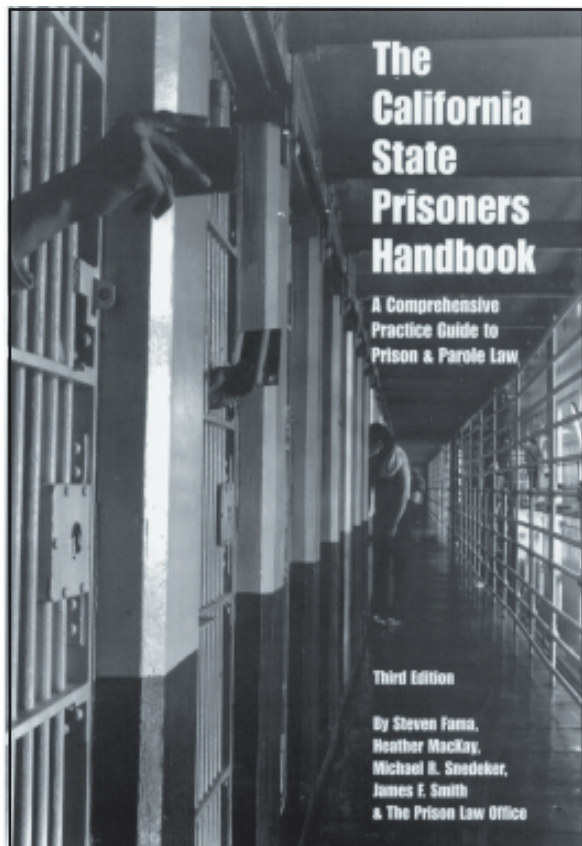
state's "interest in rehabilitating prisoners for safe return to society." (2) There was no other way Donhauser could assert his self-incrimination privilege. (3) There was no evidence regarding the impact accommodating Donhauser's rights would have on guards and other prisoners. (4) The fourth *Turner* factor, an alternative means at de minimis cost, the Court explored in depth finding New York could offer use immunity which would protect prisoner's constitutional rights and allow them to freely discuss their crimes and receive necessary treatment, while the state could still use the information as an investigatory tool though the admissions themselves could not be used as evidence in a subsequent prosecution.

Corrections Commissioner Goord, responding to the ruling, said that "use immunity places an intolerable burden" on prosecutors. He declared that he would "not grant inmates use immunity that is tantamount to a stay out of jail card complicating attempts to convict them of other crimes." Goord said that "use immunity grants inmates a sword with which to fight prosecution rather than a shield protecting their rights."

The Court issued a preliminary in-

junction at first enjoining New York from requiring prisoners to divulge a history of sexual conduct as part of the SOCP. On April 23, 2004, the preliminary injunction was vacated and amended to enjoin New York from depriving a prisoner of good time credits for refusing to divulge their sexual history in the SOCP. A stay pending appeal, granted by the Second Circuit on May 25, 2004, allowed New York to reinstate its program with about 650 participating prisoners. *PLN* will report on the appeal result when it's released. See: *Donhauser v. Goord*, preliminary injunction granted 314 F.Supp.2d 139, vacated and amended 317 F.Supp.2d 160 (N.D.N.Y. 2004).

With many states civilly committing prisoners convicted of sex offenses after they have served their criminal sentences and the prospect of additional prosecutions, it is rarely advisable to confess in any prison "therapy" or "rehabilitation" program to any uncharged or unprocessed crimes that may have been committed absent a binding immunity agreement. Prison therapists routinely testify against their prisoner "patients" in civil commitment and criminal prosecutions about disclosures made during "treatment." ■



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Ex-Prisoners Barred From Nursing in Texas

by Matthew T. Clarke

Recently, the *Dallas Morning News* (DMN) generated articles decrying the presence of convicted drug and sex offenders in the nursing profession.

Texas, like many states, has statutes denying ex-prisoners licensing in many state-licensed professions. In some professions, being convicted of a misdemeanor is sufficient cause for license revocation. In others, ex-prisoners are effectively barred from employment by laws requiring employers to perform background checks on potential employees.

The newspaper articles focused on drug and sex offenders. The reason they did this is because these offenses were the easiest to track--especially the sex offenders for which there exists a statewide registration database. The DMN compared the list of drug and sex offenders to the records of 500,000 nurses, about half of which held current licenses and the rest of which could renew their licenses if they paid delinquent fees or enrolled in nursing courses. The DMN found that, among the 500,000 names, were 31 registered sex offenders, 26 other felony sex offenders, and 142 felony drug offenders. Among these 199 drug or sex offenders, 58 were currently or had been previously incarcerated in a state prison. State law requires license revocation for felons who receive prison time. So, this crusading newspaper report discovered 58 out of 500,000 (or 0.011%) of the potential licensees could be licensed in violation of the state law prohibiting ex-prisoners from holding nursing licenses.

Some people think that a 0.011% error rate is not good enough, even though the newspaper did not turn up a single incidence of one of the ex-prisoners having caused a problem.

"You probably don't want someone who is a registered sex offender being alone with you in a room where you are probably not completely dressed," said the executive director of the Dallas group Victims Outreach, Kristianne Hinkamp. Others note that a blanket ban on sex offenders would go too far.

"Just because someone is convicted of a sex crime does not determine their dangerousness," said executive director of the Texas Council on Sex Offender Treatment Allison Taylor. "We've got to look at who is dangerous and who is not."

"A lot of times the media portrays

sex offenders in a different light than what research shows us," said Taylor. "Only 5 to 10 percent are predatory in nature."

For instance, a nurse who as a teenager had been charged with having sex with his underage girlfriend shouldn't necessarily be banned from nursing, according to Taylor. She said that most sex offenders can change their behavior, but it is essential that they be subjected to close monitoring, including polygraph tests.

The Texas Board of Nurse Examiners hasn't been performing background checks, instead relying on self-reporting by the nurses. The reason given was budgetary concerns.

So what is the employers' reaction to this controversy? In the case of Kevin Todd Shelton, who received deferred adjudication (a type of probation) for a sex offense and is a registered sex offender, the board didn't know it had licensed a registered sex offender because board rules didn't require the reporting of deferred adjudication at the time he was licensed. That changed two years ago when new rules requiring such reporting were enacted.

Upon discovering Shelton's status, the board moved to revoke his license as a registered nurse. However, Shelton's supervisors at Presbyterian Hospital in Greenville gave Shelton such a good recommendation, the board reconsidered.

"He's been working, and they love him," said James "Dusty" Johnson, general counsel for the board. "It's like he's the best nurse they ever had. They go on and on about him. Are we going to change the rule and then revoke you?"

The board decided to suspend Shelton's license until he completes a psychological evaluation. If the evaluation determines that he can safely practice nursing, he will be required to work in a clinical setting, notify employers of his criminal history, be supervised by a registered nurse and have access only to patients over 18 for three years.

Presbyterian Hospital officials said the hospital knew of Shelton's background when it hired him and confirmed it with a routine background check.

"We were able to satisfy what questions we had," said hospital official John Heatherly. "I think it is important to look at the whole picture and the whole story

and not make any uninformed or snap judgments."

The board received funding to conduct background checks on applicants for registered nurse applicants, but did not push for funding to check all license holders. The Legislative Budget Board asked the licensing board to conduct background checks on all vocational applicants and randomly check nurses coming up for license renewal over the next 10 years, in an effort to spread the expenses over several budgets.

That isn't enough for people like Hinkamp. She favors a blanket ban on all sex offenders. "Under our current system of laws, we deem him or her to be a danger enough to be registered, I think that precludes certain professions," said Hinkamp. "I can't imagine a situation where you could be using your nursing license as a registered sex offender where you could be completely trusted."

Unfortunately, in Texas and many other states, the idea of "ban 'em all, let God sort 'em out" prevails, and not just in the nursing profession. According to the Texas State Law Library, there are over a hundred state-licensed or certified professions in which ex-prisoners may not work or may be restricted from working. This includes virtually every occupation licensed or certified by the state, many of which have no obvious need for such a restriction (e.g. embalming; speech pathologist; interior designer; real estate sales; home plumbing, electrical systems, appliances, or heating/AC repair).

What is the effect of banning people returning from prison from practicing their profession? It makes it more difficult, for them to gain lawful employment. This virtually condemns them to a life of crime or poverty and creates a self-fulfilling prophecy: "prisoners can't be rehabilitated." It's like holding a prisoner's head under water then, when he drowns, saying, "See, I told you so, prisoners can't learn how to swim." ■

Sources: *Houston Chronicle*, *Dallas Morning News*.

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By Dr. Melissa Palmer
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Los Angeles County Jail Tests Prisoner Radio ID Tags

by John E. Dannenberg

The Los Angeles (L.A.) County Sheriff's Department will spend \$1.5 million to install a computerized radio ID tag system in 2006 to monitor the location of 1,900 prisoners at the Pitchess Detention Center (county jail) in Castaic.

The radio-linked wristbands work inside the jail structure, pinpointing prisoners' location to within a few feet. Outside of structures, it will be necessary to utilize Global Positioning System (GPS) technology to monitor prisoner movement. A variant of the radio tag system permits locally transported control units to be taken to any remote locale, such as for work-release crews, to create a "virtual" prison that is outside the walls. The technology had a pilot test at the minimum security unit of California's Calipatria State Prison. Calipatria's spokesman Lt. Ray Madden recounted an incident two years ago where investigators retraced prisoners' movements to prove that an unlikely suspect in a wheelchair was in fact the perpetrator in a stabbing incident.

L.A. County Sheriff's spokesman Marc Klugman anticipated expanding the system, manufactured by Arizona-based Technology Systems International (TSI), to cover 6,000 prisoners at the L.A. County Central Jail. Some 200,000 prisoners pass through the L.A. County Jail every year, where several thousand must be moved daily for court appearances. Last

year there were 1,330 incidents of violence resulting in injuries to 1,742 prisoners and 88 jail staff; five prisoners were killed. (See: *PLN*, Apr. 2005, p.16.) TSI estimates a lucrative potential U.S. market of \$1.5 billion for their TSI PRISMTM radio tag systems. However, Harinder Singh, technology director for the California Department of Corrections, anticipates newer technology that could surpass TSI's. He showed interest in the Wheels of Zeus, Inc. system that combines radio tags with GPS in a single unit. The latter system is made by a Los Gatos, Calif. firm headed by Apple Computer co-founder Steve Wosniak.

Other states are interested, too. Michigan's Bureau of Juvenile Justice has used a \$1 million system at a maximum security ward since 2003, and is testing a second installation. Ohio's Department of Corrections has pilot programs at a minimum security facility in Chillicothe. Illinois is monitoring 1,900 prisoners at Logan Correctional Facility.

An intriguing side-benefit of this technology is that the historical location-data could be subpoenaed as evidence in assault and failure-to-protect suits prosecuted by prisoners. ■

Source: *Pasadena Star News*.

Texas Enacts Life Without Parole Law

On June 17, 2005, Texas Governor Rick Perry signed into law legislation that allows Texas juries to sentence defendants to life without the possibility of parole in capital cases. Senate Bill 60 replaces the previous non-death-penalty option of 40 years without the possibility of parole with life without the possibility of parole. Thus, it represents an increase in the penalty for capital crimes.

The bill was sponsored by Sen. Eddie Lucio, D-Brownsville, and had generated strong opposition from victims rights groups and district attorneys from the larger cities in Texas who believed that the life-without-parole option would make it

harder to get juries to mete out the death penalty. The original version of the bill would have added life without parole as a third sentencing option, but, bowing to the political pressure of the district attorneys who claimed having three options would confuse jurors; Lucio revised the bill to make life without parole the only alternative to the death penalty in capital cases.

Texas is the 48th state to adopt a life-without-parole option, better known as death by incarceration. The law took effect September 1, 2005. ■

Source: *Austin American Statesman*.



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Lethal Injection Painful, Study Suggests; U.S. Supreme Court to Consider Issue

by Michael Rigby

Hundreds of prisoners killed by lethal injection—the preferred method of execution in 37 states and the federal Bureau of Prisons—may have suffered agonizing deaths due to a routine failure to administer enough anesthesia, according to a recent study. Reviewing toxicology data from 49 executions, researchers in Virginia and Florida found that low levels of anesthesia in the bloodstream indicated the prisoners were conscious in 43 of the cases. The findings were published in the prestigious British medical journal *The Lancet* on April 14, 2005.

Any suffering may not be apparent to observers, however, because prisoners are also paralyzed during the executions. Lethal injection involves administering three drugs: sodium thiopental to anesthetize the prisoner, followed by pancuronium bromide to induce paralysis, and potassium chloride to stop the heart.

For someone who is awake, lethal injection would be anything but painless. “Administration of potassium chloride will cause nerve fibers to fire, and you really get a profound burning sensation,” said Dr. Leonidas Koniaris, chairman of surgical oncology at the University of Miami and the study’s lead author. An accompanying editorial in *The Lancet* noted that “It would be a cruel way to die: awake, paralyzed, unable to move, to breathe, while potassium burned through your veins.”

The condemned are typically given two grams of sodium thiopental—enough to sedate a 220-pound man for 10 minutes. But that may not always be enough. Though the average execution time is 8.4 minutes, many take more than 10 minutes to complete, according to the study. In addition, the IV lines are usually inserted by a medic or other insufficiently-trained technician. If a mistake is made, the entire two grams may not enter the bloodstream. Extreme fear, anxiety and a history of drug abuse may also necessitate additional anesthetic. “It’s a process fraught with potential for error,” said Dr. David Lubarsky, chairman of the University of Miami/Jackson Memorial Hospital’s anesthesiology department and a co-author of the study.

Lethal injection has gained wide acceptance because it masquerades the gruesome reality of state-sanctioned murder as a painless medical procedure [See *PLN*, February 2005, p. 23]. Gary Clements—deputy director of the Capital Post-Conviction Project of Louisiana, an organization that defends condemned prisoners—agrees this is the case. “The bottom line is that there’s a real problem with the perception of how lethal injection goes down in the public, and what we believe really goes on,” he said.

The study only reviewed toxicology data from prisoners in Arizona, Georgia, North Carolina and South Carolina, which were chosen because their autopsy records are publicly accessible. Texas, the nation’s most prolific death penalty state, refused to participate in the study.

Koniaris, who does not oppose the death penalty, said he believes the findings warrant a moratorium on executions until a publicly-appointed panel can examine whether prisoners are awake during the process. “If that’s the case, as a society we need to step back and ask whether we want to torture these people or not,” he said.

The issue of lethal injection as a “humane” method of execution made headlines nationwide in early 2006 after the U.S. Supreme Court temporarily halted three executions based on legal arguments involving the lethal injection process. Missouri death row prisoner Michael Taylor and Florida prisoners Clarence Hill and Arthur D. Rutherford had their executions stayed by the Court in January and February, 2006. All three are challenging the lethal injection process, claiming the mix of chemicals is cruel and inhumane in violation of the Eighth Amendment. The Supreme Court halted Taylor’s execution after the time it had been scheduled; Hill was strapped to a stretcher with IV lines inserted into his arms when he received a stay on Jan. 24, 2006.

The reprieves by the Supreme Court represent the first step in having this issue considered by the lower courts; the Supreme Court is not expected to rule on the constitutionality of lethal injection

itself, but rather on the procedural and technical aspects of challenges to the method of execution. “The bigger issue of lethal injection will get decided by many different courts and you may have many different opinions and that issue may come back to the Supreme Court to decide once and for all,” stated Richard Dieter, Director of the Death Penalty Information Center.

Further, the Supreme Court is sending mixed messages. On January 27, 2006, the justices voted 6-3 to overturn an appellate ruling that had cleared the way for Indiana state prisoner Marvin Bieghler to challenge the lethal injection process. Bieghler was put to death the same day. And on January 31, 2006 the state of Texas executed Jaime Elizalde, Jr. after the Supreme Court refused to consider his appeal that had raised an Eighth Amendment claim regarding the chemical mix used in lethal injections.

Missouri attorney general Jay Nixon was unconvinced about arguments against the lethal injection process, saying, “It’s the type of claim you bring when you don’t want to talk about a person’s guilt or innocence.” However, John Simon, an attorney representing Michael Taylor, whom Nixon is seeking to execute, views the matter differently. “If a veterinarian did to a pet what Missouri did to its own citizens, the state would take away his or her license,” he said. Indeed, one of the drugs used in legal injections, pancuronium bromide (marketed under the brand name Pavulon), is not approved for killing animals in 19 states; the American Veterinary Medical Association condemned the use of Pavulon for euthanasia following a 2000 report that noted an animal “may perceive pain and distress after it is immobilized.”

Previously, in 2003, Tennessee death row prisoner Abu-Ali Abdur’Rahman had raised objections to the use of the lethal injection chemical mix, specifically Pavulon, in state court. While Davidson County Chancery Court Judge Ellen Hobbs Lyle upheld the method of execution, she found that Pavulon served “no legitimate purpose.” The Tennessee Supreme Court ruled against Abdur’Rahman on October 17, 2005, rejecting his arguments and

finding that the state's lethal injection procedure was acceptable. The court held, in part, that since he wasn't "livestock," he couldn't challenge the use of Pavulon in his execution. Ironically, had Abu-Ali been a cow, pig or horse the state couldn't execute him with the chemical mix used for executions. See: *Abdur'Rahman v. Bredeesen*, -- S.W.3d --, 2005 WL 2615801 (Tenn.).

The U.S. Supreme Court will hear arguments in the first case challenging the methodology of lethal injection, raised

by Florida death row prisoner Clarence Hill, in April 2006. According to the Death Penalty Information Center, as of February 1, 2006, 841 prisoners around the country had been executed by lethal injection. *PLN* reports extensively on death penalty news, trends and related issues. See the *PLN* indexes or visit www.prisonlegalnews.org for more information. ■

Sources: *Houston Chronicle*, *Los Angeles Times*, *Associated Press*

New York Jail Doctor Put on Probation After Wrong Prescription Kills Detainee

by John E. Dannenberg

The former medical director for Rensselaer (New York) County Jail was put on probation for three years by state health authorities for improper treatment of alcohol withdrawal syndrome that caused the death of a pre-trial detainee. Additionally, the director was permanently banned from practicing medicine at any correctional facility. The county settled the ensuing wrongful death suit for \$150,000 in 2004. the discipline took place after the lawsuit was settled. It is rare that the medical neglect murder of prisoners results in any medical discipline.

Ray Valigorsky, 46, was an alcoholic well known to Rensselaer County Jail personnel. On July 19, 2002, he was arrested on disorderly conduct and open-container charges. Homeless for the previous ten years, Valigorsky had been treated for alcohol withdrawal at the jail nine previous times between 2000 and 2002.

On this latest arrest, he was prescribed Ditropan, even though Valigorsky showed signs of delirium tremens ("DTs", a severe alcohol withdrawal symptom). Medical director Dr. Morteza Naghibi prescribed the drug without ever even seeing Valigorsky, and the prescription was improperly filled by contract nurses from Adept Health Care Services, Inc. (Adept). Only after four days did one nurse tell Dr. Naghibi that Valigorsky "was not doing very well." Naghibi then changed the prescription to the sedative Librium, but Valigorsky lost consciousness a few hours later and was pronounced dead shortly thereafter at Samaritan Hospital.

Investigation into the death re-

vealed a sorry continuum of negligence. Naghibi, who was paid \$42,000 a year for a two-hour jail visit every Tuesday, plus on-call responsibilities, failed to review Valigorsky's records, see him personally or communicate with jail staff.

In a 42 U.S.C. § 1983 civil rights lawsuit filed by Valigorsky's daughter Rachel McCrea against Dr. Naghibi, numerous sheriff's office administrators, Adept, Nurses Sherry McIsaac, Mary Malatino and LPNs Barbara Cicognani, Rosemary Sorel and Peter Rice, the accusations were legion. Dr. Naghibi was charged with willful neglect of his duties by prescribing Ditropan (not safe or effective for DTs), failure to review the patient's records, failing to see or monitor the patient and failure to hospitalize him.

Sheriff's administrators were charged with failing to intercede to gain proper medical care for Valigorsky, as well as failure to properly train their staff to do so.

Nurses were charged with violation of prescription distribution regulations wherein drugs were improperly ordered in bulk rather than in individualized sealed packets for specified patients.

All defendants were charged for their negligence in full well knowing Valigorsky's medical history, but simply ignoring it when giving him inappropriate medication and lack of direct medical attention for four days. Valigorsky died naked in his cell, lying on his side, skin warm, moist and blue. His death was plainly preventable. See: *McCrea v. County of Rensselaer*, U.S.D.C. (N.D. NY), No. 03-CV-0892 FJS/DPH. ■

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MASSACHUSETTS COURT SNUBS UNITED STATES SUPREME COURT

For 7 years (1972-1979), Massachusetts Courts were convicting individuals of murder and sentencing them to life without having authorization for the Massachusetts Legislative Branch.

This issue began on July 30, 1972, with the U.S. Supreme Court's ruling on the death penalty being unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 376 (1972). At that time the Massachusetts murder statute: G.L. C. 265 §2 did not have a savings clause or severability clause within the statute, yet the court's continued to operate under this defaulted statute. Massachusetts has more than 200 prisoners illegally sentenced and refuses to correct this problem. For many years the Judicial Branch of this State has become more powerful than the Legislative Branch. Looking for a keen and courageous Constitutional Lawyer to review this matter and help me right this wrong. For further information contact:

Luis Perez <http://convictmailbag.com/viewconvict.php?ID=130> or write me c/o Bay State Correctional Center, P.O. Box 73, Norfolk, MA 02056-0073.

Suspicious Deaths And Beatings Allegations Still Plague Santa Clara County, California Jail

by Marvin Mentor

Seven prisoner deaths and numerous reported police beatings between October 2004 and April 2005 at the Santa Clara County (SCC), California jail have local civil rights watchers calling for a grand jury investigation. Similar problems occurred at SCC in 1995 when they were studied by the County Board of Supervisors under the name "Sudden In-Custody Death Syndrome," more candidly retitled "Sudden Torture and Fatal Beating Syndrome" when reported in *PLN* (July 1996, p.16).

On March 28, 2005, Carlos Garcia died after guards from the SCC Department of Corrections (DOC) restrained him when he became ill in the booking area. He had been injured in an auto accident, but official reports rated him combative. One witness reported that the guards "dog-piled" Garcia.

In October, 2004, 33-year old Scott Marino died when his family finally disconnected life support. Scott had been comatose for six weeks after SCC guards "subdued" him for being unruly. Marino's family has filed a wrongful death suit alleging excessive force.

These deaths are mindful of the incident that led to the 1996 Board of Supervisors study, wherein prisoner Joseph Leitner suffered brain damage when guards restrained him by wrapping his head in a blanket and then abandoned him. He never regained consciousness, but was kept on life support for ten years in a Los Gatos hospital, succumbing in January, 2005 when his family agreed to pull the plug.

So-called "natural deaths" have raised suspicion, too. For weeks 49 year-old Raina Bermudez had complained of abdominal pains which went untreated, in spite of her having filed a grievance form. She died of an acute abdominal infection. Her family recently settled out of court for \$1.75 million after showcasing endemic poor medical practices at SCC.

On July 11, 2004, Martin Rodriguez was booked into SCC for being under the influence of methamphetamine. He claims he was just drunk; his misdemeanor charges remain pending. Booked into SCC at 4 a.m., Rodriguez was scared when the guards yelled at him for combing his

hair with his hands while his picture was being taken. He was then asked to sign for his belongings, which included \$1,925.00 in cash he had collected from two car sales that weekend. When he saw it listed as \$19.25 he objected and the guards taunted him to take their pen and correct it. Then, two guards twisted his arms behind his back, took Rodriguez' hand and hit him repeatedly in the face with it.

Rodriguez was so upset he soiled his pants, resulting in the guards pulling him up from the chair and kneeling him in the stomach so hard as to lift him off the ground. Then they took him to the corner of the booking room and chained him to a chair. In the chair, he had his head pushed down into his belly chains for several minutes, after which the guard pushed his head back in by hammering and twisting it. Writhing in neck pain, Rodriguez was left chained in the chair for five hours. He suffers permanent neck pains from this assault.

Rodriguez' complaints and grievances, as well as those of his wife Hinojosa, fell on deaf ears of everyone they complained to. The Mexican Consulate could not help because the Rodriguezes were only guests in the United States. The San Jose Independent Police Auditor, after viewing video tapes, declined to help because no City Police were involved. DOC internal affairs representative Sandra Padgett wrote that the DOC concluded, after a "careful investigation," that the case was closed, citing a penal code section that prohibited her from giving any details. San Jose Police spokesman Nick Muyo declined comment because the matter was still under investigation; Linda Deacon from the County Counsel's office, Deputy District Attorney Karen Sinunu and Chief of Corrections Ed Flores likewise declined.

With all this denial, it is not surprising that SCC has a poor record of policing itself. Thirty-five investigations of excessive use-of-force complaints were reported in 2003, 63 in 2004 and 29 in the first three months of 2005. Of 27 looked into by DOC in 2004, only two were found in the prisoner's favor. As to Rodriguez' case, the county has provided only "foggy excuses" to investigative journalists from the *Metro*

News as to why the video tape footage could not be seen, unless Rodriguez signed a release first. When a copy was later located, County Counsel Representative Nancy Clarke refused to release it because it pictured other prisoners as well. Calling the tape of poor quality, Clarke nonetheless relied upon it to dismiss Rodriguez' allegations, concluding that "nothing had happened."

Rodriguez found some sympathy in Richard Hobbs, the county Human Relations Commission director. Hobbs had experience directing a 2000 county project researching needs of local immigrant communities. He found that Mexicans were harshly treated and that racism was rampant in the SCC jail. His study was never responded to and it appears that conditions have not changed.

Gary Wood, a former Grand Jury member, pointed out the dilemma, "You're complaining to the same people that beat you up." Calling DOC an unaccountable system, Woods said that the Board of Supervisors doesn't really watch closely over it. DOC morale is so bad that most guards look at their jobs as dead end, promoting a "Fight Club" mentality and environment at the jail.

Other witnesses to brutality include members of Friends Outside, a volunteer organization providing books and other services to SCC prisoners. One unnamed witness observed a guard bouncing a prisoner's head against the wall, until another guard signaled that they were being seen, whereupon the volunteer was asked to go home for the day. Nancy Rutherford, a former SCC nurse, quit her job after frequently treating serious injuries sustained by prisoners in the booking room.

Rodriguez is now looking for an attorney to take his case on contingency. Notwithstanding his permanent disabilities from the beating injuries, his claim should at least be worth the \$1,925 the booking room guards stole from him. ■

Source: *Metro News*.

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New Jersey Taxpayers Underwrite Unqualified, Unnecessary Prison Employees

The New Jersey prison system is infested with parasitic employees--thrust upon the department by legislators and the governor's office--who bleed state taxpayers for more than \$850,000 a year, Department of Corrections (DOC) commissioner Devon Brown has admitted.

The revelation came during a May 3, 2005, meeting of the Assembly Budget Committee as lawmakers grilled Brown about department spending, including free housing for some DOC officials. During the meeting, Brown told committee members the DOC has unwanted political patronage employees whose salaries total \$867,000. Portrayed as "unqualified" and

"unnecessary," Democratic Assemblyman Louis Greenwald asked for specific names.

Brown later provided a list of 14 employees. Most were reportedly hired after former governor James McGreevey took office in 2001, but one was identified by DOC spokesman Matt Schuman as having been hired in September 1996. The employees on the list held jobs ranging from chaplain and welder to assistant superintendent and division director, said Schuman. Their salaries ranged from \$33,515 to \$99,813 a year. After the meeting, committee Republicans called for acting Democratic Governor Richard

Codey to investigate patronage in state agencies.

An official in Codey's administration said none of the employees on Brown's list came through his office.

Brown had attended the hearing to defend the DOC's proposed operating budget for fiscal year 2005-06. The department wants \$914 million for services and \$753 million for prison operations, both up about 1% from the current fiscal year.

Legislators also questioned the rationale of providing free housing for some department bigwigs. "Why should they be any different from other individuals who work for the state, and why should they be in housing," asked Republican Assemblyman Joseph Malone. The DOC owns nine such houses adjacent to state prisons. "I would seriously request that you seriously look at the absolute need to have these houses," Malone said. ■

Source: *NJ.com*

GEO Group Buys Out Correctional Services Corporation

In November 2005, GEO Group, the second-largest private prison company in the U.S., finalized its purchase of the Sarasota, Florida-based Correctional Services Corporation (CSC) for \$6 a share -- a total of \$62 million in cash -- and the assumption of \$124 million of CSC's debt. GEO had previously announced a downward revision of its earnings forecast for the third and fourth quarters and 2005 overall. The closing price of CSC stock on July 14, 2005, the day CSC entered into an Agreement and Plan of merger with GEO, was \$4.39 per share. Wall Street seemed undeterred by GEO's payment of a 37% premium for CSC stock, as the listed value of both corporations' stock rose significantly the day after the announcement of the buyout. GEO gained \$0.62 to \$25.93 a share while CSC gained \$1.43 to \$5.82 a share.

Under the buyout agreement, GEO will assume management of CSC's 15 adult correctional facilities with a total capacity of 7,500 beds. In a related transaction, CSC CEO James Slattery agreed to buy back the company's juvenile services division, Youth Services International (YSI), for \$3.75 million and will continue to operate YSI's 17 juvenile facilities with a total of 1,300 beds.

GEO's purchase of CSC was contingent on CSC's settlement of a \$38.8 million jury verdict against the company

resulting from the 2001 death of Bryan Dale Alexander, an 18-year-old prisoner at a CSC-operated boot camp in Mansfield, Texas. Alexander died of a rare penicillin-resistant type of pneumonia after being denied timely medical care [see PLN, Feb. 2004]. The settlement terms were confidential; however, CSC reportedly contributed \$2.7 million toward the total settlement amount with the balance being paid by the company's insurers.

The CSC buyout is merely the latest manifestation of a trend toward consolidation in the private prison industry, an inhumane industry whose motto might be "Companies Love Misery." GEO Group Corp., formerly known as Wackenhut Corrections, and Corrections Corporation of America are the dominant private prison companies in the U.S. GEO's acquisition of CSC increases the company's operations to a combined total of 55 facilities with approximately 47,465 beds. ■

Sources: *Palm Beach Post*, www.newcoast.com

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Judge Reduces Damage Award Against PHS In New York Jail Heart Attack Suit

by John E. Dannenberg

In July 2005, a New York federal jury awarded \$150,000 in compensatory damages and \$632,988 in punitive damages to a jail prisoner who suffered permanent disabilities when treatment for his heart attack was delayed for three critical days by indifferent guards and medical staff.

Byron Lake, then 52 years old, and serving a sentence for DUI, was imprisoned in the Schoharie County jail. On August 15, 1998, he suffered classic heart attack symptoms: breathing difficulties, chest pain and radiating pain to his arm and neck.

He reported this to jail staff, but because no doctor or nurse was on duty, the sergeant placed him in a holding cell for two hours while Lake continued to complain. He was then taken to the Schenectady County Jail to be seen by a nurse employed at that facility by EMSA Correctional Care [later bought out by Prison Health Services (PHS)].

The nurse placed him on the medical tier, where his symptoms worsened. One day later Lake lost consciousness and was brought back to the nurse, who gave him an inhaler and notified the EMSA doctor 2½ hours later by phone. Nonetheless, Lake was not seen by a doctor until he was taken to a local hospital after several more hours. There, doctors determined that Lake had suffered a heart attack 2½ days earlier. Represented by Albany attorney Kevin Luibrand, Lake filed suit under 42 U.S.C. § 1983. The complaint named both counties, EMSA, PHS and several county employees as defendants, alleging cruel and unusual

punishment, denial of medical care, unconstitutional county practices and policies, and failure to train and supervise staff.

The district court instructed the jury that to find the requisite deliberate indifference would require a finding that defendants "contemplated a condition of urgency that may result in degeneration or extreme pain." But the jury was told they must first find that "the deprivation occurred because of the policy, custom or practice of the municipal defendants." The jury found both counties liable for a total of \$150,000, as well as the nurse and EMSA. PHS became liable as successor owner of EMSA and from indemnification of the counties through its contract. The \$632,988 punitive damages award was solely levied against EMSA.

However, On Dec. 29, 2005, District Court Judge Donald E. Walter set aside the punitive damage award, holding that none of the defendants had acted with "malicious or callous indifference to Lake's medical needs." The finding of liability and the award of compensatory

damages and attorney fees was upheld. "We knew when the verdicts were reached that the battleground (for appeals) were the punitive damages," said Luibrand. "It's good that the liability remains with EMSA and the county of Schenectady."

In other incidents involving the private prison health care companies, PHS lost its contract with Schenectady County in 2004 following the death of Brian Tetrault at the county jail. The 44-year-old prisoner died when his Parkinson's medication was stopped. But EMSA later dodged a bullet in April 2005 when jurors declined to award damages in the May 4, 2000 death of 20-year-old Jason King in Florida's St. Lucie County Jail. The jury did find EMSA negligent in its jail medical services, but decided that the negligence was not a legal cause of King's death, since his death was due to King's taking medication traded from a fellow prisoner. See: *Lake v. County of Schoharie*, U.S.D.C., N.D. N.Y., Case No. 9:01-CV-1284. The court's opinion, complaint and verdict are posted at www.prisonlegalnews.org. ■

Auditors Uncover Hidden Cash Accounts at Chester County, Pennsylvania, Prison

An audit of the Chester County, Pennsylvania, Prison's finances uncovered hidden cash accounts used to collect \$18,000 from prisoners between 1984 and 2003. All but \$4,000 of the money had already been "spent at management's discretion over the years," according to Ray E. White, Jr., acting Chester County Controller. The audit was of the prisoner trust fund, an account intended to hold money for prisoners to spend at the prison's canteen. In 2003, \$1.1 million passed through the trust fund. It had a balance of \$82,000 at the end of 2003.

The audit report was released just as Chester County District Attorney Joseph W. Carroll was scheduled to release initial findings of an investigation into inappropriate expenditures and lack of financial oversight at the prison that were discovered during a 2002 audit. The investigation reportedly failed to find any criminal wrongdoing. However, the release of the

findings was delayed after the results of the 2003 audit were made public.

Prison warden John H. Masters claimed that the accounts were not "hidden," but were part of a revolving fund to be used to pay for replacement of state property that is damaged by prisoners. However, White said that the cash funds were not disclosed until county auditors uncovered them during the audit.

"They should have been disclosed to us, and they weren't. That's a red flag," said White. In May, the controller's office assumed possession of the remaining \$4,000 in the cash account.

Although the audit report called the hidden accounts a "significant weakness" in internal financial controls, White said he believed them to be due to "insufficient training," "insufficient documentation," or "oversights and human error," not "negligence or deliberate misconduct." ■

Source: *Philadelphia Inquirer*.

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Federal Court Finds California Murder Paroles Blocked by Illegal "No-Parole" Policy

by Marvin Mentor

On May 19, 2005, the United States District Court (E.D. Cal.) ruled that the California Board of Prison Terms (BPT), between 1992 and 1998, disregarded regulations ensuring fair hearings "and instead operated under a sub rosa policy that all murderers be found unsuitable for parole." Adopting and affirming the December 22, 2004 Findings and Recommendations of U.S. Magistrate Judge Peter Nowicki, Chief Judge Lawrence Karlton ordered the BPT to either release petitioner Melvin Coleman or, within 60 days, afford him a new parole hearing "conducted by a board free from prejudice stemming from a gubernatorial policy against parole for murderers." (See: *PLN*, Apr. 2000, p.1, *California's No-Parole Policy*.)

Melvyn Coleman was convicted in 1974 of first degree murder, attempted second degree murder, robbery and burglary after shooting a couple who surprised him while he was burglarizing their home. He was sentenced to seven years to life. Despite repeated prison recommendations for parole, he has never been "found suitable" for parole by the BPT. Coleman challenged the parole process as biased in a federal habeas corpus petition filed in 1996. He alleged that under directions by former governors Pete Wilson and Gray Davis, the BPT intentionally cut parole grants to a fraction of 1%, in spite of California Penal Code's § 3041(a) which requires the BPT to "normally" set a parole date at a prisoner's initial hearing.

Coleman presented sworn testimony from former BPT commissioners Leddy, Tong and O'Connell that the policy was enforced by selecting BPT appointees who were less likely to grant parole and more willing to disregard their statutory duty; by removing BPT members who granted too many dates; by selecting different commissioners to review and disapprove earlier grants of parole; by scheduling impromptu rescission hearings for no new cause; by pre-determining the outcome of hearings; and by wholesale gubernatorial reversal of those few cases approved by the BPT.

The factual record of the no-parole policy was unrefuted by the BPT. Instead, they relied upon a finding of "some evidence" in each case to justify the no-parole

action. But the court rejected this because there will always be "some evidence" to explain a denial or rescission, adding, "Federal due process requires more."

Noting prior case law establishing the existence of a state-created liberty interest in parole, the court rejected any process that amounted to arbitrary and capricious behavior. One foundational process is the guarantee of a fair and impartial fact-finder. Citing *Edwards v. Balisok*, 520 U.S. 641, 648 (1997), the court held that "a decision made by a fact-finder who has predetermined the outcome is per se invalid -- even where there is ample evidence to support it." Finding that a blanket no-parole policy prevented Coleman from having a fair hearing, the court granted the writ unless the BPT gave him a new hearing by an unprejudiced panel within 60 days.

The BPT then provided Coleman with a parole hearing in July 2005 before two commissioners; not surprisingly he was

not recommended for release, receiving a five-year denial of parole suitability. Coleman petitioned the court for immediate release, claiming that between the Magistrate's Dec. 22, 2004 Findings and Recommendations and the July 2005 parole hearing there was no change in the governor's policies regarding parole for murderers, and that the most recent parole hearing thus suffered from the same legal infirmities as his previous hearings.

On Feb. 2, 2006 the district court rejected this argument and denied the motion, holding that Coleman had presented no evidence that the second parole hearing had the same constitutional defects, or that the policies under Gov. Schwarzenegger were the same as the deficient policies that existed under former Gov. Pete Wilson. See: *Coleman v. Board of Prison Terms*, No. 2:1996cv00783, E.D. Cal., May 20, 2005 (unpublished ruling). The ruling is posted on *PLN's* website. 📄



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Class Action Suit Filed Against L.A. County Jail After 4,000 MRSA Infections

by John E. Dannenberg

A class action lawsuit against Los Angeles (L.A.) County and its Sheriff Leroy Baca was filed in 2004 in the United States District Court (C.D. Cal.) on behalf of an estimated 4,000 present and former L.A. County Jail prisoners who were infected there with MRSA (Methicillin-Resistant *Staphylococcus Aureus*), a disfiguring and potentially fatal skin disease. Alleging cruel and unusual punishment from being forced to sleep on the Jail floor in unsanitary, vermin infested and unsafe conditions, the class seeks \$4,000 per person in damages under California Civil Code § 52(b), general and punitive damages as proved under 42 U.S.C. § 1983, and attorney fees and costs provided by law for injuries suffered from 2002 to the present.

Named plaintiffs Sammy Davis, Jr. and seven other L.A. County Jail prisoners sued after exhausting administrative remedies with the County under California Government Code § 910. Each had been forced to sleep on the floor for up to four months while incarcerated. In those conditions, they experienced the unsanitary experience of sleeping next to bathroom fixtures, being infested with vermin and gnats, all the while suffering from painful sores and boils of MRSA infections they caught there, many of which went untreated. Yet, the overcrowding went unabated, with 200 new cases per month still being caught while sleeping on the Jail's floors, with filthy mattresses, pads and bedding—if not with no bedding provisions at all. Fifty-seven cases became so severe as to require hospitalization.

That the 22,000 bed L.A. County Jail is overcrowded to the point of violating prisoners' constitutional rights is well established. (See, e.g., *PLN*, Apr. 2005, p.16 [five in-jail murders result from overcrowding].) But today, Davis's suit alleges that conditions have deteriorated to where "the County's jails have become major incubators, breeding grounds and a source for dangerous, infectious and communicable contagious diseases, not limited to MRSA ... resulting in an explosion of such diseases into the community at large." Specifically, the complaint asserts that the number of MRSA-infected prisoners was at least 921 in 2002, 1,849

in 2003 and 2,480 in 2004, most of whom acquired their infections in jail.

The well drafted suit cites violations of the Eighth Amendment and California Constitution Article 1, § 17 [cruel and unusual punishment], the Fourteenth Amendment and California Constitution Article 1, § 15 [improper conditions of confinement in violation of substantive and procedural due process of law], violation of duty of care under Title 15 of the California Administrative Code (§§ 1027, 1117, 1118, 1263, 1270, 1271, 1272 and 1280) and Government Code § 815.6, and violations of California Penal Code § 2600 [prisoners' civil rights], § 4015 [Sheriffs' duty to care for

prisoners] and § 6030 [minimum standards for local detention facilities].

Past and present L.A. County Jail prisoners who have suffered MRSA or other infections from overcrowded housing conditions may wish to contact the principal attorneys for plaintiffs in this case, Litt, Estaur, Harrison, Miller & Kitson, LLP, 1055 Wilshire Blvd., Suite 1880, Los Angeles, California 90017. *PLN* will report further on this case as it develops. See: *Davis v. Baca*, U.S.D.C. Case No. CV 04-8251 AHM (MANx), First Amended Complaint, April 4, 2005. The complaint is available on *PLN*'s website at www.prisonlegalnews.org. ■

Feres Doctrine Bars FTCA Actions by Military Prisoners

The United States Court of Appeals for the D.C. Circuit held that the *Feres* doctrine, adopted by the United States Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950), bars suits brought under the Federal Tort Claims Act (FTCA) by military prisoners.

Jeffrey Schnitzer was confined in the United States Disciplinary Barracks (USDB) in Fort Leavenworth, Kansas, following court-marshal convictions for kidnapping, rape and murder.

During his confinement, Schnitzer was injured "when a portion of a ceiling at the USDB collapsed on him " while he was watching television. The accident allegedly "caused permanent injuries, including headaches, nausea, vision problems, a loss of manual dexterity and chronic pain. At the time he was injured, Schnitzer remained an active duty member of the U.S. Army."

Schnitzer brought an FTCA action for damages "for the Army's allegedly negligent maintenance of the USDB facility." Applying the "incident to service" test of *Verma v. U.S.*, 19 F.3d 646 (DC Cir. 1994), the district court "found that Schnitzer's injuries occurred incident to his primary military duty of confinement and thus were barred because "the *Feres* doctrine applies to military prisoners" the court noted that "[e]very circuit to consider the issue,...has found the doctrine to apply

without modification." Most significantly, "[t]he Tenth Circuit, in which the USDB is located, has resolved several cases involving military prisoners." See: e.g., *Walden v. Bartlett*, 840 F. 2d 771 (10th Cir. 1988). "The Tenth Circuit has held that *Feres* applies even when the prisoner has been discharged from active duty." *Ricks v. Nickels*, 295 F. 3d 1124 (10th Cir. 2002).

"Discerning no reason that military prisoners should not be subject to the same legal standards as non-incarcerated personnel," the court "adopt[ed] the approach of [its] sister circuits and appl[ied] the *Verma* test without modification to military prisoners. "Therefore, the court upheld the dismissal of Schnitzer's action."

The court also rejected Schnitzer's argument that "under *Feres*, the district court, in creating a class of service members (military prisoners) who are unable to recover under the FTCA, ran afoul of the equal protection component of the due process clause of the Fifth Amendment." The court found that military prisoners are outside the scope of *Feres* under the "admittedly narrow exceptions" of eating, sleeping and attending voluntary religious observances. More significantly, however, the court concluded that "Schnitzer's argument is more properly directed to a reconsideration of the *Feres* doctrine itself, not to the doctrine's applicability to his case." See: *Schnitzer v. White*, 389 F.3d 200 (DC Cir. 2004). ■

New Jersey Parole Officials Pay \$50,000 for Delayed Release

On February 3, 2005, a New Jersey man settled his federal lawsuit against state parole officials—whom he claimed were responsible for his remaining in prison 11 months beyond his approved parole date—for \$50,000.

Vincent Pannone was imprisoned on May 7, 1999, for theft by deception and credit card fraud. He received concurrent sentences of 5 years and 18 months respectively. On April 19, 2000, while at the South Woods State Prison, Pannone became eligible for parole.

Desiring to be paroled to his wife's house in Brooklyn, New York, Pannone submitted the relevant documents for approval in December 1999. In March 2000, after being incorrectly informed by New York that Pannone had no detainers, the New Jersey parole board set a conditional release date of June 21, 2001. Per procedure, Pannone's "parole package" was to then be forwarded to New Jersey's Office of Interstate Services (OIS) and then on to New York for approval.

However, the package was not forwarded to OIS, and because New Jersey regulations prohibit releasing a prisoner to parole when the plan has not been approved by the intended supervisory agency, a hold was placed on Pannone's release. As a result, his June 21, 2000, parole date came and went.

The package was finally forwarded to OIS on November 22, 2000; it was sent to New York a week later. On December 7, 2000, New York declined to investigate Pannone's parole plan because he had a warrant there for parole violation.

This required New Jersey to approve an alternate parole plan. On March 20, 2001, the New Jersey board amended Pannone's parole plan authorizing him to be released to New York authorities on May 2, 2001. New York subsequently took custody of Pannone on May 23, 2001—11 months after his original release date of June 21, 2000.

Pannone sued parole officials Steven Stites, Lisa Diaz, Linda Everett, and Zenaida Kirkland under 42 U.S.C. § 1983 alleging they violated his Eighth and Fourteenth Amendment rights by delaying his release. The defendants moved for summary judgment.

In an unpublished opinion dated December 16, 2004, the U.S. District Court for the District of New Jersey denied summary judgment to 3 of the

4 defendants—Stites, Diaz, and Everett. Examining the Eighth Amendment claim, Judge Robert Kluger first concluded that no penological justification existed for the defendant's failure to timely forward Pannone's parole plan to the OIS after March 23, 2000, thus delaying approval of a secondary plan, and ultimately, his release. Second, genuine issues of material fact existed as to whether defendants were deliberately indifferent.

Regarding Pannone's Fourteenth Amendment claim, the defendants asserted that board policy required them to place a hold on Pannone's release after New York denied his parole plan. The judge noted, however that their argument missed the point because Pannone

had attacked the defendants' "fail[ure] or refus[al] to complete the out of state parole package without any penological or other justification and failure] to submit the package to OIS in accordance with the custom and practice so that Pannone could be released on his scheduled date."

Following Judge Kluger's denial of summary judgment to 3 of the 4 parole officials, defendants agreed to pay Pannone \$20,000 in damages and \$30,000 in attorney fees, for a total settlement of \$50,000. See: *Pannone v. Stites*, USDC D NJ, Case No. 02-2162 (RBK)(unpublished). The settlement and ruling in this case are on PLN's website. Pannone was represented by Hackensack attorney Steve Latimer. ■

California's Preferential Bulk Price For Hepatitis-C Drugs Kept Secret

The good news is that California's Department of General Services (DGS) negotiated a bulk discount price for the large quantities of pegylated interferon it buys for the treatment of Hepatitis-C infected prisoners, and will save the state \$1 million on the \$5.6 million expended last year. The bad news is that the pricing details are not being disclosed -- not even to curious taxpayers or state legislators.

According to DGS spokesman Matt Bender, the February 28, 2005 contract with Roche (the U.S. division of Swiss drug manufacturer F. Hoffman-LaRoche, Ltd.) was part of California's strategic procurement program that takes advantage of California's massive buying power. The new lower prices became effective April 1, 2005 and apply to the Department of Corrections, the Youth Authority, the Department of Mental Health and the California State University system.

Kathay Feng, director of citizens' oversight group Common Cause, argued that this use

of public funds should be disclosed to allow local agencies to secure the same pricing afforded the state. DGS had conducted simultaneous renegotiations with two manufacturers, Roche and Schering-Plough, Inc. Citing "irreparable harm," neither would discuss contract terms.

But the truth may yet emerge. The *Sacramento Bee* and State Senator Jackie Speier sued for disclosure in Sacramento Superior Court under California's Public Records Act. ■

Source: *Sacramento Bee*

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New York: Wrongfully Imprisoned Man Settles For \$5,000,000

by Michael Rigby

A man who was wrongfully convicted of raping a 5-year-old girl has settled with the state of New York for \$5 million, the largest such settlement in state history.

But no amount of money can atone for the seven years Alberto Ramos spent in prison with the label “baby rapist.” “That was a nightmare on a daily basis,” said Ramos. When you go to jail for a crime like this, you’re treated like scum.”

Ramos’ nightmare began on February 29, 1984, when the mother of a 5-year-old girl who attended the Bronx day care where Ramos worked noticed redness around the girl’s vaginal area. The girl claimed she was sexually assaulted by a classmate.

In response to the mother’s allegations, the Human Resources Agency and the Bronx district attorney’s office investigated. A physician examined the girl but found no sign of sexual abuse. (This doctor was never called to testify at Ramos’ trial.) The agency investigation revealed that the girl had a history of masturbating in class, told classmates she watched sexually graphic movies at home, and acted out intercourse with dolls. This information was never shared with the defense, even though the prosecution was legally required to disclose it.

What’s more, a report the agency sent to prosecutors omitted key facts. For instance, the girl initially denied being raped, then said she had been attacked by a dark-skinned black man. (Ramos is Hispanic and light-skinned.) The agency eventually determined the girl’s allegations were unfounded and closed the investigation.

Then, in March 1984, a new allegation

was made: The girl now said she had been assaulted by a man named Alberto rather than a classmate, asserted the mother. Unfortunately for Ramos, the nation at this time was gripped by hysteria surrounding the alleged sexual abuse of children in day care centers. According to Ramos’ attorney, Joel Rudin, Ramos was convicted in the media before he ever went to trial.

Ramos was found guilty of rape in May 1985 and sentenced to the maximum of 25 years in prison. For the next seven years, Ramos’ life was a living hell. Guards would open his cell and turn a blind eye while other prisoners attacked him, explained Ramos. “I was verbally abused, I was sexually abused, I was harassed by prison officials, by other inmates,” he said. “It was a situation where, eventually, I had to fight to live. I had to fight back.”

Ironically, the road to freedom for Ramos began when the Human Resources Agency documents were uncovered in 1991 by an investigator working for the insurance company representing the day

care center and the city in a civil suit brought by the little girl’s parents. That investigator, Anthony Judge, gave the documents to Ramos’ mother, who then hired Rudin to file an appeal.

Ramos was freed in June 1992 after a judge overturned his conviction. But Rudin had to fight another nine years to obtain the right to sue. In August 2001 he won that right and filed a lawsuit in Ramos’ behalf against the Bronx district attorney’s office. The city settled prior to trial, though it took two years to finalize the terms.

For Ramos, the settlement is a begrudging acknowledgment of his innocence. “I know that New York City would not be paying me this settlement unless it recognized the horrible wrong that was done to me and that I am innocent,” he said. “But I remain deeply hurt and angry that no public official involved in this case—none of the prosecutors or social workers, no attorney for the city, no city official—has had the decency to apologize.”

Source: *Newsday*

\$20,000 Settlement In Oklahoma Hepatitis C Suit

by John E. Dannenberg

An Oklahoma state prisoner who sued for pain, suffering and injunctive relief when prison doctors stopped his specialist-prescribed pain medication and nutritional supplements for liver disease, settled his claim for \$20,000 in damages and permanent injunctive relief to be given third-party doctor pain evaluation and treatment on a recurring six month schedule.

Arthur Alloway sued the Oklahoma Department of Corrections (DOC) and James Crabtree Correction Center Dr. Tommy Hodge, Dr. Trout, Dr. Bass, Dr. Ryan and health service administrator Judy Watkins and Brian Sanders for failing to properly medically care for his terminal Hepatitis-C disease. In particular, Dr. Hodge overruled an outside hospital specialist’s prescription for 200 mg. Oxycontin (narcotic-based pain medication) and for specified nutritional supplements. [The latter, when originally obtained by Alloway’s family, had reduced

Alloway’s RNA count from 3.6 million to 438,000 in 30 days.]

Seven months after Alloway filed his February 2001 proper action in U.S. District Court, the magistrate judge granted his requested preliminary injunction for the pain and nutritional medication, after finding Alloway would otherwise suffer irreparable harm. (See: *PLN*, June 2002, p.16.)

Later represented by Seminole, Oklahoma attorney Jack Mattingly, Jr., who prepared Alloway’s case for a damages trial, Alloway agreed to a settlement in May 2005 for \$20,000 to resolve all damage claims, plus a permanent injunction to replace the preliminary one. The permanent injunction provides that Alloway will be seen by a third-party pain-specialist physician selected mutually by the parties, or else by the court. Importantly, DOC must follow that doctor’s recommendations as to treatment/medication. See: *Alloway v. Hodge*, USDC ED OK, Case No. CIV-01-104-S.

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Los Angeles County Pays \$60,900 To Settle Jail Detainee Rape Claim

Los Angeles (L.A.) County, California, paid \$60,900 to a female detainee who was raped in her Century Regional Detention Facility (CRDF) cell by a male prisoner who was inadvertently admitted by a County Sheriff's deputy.

On July 16, 2004, JoAnne S. was arrested by Long Beach police and detained at CRDF's female housing area pending court appearances. CRDF is run by the L.A. County Sheriff. Three days later, when a group of female detainees was transported to court, the deputy on duty thought that all females were gone and admitted a male prisoner to clean the cells. However, JoAnne remained behind in an unlocked cell. The male worker approached her on her bed and sexually

assaulted her, which JoAnne reported later that day.

When Sheriff's personnel investigated, the male worker admitted the sexual encounter, but claimed it was consensual. Nonetheless, the worker was charged with rape, but pled out to an assault. He was later deported to San Salvador.

The L.A. County Claims Board agreed with county counsel that the County had a duty to properly supervise

prisoners in a non-negligent manner. Clearly, the oversight of the deputy on duty to make sure all females were gone before admitting, an unsupervised male worker breached that duty. Accordingly, the County settled for \$60,900 for damages, costs and attorney fees. See: L.A. Board of Supervisors. Claim No. 04-2454, Memorandum Decision, May 19, 2005. The settlement is on PLN's website. 📄

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Wisconsin Must Install Air Conditioning in Supermax

The Seventh Circuit Court of Appeals affirmed a district court order requiring prison officials to take immediate steps to air condition the cells of Wisconsin's supermax prison.

In 2000, two prisoners confined in the Supermax prison in Boschobel, Wisconsin brought suit alleging that they were subjected to extreme temperatures in Supermax, in violation of the Eighth Amendment. The prisoners were represented by the ACLU National Prison Project.

Physicians who evaluated the facility found temperatures could reach 125 degrees in the cells, posing a serious health risk to prisoners, according to David Fathi, a staff attorney with the Prison Project.

A plaintiff class was certified and the district court issued a preliminary injunction ordering in part, that prisoners particularly susceptible to elevated temperatures be immediately removed from supermax. *Jones-El v. Berge*, 164 F. Supp. 2d 1096 (W.D.Wis. 2001) [*PLN*, Apr. 2002, p.1].

Before trial, the parties entered into a consent decree wherein the Wisconsin DOC "agreed to investigate and implement a means of cooling the cells during summer heat waves." The district court approved the agreement on June 24, 2002.

On October 10, 2003, prisoners "moved to enforce various provisions of the consent decree, including the terms requiring the DOC to implement a means of cooling the cells. During the November 24, 2003 hearing on this motion, the defendants admitted that the only practical way to cool the cells was to install air conditioning. Consequently, the district court ordered the defendants to take immediate steps to air condition the cells at Supermax." Defendants appealed.

DOC spokesman William Clausius indicated that in January, 2004 \$780,000 was approved for the system and that the department had spent approximately \$55,000 on design engineering before work halted in March 2004, following a March 11, 2004 stay of the November, 2003 order, pending resolution of the appeal.

The appellate court rejected defendants' argument that the district court's order was invalid for failing to comply with the requirements for prospective relief under the Prison Litigation Reform Act (PLRA). The court found it problematic that "defendants failed to make any of their highly fact-bound arguments as to why the order would violate the PLRA in their briefing to the district court or at the November 24, 2003 hearing on the issue." The court also noted that "enforcement of a valid consent decree is not the kind of 'prospective relief' considered by 28 U.S.C. § 3262(a) of the PLRA. See: *Hallett v. Morgan*, 296 F.3d 732, 743 (9th Cir. 2002)." "So long as the underlying consent decree remains valid – and the defendants here have not (yet) made a § 3626(b) motion to terminate or modify the decree – the district court must be able to enforce it."

The court concluded that the "district court's enforcement order on its face, is valid, and the defendants offer no proper argument... to the contrary." A challenge

to the appropriateness of the order "based upon the PLRA can only be properly brought as a § 3626(b) motion to terminate or modify the decree" in the district court. The court also noted, however, that "defendants will be hard-pressed to demonstrate that they should not be held to their admission... that air conditioning is the only practical way to cool the cells at Supermax."

The only argument advanced for why the installation of air conditioning was not practical was defendants' incredible argument "that the air conditioning of cells at Supermax to a balmy temperature between 80 and 84 degrees during summer heat waves would entice [prisoners] at other prisons to attack... guards and/or other [prisoners]... to be transferred there. This is despite the fact that Supermax [prisoners] are held in windowless cells for all but four to five hours a week and have almost no human contact." The court agreed "with the district court that this proposition is 'dubious in the extreme.'" See: *Jones-El v. Berge*, 374 F.3d 541 (7th Cir. 2004). See also [*PLN*, Nov. 2002, p. 19; and Feb. 2003, p. 23], for other stories about the *Jones-El* case. This is a rare case where prisoners' claims of being subjected to extremely hot temperatures has resulted in relief. ■

Additional Source: *Journal Sentinel*

Double-Ceiling Mentally Ill California Ad-Seg Prisoners Proves Fatal

When administratively segregated mentally ill prisoners were placed in the same cell at California State Prison, Los Angeles (LAC) in September, 2004, one strangled the other with a bed sheet. Upon investigating the death, the watchdog Office of the Inspector General (OIG) found that there was no policy against such double-ceiling, but recommended that one be established.

Carjacker Frank Perez, age 30 and mentally ill, was placed in administrative segregation for unspecified reasons. Eddie Arriaga, age 27 and also mentally ill, who was pending parole in July, 2005 after doing five years for attempted robbery, had been placed in administrative segregation because he had destroyed another prisoner's television set. Perez admitted killing Arriaga, giving alternate reasons of making a hit for the Mexican Mafia

or because Arriaga had poor hygiene. Both men had long histories of criminal violence and violence towards other prisoners. Although LAC officials erred by not filling out the required double-ceiling "compatibility" form, they did not violate prison policy by placing them together.

The OIG questioned the wisdom of placing such known mentally ill and violent prisoners in double cell conditions, and recommended the prison alter its policy to single-cell such prisoners.

Arriaga's death was one of five at LAC in eight months. Two were drug-related, one was from cardiac arrest after being pepper-sprayed by guards and one was from natural causes. The California Department of Corrections is continuing its own investigation. ■

Source: *Daily News*

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Guard's Liability Unaffected by NY Prisoner's Guilty Plea in Excessive Force Claim; \$38,000 in Damages Awarded, Plus Fees

A New York Federal District court has held that a prisoner's guilty plea to attempted assault does not preclude a guard's liability for use of excessive force. This holding came on the guard's motion for judgment as a matter of law or for new trial. After denying that motion, the court awarded the prisoner's attorney \$13,132.47 in attorney fees and costs.

This civil rights action was filed by New York prisoner George McCrory, alleging guard Roberto Ruiz used excessive force against him. A jury entered a verdict in McCrory's favor, awarding him \$13,000 in compensatory damages and \$25,000 in punitive damages. Ruiz moved for judgment as a matter of law or for a new trial on the basis McCrory had entered a guilty plea to a charge of attempted assault in connection with the incident, which precluded a finding of liability.

The court found that argument meritless, while McCrory did enter such a plea, there was nothing before the court but the fact of the plea itself. The court said the plea is not inconsistent with two scenarios that could have violated McCrory's Eighth Amendment rights. First, McCrory could have been guilty of attempted assault even if Ruiz punched him first for example, if Ruiz was subdued after striking McCrory, and McCrory then attempted to punch Ruiz in which case Ruiz could be civilly liable and McCrory could still be criminally responsible for an attempted assault. Similarly, McCrory could have been guilty of a criminal attempt by initiating an encounter with Ruiz, and Ruiz could be liable for excessive force if he punched McCrory after he was subdued.

The court said these matters were

presented to and determined by the jury, who were free to evaluate the conflicting testimony and evidence. Their verdict is unassailable, the court held.

The court further held there is no basis for Ruiz's assertion of immunity. Additionally, the court held the jury's award of punitive damages was in the jury's discretion because there was evi-

dence of a longstanding animus by Ruiz directed at McCrory.

Finally, the court found that under 42 U.S.C. § 1988 McCrory's counsel, Andrew F. Plasse, was entitled to an award for fees of \$12,973.50 and a cost award of \$158.97. See: *McCrory v. Belden*, Not Reported in F.Supp.2d, 2004 WL 574638 (S.D.N.Y. 2004) ■

Hawaii Prisoner Injured In Fight Awarded \$25,427

On February 1, 2005, a Hawaii court awarded \$25,427.00 to a prisoner who claimed he was assaulted by another prisoner.

Plaintiff Lael Samonte, 47, contended that while imprisoned at the Halawa Correctional Facility on May 22, 2002, he was attacked and knocked unconscious by fellow prisoner Jonathan Tagatac. Samonte was treated at the prison infirmary for multiple contusions, a black eye, visual problems, and a concussion.

Following the altercation, Samonte sued the state under 42 U.S.C. § 1983 for failing to protect him. Tagatac was named as a third-party defendant.

At arbitration, Michael H. Tsuchida determined the state had not been negligent in failing to protect Samonte from assault. Tsuchida noted that Samonte and

Tagatac were not cellmates, there had been no prior incidents between them, evidence suggested the altercation was mutual, and, guards responded immediately.

Against Tagatac, however, Tsuchida entered a judgment in the amount of \$50,000 in general damages and \$1.00 in special damages. Samonte recovered half this amount--\$25,000 in general damages and \$.50 in special damages--based on Tsuchida's finding that he was 50% comparatively negligent. Samonte was also awarded costs of \$426.50.

Samonte was represented by attorney William F. Sink. Tagatac was not represented. See: *Samonte v. State of Hawaii*, 1st Circuit Court of Hawaii, Civil No. 040189. ■

Source: *Advocates Research Company*

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11th Circuit Finds S.Ct. Overruled Heightened Pleading Standard

The Eleventh Circuit Court of Appeals held “that the heightened pleading standard is not applicable in a § 1983 action against a non-governmental entity that cannot raise qualified immunity as a defense” pursuant to *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160 (1993), which the court found overruled Circuit precedent to the contrary.

Merri Elizabeth Passmore was confined at the Blount County Detention Center in Alabama from January 3, 2001 until January 9, 2001. Southern Health Partners, Inc. (SHP), “a private corporation, contracted with the Sheriff of Blount County to provide medical care” to prisoners in the Detention Center.

“While incarcerated [Passmore] repeatedly reported to SHP’s employees that she had not urinated in several days, but was not given a urine test until January 7, 2001. SHP staff received a result of [Passmore’s] test on January 8, 2001, acknowledging that she had an infection, but [she] was still not treated.”

On January 9, 2001, Passmore “became disoriented and was released on a recognizance bond and sent to the emergency room at a Blount County Medical Center.” She was then transferred to another hospital “where she went into a coma and died on January 20, due to acute renal failure.”

Terry Lee Passmore Swan, executor of the estate of Merri Elizabeth brought suit against SHP and several other defendants. “The district court granted SHP’s motion to dismiss the Plaintiff’s first amended complaint for failure to comply with the Eleventh Circuit’s heightened pleading standard applicable to actions brought under § 1983. “However, the court granted leave to file another complaint to ‘comply with the higher pleading standards enunciated in *Oladeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992), and allege facts reflecting deliberate indifference reaching the level of a constitutional violation.”

“Plaintiff then filed a second amended complaint with SHP as the only defendant.” SHP then filed a second Fed. R. Civ. P. 12(b)(6) motion to dismiss “for failure to satisfy the heightened pleading standard[.]”

“The district court determined that although the concept of qualified immunity is not available to Southern Health, as

a defense, Southern Health is the beneficiary of the heightened pleading standard applicable to all claims brought under 42 U.S.C. § 1983.’.. The court concluded that the Plaintiff’s second amended complaint did not meet the standard, [and] granted SHP’s motion to dismiss.”

On appeal, the Eleventh Circuit acknowledged that “the United States Supreme Court’s decision in [*Leatherman*] prohibits the application of a heightened pleading standard to § 1983 actions against private entities, like SHP, who cannot raise qualified immunity as a defense.” The court then “address[ed] for the first time the impact of *Leatherman* on” *Oladeinde* and *Arnold v. Bd. Of Educ.*, 880 F.2d 305 (11th Cir. 1989), which held to the contrary.

The court agreed with Plaintiff that *Oladeinde* and *Arnold* “were effectively overturned by the *Leatherman* Court.” It then found that “[t]he parties agree that as a private entity, SHP is not entitled to assert a qualified immunity defense. Therefore,

under *Leatherman*, the Plaintiff need not satisfy any heightened pleading requirements when asserting § 1983 claims against it.”

The court also rejected Defendant’s argument that post-*Leatherman* circuit decisions have continued to recognize a heightened pleading requirement in § 1983 actions applicable in cases involving not only individual defendants, but also entities unable to raise qualified immunity as a defense. Acknowledging that some of its post-*Leatherman* decisions “were misleading” the court found nothing, “other than dicta, acknowledg[ing] any heightened pleading standard in a § 1983 action against a non-immune defendant.” It also found that at least two of its post-*Leatherman* cases followed *Leatherman*. Therefore, the court reversed and remanded “so that the court may even evaluate the sufficiency of the Plaintiff’s second amended complaint without applying a heightened pleading standard.” See: *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004). ■

Seventh Circuit Reverses § 1915(e)(2) Dismissal of Meritorious Complaint

by Bob Williams

The United State Court of Appeals for the Seventh Circuit has reversed a Wisconsin Federal District Court’s (Western District) dismissal of a prisoner complaint the district court found to have probable merit but dismissed under 28 U.S.C. § 1915(e)(2) screening because the judge felt the prisoner could not afford the litigation.

Wisconsin state prisoner Nathaniel Lindell filed a 62-page 42 U.S.C. § 1983 complaint alleging the state prison was preventing him from practicing his religion and also forcing him to participate in programs that violate his religious beliefs. Lindell is a follower of Wotanism (also called Odinism or Asatru) .

Chief district court Judge Barbara B. Crabb found that Lindell was indigent under 28 U.S.C. § 1915(a) and (b)(1) and had not collected the three strikes that would have prevented Lindell from proceeding despite his indigency. All that was left was for Judge Crabb to determine if the complaint was frivolous or malicious, failed to state a claim, or sought damages from an immune defendant. See: 28

U.S.C. § 1915(e),(g), and 1915A.

Judge Crabb, however, decided that she did “not intend to allow [Lindell] to begin another lawsuit that he cannot afford to prosecute.” She found Lindell’s claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) may have merit. She also noted that Lindell had nine other actions pending, was indigent, but would now exceed his legal loan limits (referring to Wisconsin’s maximum \$200 per year subsidization of litigation costs through Wis. Adm. Code § DOC 309.51 that advances funds to prisoners for expenses such as filing fees, paper, and postage). She dismissed the otherwise meritorious complaint on these financial grounds.

On appeal, the Seventh Circuit agreed that Lindell’s complaint stated a claim under RLUIPA and could see no reason why it was otherwise frivolous or malicious. Expressing shock that Lindell had accrued not one of the Prison Litigation Reform Act’s three-strikes, despite this being his tenth action, sixth in federal court, the Court still found no authority with

which they could uphold Judge Crabb's decision. The Court noted Judge Crabb could have dismissed under F.R.Civ.P. 8(a) if the complaint is unintelligible or could have dismissed only parts that did

not state a claim. However, she could not dismiss it solely because she speculated Lindell could not afford to prosecute the claims and doing so might overextend Lindell's credit with Wisconsin. On the

latter point, the Court held that's a matter between Lindell and the state "and not any business of the federal courts." See: *Lindell v. McCallum*, 352 F.3d 1107 (7th Cir. 2003). ■

News in Brief:

Alabama: On January 10, 2006, Ronald Hammonds, 35, a guard at the Federal Correctional Institution in Talladega was arrested in a Taco Bell parking lot by FBI agents on charges of supplying prisoners with marijuana.

Arizona: On December 31, 2005, Vincent Cannon, 23, a guard at the Arizona State Prison Complex-Lewis was stabbed to death at a New Year's party after an argument with Jeremiah Sturmer, 26, escalated. Sturmer, described as a former prisoner, has been charged with first degree murder. Three other people were stabbed in the incident but they survived.

District of Columbia: On January 31, 2006, Simmie Bellamy, 27, attempted to escape from the D.C. jail as he was brought to attend a status conference at the courthouse on driving a stolen vehicle charge, by climbing underneath a different jail transport bus. He successfully evaded guards, climbed under the bus as the vehicle left the courthouse. A block from the courthouse he fell off the undercarriage of the bus and was run over by an airport van following close behind. He died instantly and caused a massive traffic jam.

Florida: On January 26, 2006, Jeffrey McCann, 30, a Pinellas county jail guard, was sentenced to two years in prison and an 8 year suspended sentence for chok-

ing, punching, stalking, and threatening to kill a female jail information specialist at a local restaurant. At the time he was carrying a Glock pistol, two knives and a retractable night stick. After being released from jail on that arrest, he went to the woman's home, showed her a knife and threatened her not to testify against him. He was arrested a third time for calling, stalking and threatening the woman again. McCann pleaded no contest to charges of aggravated stalking, burglary, witness tampering and battery.

Florida: On January 29, 2006, the CBS program *Sixty Minutes* reported that state prisoner Richard Paey, who was sentenced to 25 years in prison, for prescription drug abuse after he purchased 18,000 pain pills in a two year period to control severe pain caused by multiple sclerosis and various injuries. Paey denies selling his pain medication and turned down a plea deal that would have resulted in probation. Ironically, the Department of Corrections now has a morphine pump hooked directly into his spine which supplies him with larger amounts of opiate pain killers than he was taking at the time of his conviction.

Honduras: On January 5, 2006, a shoot out between prisoners in the National Penitentiary near the capital of Tegucigalpa left 13 prisoners dead and 30

wounded. Prison officials were investigating how the prisoners obtained guns.

India: On January 1, 2006 the warden of the Bhagalpur jail received a letter from the area commander of Maoist Communist Center, a guerrilla group seeking to end feudalism and capitalism in India, demanding that jail officials deliver money to the group or the rebels would raid the jail and blow it up. Jail officials expressed concern over the demand. No word on whether they paid.

Massachusetts: On December 29, 2005, an unidentified prisoner at MCI Gardner attacked a female mental health therapist in a counseling and activities building at the prison. The therapist fought off the attack and was not seriously injured.

Massachusetts: On January 10, 2006, Robert Mulligan chief justice for administration and justice in the state court system imposed a ban in all 113 state court houses on the "Stop Snitching" t shirts that have become popular among minority communities and also banned cell phones. Mulligan claimed the ban is to deter witness intimidation. Harvey Silverglate, a civil liberties lawyer said the t shirts are a political statement. "The informant system, as it has evolved in Boston and all over the country, has produced such

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News In Brief (cont.)

a large number of false convictions that it's a perfectly appropriate political point of view to say that the snitch system has to be reformed or abolished," he said. The more effective witness intimidation systems of police and prison guards was not addressed by the judge's purported concerns.

Mexico: The Mexican government has bought \$400,000 worth of biometrics equipment from Australian company Argus Solutions and San Diego based ImageWare. The fingerprint, iris and face recognition software will purportedly be used to increase security in Mexican prisons.

Michigan: In January, 2006, an arbitrator ruled that the state Department of Corrections erred when it fired parole officer Thomas DeLeon in 2004 for spending four hours a day on his DOC work computer cruising the internet, including porn sites. The arbitrator said DeLeon should only have been suspended one day. It ordered him reinstated to his job and awarded him \$45,000 in back pay, noting at least ten other DOC employees had committed the same infraction and none were fired.

Mississippi: In December, 2005, East Mississippi Correctional Facility guard Tomeka Brown was fired for transporting escaped prisoners Gregory Malone, 26, and Christopher Roy, 24, from the state line to Tuscaloosa. The prisoners escaped by sawing through their cell bars on October 17, 2005. Brown was also charged with abetting the escape. Another guard, Lakeisha Gowdy, was fired for not physically counting the prisoners to ensure they were in their cells. Sergeant Cheryl Thornton resigned over the escape as well. The prison is run by private, for profit Geo Group Corp. The escapees were recaptured 24 hours later in a hotel in Northport. On January 31, 2006, Roy and Malone attempted to escape from a state DOC prison van that had brought them to the courthouse in Meridian to face escape charges. Roy used a homemade handcuff key to unlock his handcuffs and leg shackles and run away, leading guards on a three block chase before being recaptured without incident. Malone attempted to unlock his shackles but could not. Roy now faces additional charges. Both men are serving life sentences for capital murder.

Missouri: On December 22, 2005, an

unnamed jail guard at the Pulaski county jail was fired after he allowed an unidentified prisoner to have sex with his girlfriend in a jail office as a favor.

Missouri: On January 10, 2006, Lisa Peery, 41, a nurse for Correctional Medical Services at the Potosi Correctional Center was arraigned on one misdemeanor count of stealing prescription medications and medical supplies from the prison. She stole drugs prescribed to prisoners including Vistaril, an anxiety drug, and Congentin, which is used to treat Parkinson's disease.

Missouri: On January 9, 2006, Roderrick Nunley, a death row prisoner at the Potosi Correctional Center, stabbed an unidentified guard three times in the head, critically injuring him and stabbed two other guards. An ice pick like shank was used in the attack. Nunley is awaiting execution after being convicted of the rape murder of a 15 year old girl.

Montana: On January 3, 2006, Michael Short, 50, a guard at the Montana State Prison in Deer Lodge was charged with attempting to distribute a half pound of marijuana, a half ounce of methamphetamine and 2 grams of heroin as well as being a drug user in possession of a firearm.

New York: On December 28, 2005, the state Commission on Judicial conduct issued a censure of Kingston City judge James Gilpatric who appeared drunk in court on September 1, 2004, both as a lawyer and later that day as a judge. He was unable to preside in court and had to be relieved of his duties. Gilpatric is an alcoholic who had a relapse. The Commission said the public is entitled to a judge that does not come into court under the influence of alcohol and litigants "should not have to wonder whether a judge has fallen off the wagon on a particular court date."

New York: On December 7, 2005, former Oneida county jail prisoner Jonathan Castro, 20, got into an argument with two unidentified guards from the same jail in a local bar and allegedly fired one shot from a .22 caliber pistol at them. Police did not state what led to the altercation. Castro was charged with attempted second degree murder. No one was injured during the incident.

New York: On January 12, 2006, Matthew Smith, 43, a former Clinton County jail guard, pleaded guilty to first degree attempted criminal sexual act, first degree attempted rape, third degree attempted

sexual act and two counts of forcible touching. He was initially charged with 14 counts of raping four jail prisoners and a co worker. He pleaded guilty as jury selection in his trial was scheduled to begin.

North Carolina: An unidentified male prisoner who was locked for two hours in a Cumberland County courthouse holding cell with 13 female prisoners on January 17, 2006, claims he was sexually assaulted by at least one of the female prisoners. The male prisoner, who is 6' 6" and weighs 200 lbs. was handcuffed and shackled while the female prisoners were not. Sheriff Moose Butler said the incident occurred due to an oversight by a cleaning crew that left a cell door open.

North Carolina: On January 2, 2006, Wilkes county jail guard Brian McGuire, 30, was fired and also charged in court with causing injury to a prisoner by burning two jail prisoners with a krypton bulb flashlight. McGuire told the prisoners he would give them a cigarette if they could hold the flashlight against their skin for five minutes. Two prisoners, Boyd Cleary, 27, and Tony Oliver, 36, took McGuire up on the offer and later complained when they developed blisters on their chest and arm, respectively. McGuire had been a part time jail guard for 22 days before he was fired.

Ohio: On December 27, 2005, five members of the Aryan Brotherhood attacked six other prisoners at the Pickaway Correctional Institution with belts and sharpened broomsticks after Brian Rozell drew a swastika on the forehead of sleeping Aryan Brotherhood member Christopher Radcliff with a marker. Rozell was not injured but Radcliff, seven other prisoners and two guards were, none seriously.

Oklahoma: On December 23, 2005, Suzanne Putnam, 41, was sentenced to five year's probation after pleading guilty to drug possession charges. While visiting a prisoner at the Cimarron Correctional Facility a drug detection dog detected marijuana on her hands, she confessed to smoking the weed and consented to a search of her car which revealed marijuana and a pipe. She also had six pills of Diazepam and Xanax in her pocket which she was introducing into the prison.

Oklahoma: On January 5, 2006, Muskogee county jail guard Stacy Gray, 26, was sentenced to an 18 month deferred sentence and fined \$200 for arranging to have 4 jail prisoners beat up prisoner Alicia Mackey because she had allowed her

husband to sexually abuse two children. The prisoners had earlier pleaded guilty to committing the assault and were given 90 day suspended sentences.

South Carolina: On December 8, 2005, Charles Martin, 26, a prisoner at the Perry Correctional Institution in Pelzer was strangled to death on the floor of a common area in the prison. He was due to be released the following month after serving a five year sentence for assault and battery and trespassing.

South Carolina: On January 8, 2006, Albert Bellamy, 42, a Horry county jail guard, was arrested and charged with providing cigarettes and three ounces of marijuana to jail prisoners. He was fired the same day.

Texas: On December 15, 2005, Michael Mitchell, a guard, and Schwneequa Lee, a nurse, at the Stiles Unit in Beaumont, were criminally charged with bribery for allegedly giving tobacco to prisoners. Prosecutors claim Mitchell sold a prisoner 16 packages of Bugler brand tobacco for \$150 (they retail for about \$1.25 each). Lee is accused of accepting more than \$1,200 from a prisoner in exchange for tobacco and three cell phones.

Venezuela: Humberto Prado, the director of the Venezuelan Prison Observatory holds a weekly news conference to announce the death toll in Venezuelan prisons and jails. For the month of November, 2005, 37 prisoners were killed and 39 injured. In early December, 2005, three prisoners at the prison in La Pica were dismembered with the head of convicted robber Raul de Jesus Vera Mendoza, 26, being thrown into the main entrance of the prison. Those deaths brought to total prisoner deaths at that facility to 53 for the year. Venezuela holds 18,787 prisoners, half of whom have not been convicted

of a crime.

Virginia: On January 26, 2006, twelve prisoners and two guards from the Loudoun county sheriff's office were injured when the van they were traveling in struck a logging truck. No one suffered life threatening injuries.

Virginia: On January 5, 2006, Bobby Brown, 55, a former lieutenant with the Virginia Department of Corrections, pleaded guilty to having sex with and impregnating prisoner Sheron Monterey,

30. Virginia, like most states, criminalizes sex between prisoners and staff.

Washington: On January 26, 2006, Lance Gauthun, 20, escaped from the minimum security Thurston county jail annex where he was ten days into a 20 day jail sentence. After escaping he ran or fell down an embankment behind the jail and began yelling for help. Police rescued him from temperatures in the low 30's. He was placed in the main jail and now faces escape charges. ■

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Court Invalidates Mental Health Supervised Release Condition; Condition Impermissibly Delegates Judicial Authority to PO

The Third Circuit Court of Appeals held that a Delaware district court improperly imposed a supervised release condition requiring mental health

counseling. The court also held that the condition was invalid because it impermissibly delegated judicial power to the defendant's probation officer.

Calvin Pruden was convicted of federal firearms offenses and a Delaware district court sentenced him to 21 months in prison and 36 months of supervised release. Despite a lack of evidence that Pruden suffered from any mental health problems, the court imposed a supervised release condition that Pruden "participate in a mental health treatment program at the discretion of his probation officer."

On appeal, the Third Circuit held that the mental health condition was invalid. "Given the complete absence of facts that would indicate a need for this mental health treatment," the court could not "find that his condition is 'reasonably related' to any of the allowable purposes of conditions unsupervised releases," under 18 U.S.C. § 3553.

The court also concluded that "the

condition is invalid because it delegates to Pruden's probation officer the decision whether to require mental health treatment." The court cited *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001) for the proposition that it is "an impermissible delegation of judicial authority to the probation officer[]" if the probation officer may direct the defendant to participate in mental health counseling. The delegation is proper, however, if "the District Court was intending nothing more than to delegate to the probation officer the details with respect to the selection and schedule of the program." Applying this reasoning, the court found that "the District Court... gave Pruden's probation officer the authority to decide whether or not Pruden will have to participate in a mental health treatment program. As this was an impermissible delegation of judicial authority, this aspect of the sentence was error." See: *United States v. Pruden*, 398 F.3d 241 (3rd Cir. 2005). ■

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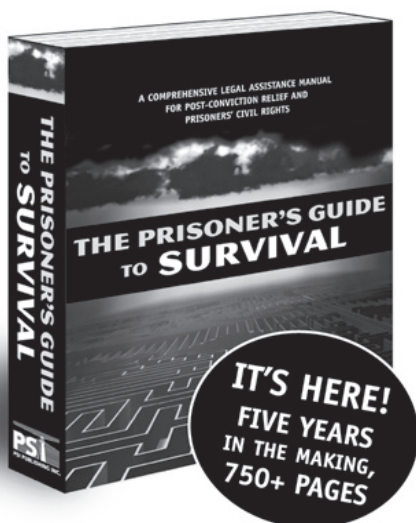
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February 2006

Incompetence, Brutality and Scandal Infest Tennessee Prisons and Jails

by Michael Rigby

Tennessee isn't known for its huge prison system, like Texas or California. Nor is the state's capital city, Nashville, recognized for massively overcrowded jails such as the ones in Los Angeles or New York City. But one thing is clear: Tennessee lockups are just as dangerous, the guards equally brutal and incompetent, and supervisory officials just as scandal-prone as those in more populous states.

At a prison in Nashville, a state prisoner was brutally murdered and set on fire after guards abandoned their post, leaving him with two other maximum-security prisoners; one of the guards was fired for violating prison policy and

the other resigned. A national headline-making escape of a state prisoner from a courthouse parking lot resulted in the shooting death of a prison guard. Another guard smuggled a gun into a state facility for her imprisoned lover. And at the administrative level, the Commissioner of the Tennessee Dept. of Correction (TDOC) resigned amid allegations of sexual harassment and questions about his relationship with a subordinate.

The situation is no better in the state's county jails. At one Nashville facility a diabetic prisoner died after private contract medical personnel failed to dispense his insulin. At another jail operated by Corrections Corporation of America (CCA), a female prisoner was murdered in her cell by four guards. At the same facility a pregnant prisoner received inadequate medical care, resulting in a miscarriage. A Tennessee sheriff was indicted and convicted for aiding in the escape of a female prisoner, who had been impregnated by one of his deputies, so she could obtain an abortion. And a grand jury in Knoxville faulted the county jail for low staffing ratios and inadequate medical care leading to a prisoner's death; another prisoner was murdered at the facility.

A state prisoner committing suicide, federal charges filed against jail guards who beat a prisoner to death, and a jail-house escape round out Tennessee's prison and jail-related travails.

Another Casualty of the Drug War

The day was probably progressing like any other for Keith Latron Drinkard, one of three maximum-security prisoners

on a work detail inside the Riverbend Maximum Security Institution (RMSI) in Nashville. Unfortunately, it didn't end like any other day. When the two guards supervising the trio left to perform drug tests in another part of the prison, the two other prisoners allegedly attacked Drinkard.

The guards returned at about 6:30 p.m., just in time to watch Drinkard, 38, take his last breath. He had been stabbed 8 times, doused with gasoline from a prison lawn mower and set on fire. "I was in shock. It was the most horrible thing I've ever seen," said Kevin Pittman, one of the guards who left his post. "I haven't had much of an appetite since. I don't sleep good. If there was anything I could have done to stop it, I would have done it."

In the aftermath of the April 21, 2005 killing at RMSI, Pittman, 38, was fired while prison sergeant Warren Russell, 50, the second guard involved, was allowed to resign. The other two prisoners on the work detail, Robert V. Manning and Eric F. Manning (not related), are prime suspects in Drinkard's murder. Maximum-security prisoners are allowed to perform cleaning jobs and hand out meal trays. But according to TDOC policy, such prisoners must be constantly supervised. Pittman said prisoners are occasionally left unsupervised because of the prison's work load and staffing levels.

Russell submitted his resignation in a May 6, 2005 letter to RMSI Warden Ricky Bell, two weeks after Drinkard's death. Along with abandoning his post that day, Russell was accused of lying to investigators and coercing his subordinates to falsify reports. As one example,

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Tennessee Prisons (cont.)

Pittman and Russell first told investigators they were gone for less than two minutes, but later admitted they had been absent for 12-15 minutes. In a letter accepting Russell's resignation, Warden Bell wrote that Russell "coerced ... subordinates to falsify reports and statements in order to prevent your negligence from being discovered."

Prison officials said they don't believe the guards intentionally left to allow the attack, and no criminal charges were filed against either guard. Warden Bell refused to say why he allowed Russell to resign rather than being fired.

While prison officials held Pittman and Russell responsible for Drinkard's murder, Pittman blames his superiors, claiming he told his supervisor it wasn't a good idea to leave the prisoners unsupervised while he and Russell conducted drug tests. "Shouldn't we lock these guys up?" he recalled asking. He was told the prisoners needed to finish stripping the floors.

In a bizarre twist, another prison guard who offered supporting testimony in Pittman's disciplinary hearing was fired for falsely claiming that he was involved in an unrelated murder.

TDOC guard Jason Johnson, 20, admitted telling a supervisor that he "took a friend to get some drug money and that my friend killed somebody." His comments sparked an internal affairs investigation, and prison officials contacted police to determine if a murder similar to the one Johnson described had been committed. "We looked at the limited information that he gave, but there didn't seem to be a case that fit," said Metro police spokesman Don Aaron.

Johnson said he made up the story after his supervisor related "a story of how he and his brother moved many kilos of dope." Johnson said his comments were not intended to be taken seriously and that he didn't believe the supervisor's story, either. "It was only guy talk," he said.

But comments made during Johnson's May 18, 2005 disciplinary hearing heightened prison officials' suspicions. "On multiple occasions during the interview you stated that you were not willing to 'snitch' on your friend, even if it meant losing your job or going to prison for your knowledge or participation in the murder," Warden Bell wrote in a letter notifying

Johnson that he was being fired effective July 4. Both Johnson and Pittman are appealing their terminations.

Corrections Commissioner Resigns

While corruption and incompetence permeated the lower ranks of the prison system, scandal was also percolating at the top. On July 13, 2005, TDOC Commissioner Quenton White, a former U.S. Attorney General for Middle Tennessee, resigned amid mounting questions relating to a sexual harassment claim against him, circumstances surrounding his relationship with a former subordinate, and his handling of a sexual harassment allegation against his executive assistant.

Governor Phil Bredesen confirmed that White was the subject of an August 2004 sexual harassment investigation, but said the complaint was deemed unfounded. The Nashville newspaper, *The Tennessean*, was unable to independently confirm the information because the Personnel Department's top attorney, who investigated the complaint, shredded her notes and no written report was filed.

As part of its inquiry into Bredesen's administration, which was part of a broader ethics investigation, *The Tennessean* asked the Personnel Department for copies of files on the ten most recent harassment claims it had investigated. Three of the files the newspaper received were empty and the state refused to provide any records in those cases. One of the empty files involved the claim against Quenton White, said Personnel Department spokeswoman Lola Potter.

White, who was appointed by Bredesen in 2003, has been implicated in numerous other scandals as well. In June 2005, questions were raised about the TDOC's handling of a September 2004 sexual harassment claim against Omaran Lee, White's executive assistant. Lee was suspended for one day without pay for sexually harassing a secretary, and six months later White promoted him and gave him a raise.

As the scrutiny of White increased, news accounts reported that White's driver's license had been suspended for failing to pay a ticket he received in Louisiana. It was then discovered that White had apparently been driving his state-issued car for months with a suspended license, and that his license had been suspended twice before.

White's indiscretions also extended to his home life. His wife filed for divorce

Tennessee Prisons (cont.)

in January, 2005, and it was revealed that White's girlfriend, Kym Dukes, was his subordinate until she transferred from the TDOC to the Department of Education in October 2004.

Further, in April 2005, state lawmakers had expressed frustration over the prison system's failure to control drugs and other contraband being smuggled into state facilities, often by TDOC employees. "Here in the state of Tennessee, I don't believe that our policies and procedures have been quite as effective as they could be," said state Sen. Doug Jackson, co-chairman of the Select Oversight Committee on Correction.

According to a June 2, 2005 article in *The Tennessean*, 17 TDOC employees had resigned or been fired due to drug violations since the beginning of 2004, and twelve had subsequently faced prosecution. The offenses ranged from an employee being found with drugs at the prison academy to a guard who smuggled two pounds of marijuana into a secure facility. In one case, former TDOC guard Jamie Bizzle admitted that he had brought drugs, alcohol and a cell phone into the Northwest Correctional Complex in West Tennessee. "I smuggled drugs to inmates, but I had only done two small packages and that was it," said Bizzle. "They weren't but a size of a matchbox. It wasn't a whole lot." Commissioner White was criticized by legislators for not doing more to address problems with contraband and corrupt guards.

Following White's resignation in July, 2005, Deputy Corrections Commissioner (and former Davidson County Sheriff) Gayle Ray was appointed interim commissioner. Several days later Ray fired two

of White's executive assistants, Omaran Lee and Julian Davis. Ray said she would evaluate White's remaining staff to see if more employees needed to be fired.

Ray, who stated she would like to be appointed commissioner of the state's 15 prisons and 19,000 prisoners on a permanent basis, also ordered all 5,200 TDOC employees, including herself, to undergo workplace harassment training. Unfortunately for Ray's future career plans, in September 2005 Governor Bredeson named George Little to run Tennessee's prison system. Little has over 20 years experience in the prison and jail industry and previously worked for the TDOC, the Shelby County Division of Corrections, and the Board of Probation and Parole. Bringing a no-nonsense approach to the job, the new commissioner said he would work to reduce employee turnover, would crack down on drugs and other contraband, and would not tolerate prisoner-staff relationships or sexual harassment by employees.

Little wasted little time in showing that he was serious. On November 4, 2005, approximately 300 state officers mounted a surprise raid on the state's largest prison complex, the West Tennessee State Prison, searching for drugs, cell phones and other contraband. Drug dogs and electronic detection devices were used in the daylong search, which included both prisoners and TDOC employees. One prison visitor was arrested on drug charges, and the dogs alerted to at least six cars in the facility's parking lot, including one belonging to a prison employee. "Obviously something needs to be done, and I think it sends a clear message that we're not going to tolerate the illegal activities -- whether it be the inmates or the correctional officers," said Tennessee Bureau of Investigation Director Mark Gwyn.

Little also voiced support when lawmakers suggested random drug testing for prison employees during a December 5, 2005 Oversight Committee on Corrections hearing, saying he found it "amazing" that the TDOC didn't already require employee drug tests (prisoners are currently subject to random drug testing, of course). Little further testified that he was taking steps to address the contraband problem, including the use of cell phone detectors, the installation of more security cameras, and an increased use of drug detection dogs. "We're going to add [more security measures] until we have every entry point covered and virtually every

housing unit," he said.

Deadly Escape, Smuggled Gun and Other Problems in State Prisons

In a gross security lapse, on August 9, 2005, TDOC prisoner George Hyatte escaped from the Roane County courthouse parking lot during a gun battle in which his wife, Jennifer Hyatte, a former TDOC nurse, shot and killed prison guard Wayne "Cotton" Morgan. George Hyatte allegedly told his wife to shoot Morgan during the breakout; Jennifer Hyatte was wounded by Morgan's partner, who returned fire. The incident resulted in nationwide news coverage and the Hyattes remained on the run for three days before being captured in Columbus, Ohio. They were indicted in October 2005 on first-degree murder charges and prosecutors have stated they will seek the death penalty.

In another security lapse that occurred under Commissioner Little's watch, a prison guard was fired from the Charles Bass Correctional Complex in Nashville on Nov. 14, 2005 after she smuggled a deringer and two rounds of ammunition into the facility. TDOC guard Celina Clay, 51, brought the .38 caliber gun into the prison in October, 2005 and gave the weapon to prisoner Clinton Osborne, who was to deliver it to David Allen Lane, another TDOC prisoner with whom Clay had a romantic relationship. Osborne, who didn't want to get involved, reported the gun to prison officials. Clay was placed on administrative leave after the incident until she was fired; both Lane and Osborne were transferred to a maximum security facility.

In another prison-related incident, in September 2005 a prisoner at the Northeast Correctional Complex in Mountain City, Tennessee hung himself from a sheet tied to a shower bar. Eddie E. Gaston's death was ruled a suicide; he was serving a 151-year sentence. But his attorney, Bruce Poston, said it was "very shocking and inconceivable" that his client had killed himself, since Gaston's case was on appeal and oral arguments the month before had "went very well."

PHS Neglect Kills Diabetic Prisoner at Nashville Jail

Ricky Douglas would have turned 40 on March 17, 2005. Instead, that was the day his autopsy report was released. The report confirmed what many already suspected: Douglas died at Nashville's Metro Jail because Prison Health Services (PHS), which provides medical care to prisoners

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By: Kent Russell
Prison Legal News Columnist:
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at the facility under a \$3.5 million contract, failed to treat his diabetes even after he requested his medication.

"It does appear that there were individual failings in following policies, and you had this adverse result," said Bob Eadie, deputy director of the Metro Public Health Department. "Whatever consequences come from Mr. Douglas's death, Prison Health Services will be held accountable for those." The Health Department oversees the company's health care services.

On the night of January 18, 2005, Douglas and several other prisoners informed a jail guard that the nurse had not made her scheduled rounds to dispense medication. As so often happens in the correctional environment, the guard took no corrective action. After all, it wasn't his job.

Four hours later Douglas was dead. Deputies found him unresponsive in his cell at about 2:40 a.m. with one arm hanging from his bunk and his tongue protruding between his teeth. According to the autopsy report, his blood sugar had skyrocketed at the time of his death.

Douglas' family retained the Memphis law firm formerly headed by famed attorney Johnny Cochran. Attorney Archie Sanders III, who is investigating Douglas' death for the firm, said the au-

topsy indicates that PHS, the Davidson County sheriff's staff and the Metro Health Department all bear some responsibility for the death.

"The entire situation has been very difficult and tough on the family," Sanders said. "But it's especially tough on them because this could have been prevented with properly monitoring his medical conditions, with him receiving medications and getting him what he needed."

Following Douglas' death, two other diabetic prisoners at the jail said they had been hospitalized with severe diabetic-related illnesses because they were not given the correct amount of insulin. This is not surprising, as PHS has been accused of causing or contributing to prisoner deaths around the country, and criticized for its substandard level of correctional health care.

In February 2005, PHS was profiled in a scathing series of articles in the *New York Times* over the company's mishandling of numerous cases involving New York prisoners [see *PLN*, August, 2005]. PHS has also been investigated for shoddy medical care and suspicious prisoner deaths in Ohio, Nevada, Florida, Wisconsin, New Jersey and Pennsylvania [see *PLN*, March 2001; February and July 2003; and April and May 2004, respectively]. PHS was even

implicated in the insulin-related death of another diabetic Tennessee prisoner in 1996, and the company was ordered to pay \$187,500 of a total \$377,500 damage award in that case [see *PLN*, May 2002].

CCA Guards Murder Female Jail Prisoner

Estelle Richardson was murdered in her isolation cell at the Nashville Metro Detention Facility on July 5, 2004, and four guards were placed on paid leave shortly after she was found beaten and unresponsive. The jail is privately operated by Corrections Corporations of America (CCA), the world's largest for-profit prison operator.

Richardson's death was initially investigated by the Nashville police and then turned over to the Davidson County district attorney general's office. The civil rights division of the U.S. Department of Justice also launched an investigation.

An autopsy found that Richardson, 34, suffered a fractured skull, four broken ribs and liver damage. Nashville Medical Examiner Bruce Levy ruled her death a homicide, saying the injuries indicated that Richardson's head had been slammed into a hard surface, such as a wall, and that it was impossible for Richardson to

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Tennessee Prisons (cont.)

have killed herself or died by accident.

CCA records indicate that in the days immediately before her death Richardson was the only person in her cell. Also, one day before her body was found, she reportedly was involved in a fight with four guards because she refused to clean her cell.

CCA and the four guards -- Keith Hendricks, Joshua Schockman, Jeremy Neese and William Wood -- have been named as defendants in a federal civil rights lawsuit filed on behalf of Richardson's two minor children. The suit accuses the guards of beating Richardson to death. Richardson was serving a six-year sentence for trying to illegally obtain prescription painkillers, which was a violation of her probation. [For more on Richardson's death see *PLN*, April 2005].

Adding insult to injury, CCA refused to divulge how much the guards have earned while on paid administrative leave. The company claimed that such information was "proprietary" and not subject to the state's Public Records Act because CCA is a private corporation and not a government agency.

Experts disagree. State courts have ruled that companies working as the functional equivalent of government entities must abide by the Public Records Act, said Rick Hollow, general counsel for the Tennessee Press Association. "Therefore, [CCA's] records should be open to public inspection," he said.

Hollow pointed to the Tennessee Supreme Court's 2002 ruling in *Memphis Publishing Co. v. Cherokee Children and Family Services, Inc.* "Privatization may be desirable in itself but it should not come without leaving public accountability

intact," the court held. "Not only should the public be able to monitor the private company's activities but the monitoring should be on the same terms as when the public agency was the information vendor."

Finally, in October 2005, almost fifteen months after Richardson was killed, the four guards were charged and arrested. Hendricks, Shockman, Neese and Wood pleaded not guilty to felony charges of reckless homicide and aggravated assault. "We're just looking forward to the outcome, basically," said Tyrone Gibson, Richardson's brother. "Hopefully it's in our favor, our family's favor, and for these men to be served justice." CCA declined to comment. The guards remain on administrative leave.

Poor Medical Care Results in Miscarriage

Meredith Manning, 23, formerly incarcerated at CCA's Metro Detention Center, the same facility where Estelle Richardson was murdered, filed a \$250 million lawsuit against the company in August 2005, claiming that inadequate medical treatment she received at the facility led to the death of her newborn child.

Manning was under CCA's care at the jail, where she claimed she bled vaginally for three days, was left alone in her cell and was repeatedly ignored by medical staff despite her pleas for help. Finally, after screaming and beating on a door, she was taken to a hospital. "By the third day, I was bleeding so bad it was going down my pants, onto the bed, onto the sheets, down my legs," she said.

Following her arrest on misdemeanor charges in 2004, Manning was diagnosed as being pregnant while at the CCA facility. She had to stay at the jail because she couldn't afford to post bond, said Nathan Moore, her lawyer in the criminal case and one of the attorneys representing her in the civil lawsuit.

Manning began having problems with bleeding on October 18, 2004, around her 22nd week of pregnancy. She claims that a nurse at the jail was verbally abusive and demanded to see "proof" of the bleeding, according to the lawsuit. The nurse allegedly gave her some sanitary napkins and put told her to return once they were filled with blood. After being rushed to the hospital with blood running down her legs, Manning gave birth to Elisha Edward Manning, who lived less than three

hours. Nashville attorney Jim Roberts, another attorney representing Manning in her suit against CCA, said no person should be treated the way Manning was treated. "If it had happened to my dog, I would have taken (it) to the vet," he said. Which, apparently, is an accurate indication of how CCA treats prisoners housed in the company's for-profit facilities.

Even More Jail Madness

McNairy County, Tennessee Sheriff Tommy Riley was indicted on Oct. 24, 2004 and charged with official misconduct and other offenses in connection with facilitating the escape of prisoner Sheila Kirk, who was released from the county jail on June 17, 2004, almost eight months before completing her sentence. Sheriff Riley had ordered Kirk's release so she could have an abortion after she was impregnated by one of his deputies, Johnny Carter, who admitted that he also brought her cigarettes and drugs. Carter pleaded guilty to a sex charge and three counts of introducing contraband into the jail, and is serving a six-month sentence. On October 26, 2005, following a hung jury in his first trial, Riley was convicted of a Class C felony; he has not yet been sentenced but a petition has been filed to remove him from office. Jail administrator Jimmy Lyles was also indicted but the charges were later dismissed.

In Knoxville, a grand jury issued a report critical of the county jail after a prisoner died one day after a judge ordered that he be taken to a doctor. The report, released on Nov. 3, 2005, found fault with the prisoner-to-guard ratio at the facility and the health care provided to prisoners. "The quality of the medical care is a concern," the report stated. "We recommend that the county have an independent audit of facilities [and] equipment to ensure that medical care is within traditional facility requirements and meets minimum applicable standards of care."

The grand jury report, which has no legal authority, followed the August 2005 death of David Wesley Williams, 60, at the Knox County jail. Williams' family alleged that guards had refused to give him prescribed medications and neglected his medical needs. Williams' attorney, Assistant Public Defender Kenneth Irvine, was so concerned about his client's condition that he requested an order from Criminal Court Judge Mary Beth Leibowitz requiring jail officials to provide Williams with

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his medications. Sheriff Tim Hutchison claimed that Williams died of natural causes.

The grand jury also remarked on the high 48:1 ratio of prisoners to guards in each jail unit. "It has operated at that ratio since the day it opened," said Hutchison, stating that it was also less expensive. While perhaps less costly, such sparse staffing may have contributed to the death of another prisoner at the facility. Nicholas Lewis Wirkkala was charged with reckless homicide for the August 2005 killing of fellow Knox County jail prisoner Harold Douglas Smith. Both Wirkkala and Smith were in the jail's intake area when they got into a fight. Wirkkala reportedly hit Smith once and walked away; Smith later lost consciousness and was taken to a hospital, where he died. The Sheriff's office declined to comment on the incident.

Another jail, in Roane County, Tennessee, experienced the brief escape of one of its prisoners. On Dec. 6, 2005, Dustin Scarbrough, who was being held on armed robbery charges, was spotted outside the jail by Kingston Police Sergeant Wes Stooksbury. After being taken into custody, Scarbrough was found to have a package containing clothes, liquor, prescription drugs, a substance thought to be crack cocaine, and four McDonald's hamburgers. It was not clear whether Scarbrough was trying to smuggle the items back into the facility to sell to other prisoners. He had escaped by prying loose a fence around the top of the recreation yard.

Finally, on December 29, 2005 it was reported that a former Wilson County, Tennessee jail guard, Gary Hale, had plead guilty to civil rights violations in connection with the 2003 beating death of a prisoner at the county jail, and had agreed to testify against four other jail employees. An investigation of the Wilson County jail revealed that guards had beaten prisoners at least eleven times between July 2001 and January 2003. Walter S. Kuntz, one of the prisoners who was assaulted, lapsed into a coma and died two days later on January 14, 2003; the county later settled a civil lawsuit filed by Kuntz's surviving family members for \$400,000.

Hale was one of five former jail employees indicted on charges of conspiring to assault prisoners, covering up the assaults by creating false reports, and withholding medical care from prisoners

who were beaten. The remaining defendants, Patrick Marlowe, Tommy Shane Conatser, Robert Ferrell and Robert Locke went to trial on the federal charges on January 10, 2006 and were convicted. *PLN* will report the details in an upcoming issue once they are sentenced. Two other Wilson County jail guards, John McKinney and Christopher Lynn McCathern, plead guilty to related charges in April and June 2004, respectively.

Tennessee prisons and jails, like many

others around the country, are mired in a quagmire of overcrowding, low budgets, incompetence and brutality with an abdication of political will and leadership to resolve the problems. Having locked up 2.2 million Americans, politicians now seem at a loss of what to do with the resulting exponentially growing prison and jail population. ■

Sources: *WSMV News (Nashville)*, *The Tennessean*, *AP*

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From the Editor

by Paul Wright

In addition to PLN's own censorship litigation for prisoners we also undertake advocacy and support for prisoner rights on behalf of prisoners in other court cases. In the current supreme court term, PLN submitted an amicus brief in *Goodman v. Georgia*, a case involving prisoners' right to sue states for money damages under the Americans with Disabilities Act. The supreme court ruled unanimously in favor of the prisoner.

Prison Legal News was also the lead amicus in a brief submitted by various publishing groups, including Reporters Committee for Freedom of the Press, the Freedom to Read Foundation, the Association of American publishers, the Publishers Marketing Association and the American Booksellers Foundation for Free Expression in *Banks v. Beard*, a lawsuit challenging a Pennsylvania prison rule barring prisoners in long term control units from receiving all non religious books and publications. That case will be decided later this term.

PLN also submitted an amicus brief in *Williams v. Donald*, at the district court level. The case involves a challenge to the Georgia prison system's ban on material downloaded from the internet.

We have also filed an amicus brief in a certiorari petition to the US Supreme Court on behalf of Michigan prisoners in the case of *Williams v. Overton* concerning the administrative exhaustion provisions of the Prison Litigation Reform Act. On March 6, 2006, the Supreme Court granted review.

This is in addition to PLN's own censorship and public records litigation. We do this with no staff attorneys or litigation budget despite the fact that it is both time and resource consuming. We recently sent out PLN's annual fundraiser and we hope you will find these efforts worth supporting. PLN gets a lot done with a very limited budget and our hardworking staff. If you can afford to make a donation, please do so. Any amount, no matter how small, helps. Wondering what to do with extra 37 cent stamps and envelopes now that postage has gone up? Send them to PLN, we send out hundreds of pieces of mail every day, stamps are always welcome.

PLN currently has a circulation of around 4,600 subscribers. I think this number is ridiculously small given the 2.2 million people now imprisoned in the US and their

family members. More so since *PLN* is the longest publishing prisoner rights magazine with a national circulation in US history as we come up on our 16th anniversary and 190 published issues. We are undertaking sample mailings to potential subscribers. We need your help to expand our circulation. While postage and printing costs keep going up we have kept our subscription prices ridiculously low, especially given the quality and depth of the information *PLN* presents each month. While other magazines folded, we increased our size to bring readers more prison and jail news. One way to hold our costs down, and keep subscription rates at their current prices, is to increase our circu-

lation so the per issue printing and postage cost goes down. If *PLN* can double its circulation to 10,000 subscribers in the next year we will be able to do this.

Encourage friends, attorneys, family members and people interested in the criminal justice system to subscribe. We are happy to send an information packet on request with full book and subscription details. People can learn more about us on our website at www.prisonlegalnews.org. Your friends value your opinion. If you like *PLN* and what we have to offer, let other like minded people know. Enjoy this issue of *PLN* and encourage others to subscribe. ■

Private Prisoners Bilk \$13 million From Florida; State Awards More Contracts

by David M. Reutter

Florida's Correctional Privatization Commission (CPC) "consistently failed to safeguard the State's interests in its role as steward of privately operated correctional facilities," causing Florida's taxpayers to pay \$12.7 million in questionable and excessive of cost. That conclusion was arrived at in a scathing report of the CPC by Florida's Inspector General.

The audit, issued on June 30, 2005, comes a year after the Florida Legislature abolished the CPC and turned its operation and management of private prison contracts over to the Department of Management Services (DMS).

Florida contracts with two vendors to operate five prisons in the state. Gadsden, Bay, and Lake City prisons are operated by Corrections Corporation of America (CCA) while GEO Group, formerly Wackenhut Corrections, operates Moore Haven and South Bay prisons. Combined, these prisons warehouse 5,290 male prisoners.

The audit said that CPC "records and contract documentation showed CPC consistently made questionable contract concessions to the vendors." That statement comes as no surprise to those familiar with the cronyism and infestation of the CPC by those who are in the vendors' pockets. That story as told in *Private Capitol Punishment: The Florida Model*, by Ken Kopczynski, reviewed in

PLN, December 2004, pg. 19.

CPC's failures allow the private vendors to increase their profit at taxpayer expense. The vendors saved \$290,000 from a CPC blanket waiver of staffing requirements. Under the contracts, the vendors were required to provide designated services staff with qualified employees in accordance with the staffing pattern provided in the vendors' proposal. Vacancies for non-security positions must be filled within forty-five days. The waivers were granted without the vendors even requesting them. Instead, CPC's Executive Director was advised the vendors were encountering difficulties recruiting Registered Nurses and vocational and academic instructors at all prisons. "It appears that the blanket waivers were granted in order to allow facilities to avoid monetary deductions for vacant non-security positions," the audit said.

GEO Group pocketed \$3.4 million for overcharging the State for Competitive Area Differential (CAD) pay, which is authorized by the State for specific positions within a State Agency when the agency can demonstrate that the additive is based on geographical, localized recruitment, turnover, or competitive pay problems. The South Bay prison is in Palm Beach County, which allows State employees in the county to receive the salary additive.

The 1995 contract for South Bay authorized CAD for that prison's em-

ployees. Originally each guard at South Bay received \$6,300 per year in CAD pay, billed to the State by GEO. In 1999, the State reduced CAD pay to \$4,400 a year. From 2000 to current, it was reduced to \$2,500. GEO, however, continued to build the CPC at the original rate, overcharging the State \$3.4 million. CPC discovered this overcharge in June 2002, but took no action to recoup any of the overpayments.

The CDC also authorized \$1.57 million for the South Bay facility to pay tax burdens from CAD salaries for the Federal Unemployment Tax Act, State Unemployment Tax Act, and Federal Insurance Contributions Act. The audits could find no statutory authority to pay such a burden and questioned why the CPC would authorize the payment of any portion of the vendor's taxes.

Finally, South Bay profited by submitting invoices in the amount of \$104,000 for CAD payments for employees who were no longer employed at the prison. These invoices covered 73 employees who were terminated, but were reflected on CAD invoices for about 19 weeks, or 4 monthly billing cycles. CPC never reviewed the invoices for accuracy.

South Bay's abuse of CAD payments came in the audit's sixth finding, which found the CAD was being used to supplement below-market starting salaries to South Bay employees. Guards at Moore Haven are paid \$27,000 per year to start. Meanwhile, guards at South Bay, received \$28,371; subtract a \$6,300 CAD payment, and South Bay's starting pay is \$22,071. The audit concluded that it "becomes apparent that the vendor has created its own 'competitive pay' problem by paying artificially lower starting salaries and using the CAD to offset the difference in its own payroll."

The Inspector General also found the Gadsden prison profited \$2.85 million from a per diem for each of the prison's first 768 prisoners for maintenance and repair of the prison. For the first 768 prisoners, Gadsden received a per diem of \$2.68 or \$645,000 annually. Rather than expend that amount for repairs and maintenance, Gadsden placed in its corporate coffers all but an average of \$170,000. No explanation was given why Gadsden received this per diem when other private prisons did not.

Each private prison contract requires the vendor to place into the "Inmate Trust Fund" all proceeds from canteen sales and collect telephone calls by prisoners. Those funds may only be used to "provide unique

and innovative programs for inmates' reintegration into society and that such expenditures do not include any program contemplated in the contract." Gadsden, however, used \$987,617 to pay for salaries of programs required by the vendor's contract, such as Chaplain, Administrative Chaplain Clerk, Librarian, Library Aide, and Education Counselor.

Each of the above fraudulent overcharges makes it impossible to determine each private prison's actual per diem per prisoner. This is critical, for Florida law requires that private prisons achieve a seven percent savings in expense over public owned prisons. The result is it is impossible to adequately measure whether or not the public is achieving this savings.


Despite these overcharges and apparent corruption, Florida's private prison industrial complex is set to continue its growth. In July, 2005, it was announced CCA will build a 1,515 the bed medium security prison in Southwest Ranches.

The GEO Group was the prevailing bidder to build a 1,500 bed medium to maximum prison in Jackson County near Graceville. GEO expects that contract to generate \$21 million in revenue. In announcing the contract award, Colleen Englert, a

spokeswoman for DMS said, "We will offer a \$10 million savings over a like public prison over the term of the contract. This is a financial benefit for the state."

Kopczynski asks how the \$10 million savings was calculated, asking for GEO's financing plan. "That's how you determine what the true cost is going to be," Kopczynski said. "This is where you get into lies, damned lies, and statistics."

Gov. Jeb Bush, meanwhile, vetoed a bill passed by Florida's Republican-controlled Legislature, which not only established more controls over state procurement procedures, but also created a Center for Efficient Government to keep tabs on state-private-contractor relationships.

As Florida's experiments into privatization shows, corporate profits and partisan politics are more important than safeguarding the public purse and protecting the public's interests. The Audit Report, number 2005-61 is available at dms.myflorida.com/administration/inspectorgeneral and www.prisonlegalnews.org. 

Additional Sources: *Tallahassee Democrat*; *Sun Sentinel*; *The Ledger Palm Beach Post*.



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8th Circuit Invalidates BOP Halfway House Policy; 7th Circuit Says Challenge Not Cognizable on Habeas

The Eighth Circuit Court Of Appeals reversed the denial of a federal prisoner's 28 U.S.C. § 2241 habeas corpus petition challenging the Bureau of Prisons (BOP) policy limiting halfway house placement to the lesser of six months or ten percent of the sentence. The court found that the policy was based upon an erroneous interpretation of two statutory provisions.

The Seventh Circuit Court of Appeals, however, issued an opinion the following day, that § 2241 was not the proper remedy for a BOP halfway house policy challenge and that prisoners bringing such a challenge must comply with provisions of the Prison Litigation Reform Act (PLRA), including exhaustion of administrative remedies pursuant to 42 U.S.C. § 1997e(a).

Prior to December 13, 2002, "the BOP had a policy of allowing prisoners to serve their last six months of incarceration in a [Community Corrections Center (CCC)] regardless of what percentage of the sentence this six months comprised."

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On December 13, 2002, however, "the U.S. Department of Justice issued a Memorandum (the 'Memorandum') that found the BOP's CCC placement policy illegal because it was inconsistent with the BOP's statutory grant of authority." The Memorandum concluded that the BOP policy was inconsistent with 18 U.S.C. §§ 3621(b) and 3624(c), in that, under it those statutes, the Memorandum concluded, "the BOP had no authority to transfer a prisoner to a CCC, except for the lesser of the last ten percent of the sentence in the last six months of the sentence." In other words, under this interpretation prisoners serving sentences of less than 60 months were no longer eligible to serve the last six months other sentence in a halfway house. Rather, they were authorized to serve only 10 percent of the overall sentence there (e.g., 2 months for a 20 month sentence, etc.).

"On December 20, 2002, the BOP adopted the opinion... and instituted a policy that inmates could be released to CCCs only for the last ten percent of their terms, to be capped at six months."

Prior to the BOP policy change on May 28, 2002, Anthony Elwood was convicted of wire fraud. On February 20, 2003, he was sentenced to 48 months in prison. "Upon entering prison, Elwood learned that he would not be eligible for transfer to a CCC until November 28, 2005, which would be, with the application of good time credits, four months from the end of his sentence. Elwood filed grievances asserting that he should be transferred to a CCC at an earlier date. Elwood's grievances were denied." He then filed a habeas corpus petition under 28 U.S.C. § 2241 challenging the 2002 BOP policy and seeking CCC placement during the last six months of his sentence. The district court denied Elwood's petition and he appealed.

On appeal, Elwood argued that the policy was based upon an erroneous interpretation of 18 U.S.C. §§ 3621(b) and 3624(c). He also asserted that it violated the Administrative Procedures Act (APA) and the Ex Post Facto Clause. The Eighth Circuit agreed with Elwood's statutory construction argument and declined to reach the APA or Ex Post Facto arguments.

The court began by noting that "[u]ntil recently, no appeals court had spoken on the issue of the legality of the BOP's current placement policy. However, the First Circuit

in a recent decision, *Goldings v. Winn*, 383 F.3d 17(1st Cir. Sept. 3, 2004), agreed with Elwood's interpretation of the statutes and invalidated the policy. In addition, the judgments of several district courts' support Elwood's interpretation." See "Federal Halfway House Litigation," by Todd Bussert, Esq., [PLN, Sept. 2004, pp. 40-41].

Ultimately, the court "agree[d] with the interpretation of the statutes put forward by Elwood and the First Circuit." Therefore, it held "on the facts of this case, in which both parties agree that CCCs are places of imprisonment for the purpose of 18 U.S.C. § 3621(b), that § 3621(b) gives the BOP the discretion to transfer prisoners to CCCs at any time during their incarceration. Further, the BOP is required to place prisoners in 'conditions of that will afford [them] a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community' during a reasonable part of the last ten percent of the prisoner's term, to the extent practicable. This duty shall not extend beyond the last six months of the prisoner's sentence." One judge dissented, however, finding that the "majority's interpretation eviscerates section 3624(c) any judicial effort to expand the possible CCC time." See: *Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004).

The Seventh Circuit declined to reach the merits of a challenge to the BOP's CCC policy brought on a petition for writ of habeas corpus under 28 U.S.C. § 2241 by Michael Richmond. Rather, the court concluded that § 2241 does not furnish the appropriate remedy to contest the Bureau's understanding of §3624(c)." The court believed that the proper remedy was "a mundane civil action," in the form of an APA challenge to the policy. Thus, the prisoner would also be required to comply with the requirements of the PLRA. However, the court found that "Richmond ha[d] not followed any of the rules applicable to the prisoners' general civil litigation—not only exhaustion under § 1997e(a) but also payment of the full docket fee, screening through the three strikes rule, and other differences between requests for habeas corpus in general civil litigation." Therefore, the court affirmed the district court's dismissal of Richmond's § 2241 action. See: *Richmond v. Scibana*, 387 F.3d 602 (7th Cir. 2004).

Florida Prisoner's Disciplinary Challenges Reversed for Further Proceedings

Two separate Florida District Court of Appeals decisions have reversed the dismissal of two prisoners' civil actions that challenged disciplinary reports.

Prisoner Craig A. Savery was disciplined for possession of narcotics. Savery's initial appeal to Tomoka Correctional Institution's Warden was denied. His second administrative review to the Secretary of the Florida Department of Corrections (FDOC) was denied as untimely because it was filed more than fifteen days after the previous denial. Savery then filed a petition for writ of mandamus in Volusia County Circuit Court, which held the petition was barred by the statute of limitations because it was not filed within 30 days of F.D.O.C. rendering a decision.

On certiorari review, the Fifth Circuit Court of Appeals found the denial of Savery's appeal was dated March 24, 2004, but not filed with the agency clerk until March 29. Savery's mandamus petition was filed on April 27, 2004, the court held the circuit court erroneously used the March 24, date to begin running the 30 days limitations period. Under Fla. R. App. P. 9.0201 an order is not rendered until filed with the clerk.

As the denial was not filed with F.D.O.C.'s clerk until March 29, that is the operative date to begin running the limitation period. Accordingly, the court held Savery's mandamus was timely filed on April 27 and ordered it be considered on its merits. See: *Savery v. Florida*, 884 So.2d 439 (Fla. 5th DCA 2004).

The second case was filed by Thomas P. Wells, who challenged an unspecified disciplinary action taken against him at Martin Correctional Institution. After

exhausting administrative remedies, Wells filed a petition of writ of mandamus and declaratory judgment. The Martin County Circuit Court denied the mandamus claim and dismissed the declaratory claim. The Fourth Circuit Court of Appeals held that where a petitioner states a cause of action

for declaratory judgment, it was error for the court to make a final determination on the disciplinary action before hearing the constitutional challenge to the rule itself. Accordingly, Well's case was reversed for further proceedings. See: *Wells v. Harris*, 884 So.2d 1030 (Fla. 4th DCA 2004).

Private Prison Contractor Who Allegedly Diverted \$1.6 Million in Telephone Revenues Sues California DOC

A Bakersfield, California businessman, who lost a contract for his private prison housing California Department of Corrections (CDC) prisoners due to allegations that he misappropriated \$1.6 million from prisoner collect telephone call revenues, has filed suit in Kern County Superior Court against CDC for libel, defamation and breach of contract. He claims his reputation and his ability to do business were harmed.

Terry Moreland, affiliated with Marantha Corrections LLC, once operated a CDC Community Corrections Facility in Adelanto, but that contract was constructively terminated when he sold the 550 bed minimum security facility to San Bernardino County while CDC was demanding he return the disputed revenues. (See: *PLN*, Feb. 2005, p.39.) Moreland

has resisted CDC's refund demand for years, arguing that his contract did not require it.

Source: *Bakersfield Californian*.

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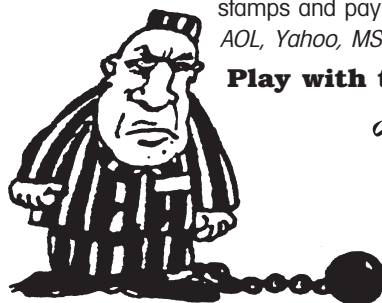
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BOP's Failure to Provide Adequate Medical Treatment Nets Downward Departure Sentence

A Massachusetts federal district court has departed from the Federal Sentencing Guidelines because of the defendant's illness and the Bureau of Prisons' (BOP) failure to meet its burden that it could provide "the most effective" medical treatment.

Robert Pineyro was charged for being a felon in possession of a firearm. Initially, he was held at the Plymouth House of Correction (PMC). After fifteen months, the court released him to home detention because his incarceration was amounting to punishment. While held at PHC, Pineyro was without pain medication, surgery, therapy, or meaningful care.

Pineyro suffers from heterotopic ossification (HO), a condition that has immobilized his left arm, shoulder, back, and a left leg. HO is a disease that causes excess bone growth in the bone Pineyro broke in a very serious car accident in 1999.

The affected areas—elbow, forearm, shoulder, hip, and back—become stiff, like stone. Pineyro is unable to bend or raise the areas in question; he walks with a limp. Since the condition is chronic, he must be closely monitored. He periodically undergoes radiation and physical therapy and has undergone multiple operations to scrape away the excess bone. Because of the pain, he requires 60 mg of morphine per day. Not surprisingly, there are also substantial emotional consequences to these injuries.

After a year on home detention, Pineyro pled guilty, moving for a downward departure based on his physical condition, diminished capacity, and criminal history, which he alleged overstated his culpability. The accounts of Pineyro's 15 months at PHC, where his condition worsened, had an impact on the Court's ultimate sentencing decision.

Sentencing was delayed to fully evaluate Pineyro's condition and whether the BOP was able to provide him adequate care. The BOP responded with a letter the Court found was "inadequate on its face," for it could not have been "more general" and "less attuned to the particularities of Pineyro's medical and mental health condition." The Court then ordered a study of Pineyro.

After holding a hearing, the Court came to the conclusion Pineyro's sentence should be reduced. The Court

found his medical condition is "a) a serious and imminent medical threat, b) which would be made worse by incarceration, and/or c) which the Federal Bureau of Prisons cannot adequately treat." The Court held the "BOP has not remotely met its burden of showing that it can provide the defendant with 'needed... medical care, or other correctional treatment in the most effective manner.'"

The Court also found Pineyro had a "reduced mental capacity" from brain

damage occurring during his car accident. Also, his "criminal history category does not reflect the likelihood that [he] will commit further crimes." Finally, he has strong familial ties.

The Court departed nine levels from the guidelines, which recommended 46-57 months, to impose a sentence of time served (15 months) and three years of supervised release with six months of home detention with electronic monitoring. See: *United States v. Pineyro*, 372 F. Supp. 2d 133 (D MA 2005). ■

Seventh Circuit Reverses Judgement on Denial of Methadone

The Seventh Circuit Court of Appeals reversed a district court's grant of summary judgment to jail officials on claims of denial of methadone and inadequate medical care.

On April 27, 2000, Richard Foelker reported to the Outagamie County, Wisconsin, Jail to begin serving a sentence for driving under the influence of intoxicants.

When he entered jail, Foelker had been on a methadone maintenance treatment program for heroin addiction for five weeks. He had not taken his daily dose "because he was ill that morning and the clinic closed at noon." At the jail he told a registered nurse that he needed "a dose of methadone to avoid going into withdrawal." However, he was not given a dose the next day and he was told "that he would not receive methadone during his incarceration because he had been off the drug for 3 days." The methadone clinic advised jail staff "that Foelker should receive a reduced dose of methadone" but he was never given any.

On Foelker's third day in jail he defecated on himself and the cell floor. Jail staff believed he "was 'playing the system' and not in need of medical attention." Three hours later Foelker "was confused, disoriented, and hearing voices, and... although he knew that he had not taken methadone for several days, he was unaware that he had defecated on himself and" the cell floor.

Medical staff did not examine Foelker the next day. He "remained in his cell life again defecating on the floor. The following morning, [staff] found Foelker

to be 'disoriented.' Foelker thought he was at 'the wedding hotel' waiting to be married and was hallucinating about another person in his cell."

Foelker was given thiamine, a drug for alcohol withdrawal, but it had no effect. Three hours later Foelker was sent to the hospital where he was diagnosed with delirium, secondary to drug withdrawal. He remained hospitalized for four days.

Foelker sued jail officials, alleging violations of his constitutional rights when he was denied methadone and adequate medical care as his condition worsened.

The district court dismissed the claims against several defendants then granted summary judgment to the remaining defendants, finding that although Foelker presented evidence of a serious medical need, he failed to show that jail staff were deliberately indifferent.

The Seventh Circuit rejected defendants' argument that Foelker failed to establish a serious medical need. "The fact that Foelker was not distressed despite believing he was at the 'wedding hotel' and defecating on the floor of his cell and on himself is strong evidence of a severe medical need."

The majority then reversed the grant of summary judgment, finding that a reasonable jury could conclude that the jail staff knew that Foelker was exhibiting signs of withdrawal but recklessly, maliciously or intentionally allowed Foelker to suffer. The dissent disagreed, concluding that, at most the evidence showed negligence by jail staff. See: *Foelker v. Outagamie County*, 394 F.3d 510 (7th Cir. 2005). ■

Washington DOC Must Ship Prisoners' Property For Free

The Washington State Supreme Court (Supreme Court) has re-instated a lawsuit challenging Department of Corrections (DOC) Policy 440.000 (Policy). The Policy requires prisoners who are transferred to another prison to pay shipping costs for their property.

Lonnie Burton, Gordon Lebar, James Bringham and Michael Holmberg (collectively Burton), all Washington state prisoners, sued then DOC Secretary Joseph Lehman and several others claiming that the Policy violated, *inter alia*, RCW

72.02.045(3). The Thurston County Superior Court dismissed the suit under CR 12(b)(6) for failure to state a claim, and Division 2 of the State Court of Appeals affirmed. See: *Burton v. Lehman*, 76 P.3d 271 (Wash. App. Ct. Div. II, 2003). Burton sought discretionary review.

On discretionary review, the Washington Supreme Court recognized that section IX of the Policy required DOC to ship 2 boxes of a prisoner's property for free when a prisoner is transferred from one prison to another. Any additional

property, however, would be shipped only if the prisoner paid shipping costs in advance. Otherwise the prisoner forfeited the property.

The Supreme Court considered whether the Policy "requiring inmates to either pay the shipping costs for some of their property or lose ownership of that property, violated the requirement in RCW 72.02.045(3) that DOC superintendents shall deliver inmate property upon transfer[.]"

The court eventually construed RCW 72.02.045(3) to mean "exactly what it says; that is, whenever an inmate is moved between DOC institutions, DOC is responsible for ensuring that the property owned by convicted person is sent to the prison where they are sent."

On that basis, the Supreme Court concluded that Burton's argument that the Policy violates RCW 72.02.045(3) had merit and that the case could not be dismissed under CR 12(b)(6). The case was therefore remanded to the superior court for further proceedings. See: *Burton v. Lehman*, 153 Wn.2d 416; 103 P.3d 1230 (Wash. 2005). ■

Second Circuit Upholds Guard's Rape Sentence Under Federal Guidelines

The U.S. Court of Appeals for the Second Circuit held that multiple counts of prisoner sexual abuse against a prison guard had been properly grouped under federal sentencing guidelines.

While employed as a guard at the federal prison in Danbury, Connecticut, Ricardo Vasquez sexually assaulted 4 female prisoners on separate occasions. Specifically, Vasquez had sexual intercourse with one prisoner on one occasion; sexual intercourse with a second prisoner on two occasions; separate incidents of sexual intercourse and oral sex with a third prisoner; and repeated sexual touchings with a fourth prisoner.

Vasquez was charged with 5 counts of sexually abusing a prisoner (18 U.S.C. § 2243(b), 1 count of abusive sexual contact (18 U.S.C. § 2244(a)(4), and 1 count of making a false statement (18 U.S.C. § 1001(a)(2)). During trial in the U.S. District Court for the District of Connecticut, Vasquez pled guilty to all 7 counts.

Because abusive sexual contact is a misdemeanor, it was not used in the sentencing calculation. The other six counts, however, were calculated as separate incidents, and Vasquez was ultimately sentenced to 21 months in prison. Vasquez appealed the November 6, 2003, ruling arguing that two violations of § 2243(b) should have been grouped together—to comprise a single unit rather than two—because they involved the

same prisoner. He made the same argument for two more violations involving a second prisoner.

On appeal, the Second Circuit initially labored over the proper standard of review—"de novo," "abuse of discretion," "clearly erroneous," "due deference," or "either de novo or clearly erroneous." After deciding on de novo review, the Second Circuit concluded that the district court "was correct not to group the separate acts of sexual misconduct occurring with the same inmate on different days."

First, the appellate court asserted that U.S.S.G. § 3D1.2 does not require that force be used in order to place "the same crimes against the same person in separate groups." Second, the court noted that, "two episodes of sexual misconduct that society has legitimately criminalized occurring with the same person on different days are not 'substantially the same harm' for purposes of section 3D1.2."

Interestingly, the Second Circuit pointedly referred to Vasquez as a "guard," noting that "it would be hypocritical to call [him] a correctional officer." See: *United States v. Vasquez*, 389 F.3d 65 (2nd Cir. 2004). ■

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Maryland's PHS Prison Health Care Under Fire, New System Implemented

by Michael Rigby

A Maryland prison is no place to get sick. Virtually every facet of prisoner health care, which has been provided by Tennessee-based Prison Health Services (PHS) since 2000, is in disarray. Prisoners sometimes receive the wrong medicine or none at all; records are poorly kept; physical exams are often cursory; sick call requests are ignored; and short-staffing is ubiquitous.

To address the problems, the Department of Public Safety and Correctional Services (DPSCS), which operates Maryland prisons and Baltimore jails has implemented a new health care system and changed providers. The department also promised to spend more money for health services. Some critics doubt the new system and additional money will make a difference since the quality of care--or lack thereof--will still be influenced by profit motives.

Medication mix-ups, and delays are common in Maryland prisons, according to independent audits, internal documents, and prisoner complaints. In a December 2004 letter to a concerned community organization, DPSCS Secretary Mary Ann Saar acknowledged the problem when she wrote, "We have repeatedly heard complaints relating to the failure of inmates to receive medications ... in a timely manner." The situation can be deadly for prisoners with life-threatening illnesses such as asthma, diabetes, and AIDS.

Poor record keeping has exacerbated the problem. When state auditors visited the infirmary at the Maryland House of Correction in March 2000, for instance, "it was observed that one inmate had been in a bed on the unit for more than 15 hours. There was no admission order, transfer note, vital signs, history, initial nursing assessment, documentation of nursing protocols, or any treatment/care plan. Interviews with the nursing staff on the unit revealed that there was no information on the inmate."

Even when records are kept, they're not reliable. In March 2005, DPSCS officials discovered that PHS employees had apparently altered records at the Baltimore Women's Detention Center

to indicate they had performed required checks of suicidal prisoners every 15 minutes. PHS officials said the employees involved resigned.

PHS medical personnel also regularly fail to perform sufficiently detailed examinations or follow up on prisoner complaints. In 2001, for example, Ricky Searce, 48, reported all the classic signs of colon cancer to a prison doctor, according to his lawsuit against PHS. Though his symptoms persisted, it was two years before a colonoscopy was scheduled. The test revealed advanced-stage, terminal colo-rectal cancer. PHS settled with Searce for an undisclosed sum in 2004.

Insufficient staffing is also a major concern. Audits of prison infirmaries performed by the independent Office of Health Care Quality found that staff shortages have caused long delays in prisoners being seen by doctors, nurses, and psychiatrists. At two Baltimore jails, the city detention center and the Booking and Intake Center, psychiatrists were available for only 100 of the required 156 hours each week in 2004. During this time, the jails had five prisoner suicides--the highest in seven years.

PHS blames the problems on the prisoners themselves. The company tries to "have outcomes that are appropriate and desirable ... but it's a difficult environment and it's a difficult group of patients," said Richard D. Wright, president and chief executive of PHS until March 31, 2005. Wright noted that prisoners are usually sicker than the general population and that many have combined problems such as substance abuse, infectious disease, and chronic illness. Still, Wright's sentiment rings hollow considering that prisoners are the company's bread and butter.

PHS's Maryland contract expired on June 30, 2005. The company claims it tried to get out of the contract in 2003 because it was losing money, but the state refused. Over the life of its 5-year contract, PHS was paid \$53 million annually to provide comprehensive health care to 24,000 prisoners across Maryland, except for three prisons in Hagerstown. During the same period, the company claims it lost

\$14 million.

Much of the problem, according to PHS, stems from the way its contract was structured. The company was paid a flat fee to provide a broad array of services, including medical, dental, and mental health care, and pharmaceuticals. Soon after it signed the contract, the company contends, medical costs soared as the price of hospitalization nearly doubled and expensive new AIDS drugs hit the market.

For the state, however, the contract was a good deal, essentially locking in costs. In fact, one of the few detailed analyses conducted by the state revealed that Maryland was spending \$2,293 per prisoner on health care in 2002, well below the national average of \$2,722. Consequently, when the issue of renewing PHS's contract came up in early 2003, state budget analysts urged Secretary Saar to extend the contract by two years because "the state was paying far less than the cost of providing the services."

Some say the state should not have shirked its responsibility.

Dr. Ronald Shansky, an expert on prison health care, said states are obligated to provide an appropriate level of health care services to prisoners in their custody. "If a contract is under funded, and not just poorly managed, that's also a state responsibility," he said. "They should know what it takes per capita to provide the services and shouldn't support any bidder whose proposal is too low" to do the job properly.

In some cases, the deplorable conditions in which prisoners are held contributes to health care problems. Baltimore's jails are illustrative. The consistently overcrowded Booking and Intake Center and the adjacent city detention center have been criticized for their squalid living conditions. The jails are infested with vermin and cockroaches; sewage backups periodically flood the floors; and antiquated cooling and heating systems keep the jails freezing in the winter and sweltering in the summer.

The situation is no better at the Baltimore Women's Detention Center, where investigators with the Office of

Health Care Quality visited the mental health unit in January 23, 2004. "Inmates were found to tear apart the mattresses and climb inside of them to stay warm, and/or use some of the fiberfill material from the mattresses to cover the windows in an unsuccessful attempt to block out the cold air drafts from the outside," auditor's wrote. The women were climbing inside the mattresses because they were being held naked in icy cells. They were supposed to be given suicide smocks, said Dr. Annette Hanson, PHS's chief psychiatrist in Baltimore, but the smocks were often lost when they were laundered.

The jails' dilapidated conditions and PHS's poor health care stressed the relationship between prison officials and the company. In a May 2004 e-mail to a state prison official, assistant commissioner for the Division of Pretrial Detention and Services, Benjamin Brown, complained of ongoing conflicts with PHS over staffing and procedures for evaluating new jail arrivals. "Their cavalier attitude to their contractual and ethical responsibilities is unacceptable; their inability or unwillingness to communicate effectively is equally unacceptable," Brown wrote.

In one case, PHS's failure to treat a female prisoner at the women's detention center ended in her death. Deborah Epifanio, 34, died on September 14, 2005, from an advanced case of cryptococcal meningitis. Epifanio had experienced fainting spells for days before PHS personnel sent her to the emergency room. PHS subsequently reprimanded and reassigned four employees for failing to properly perform their duties, but no one was fired.

The DPSCS has now restructured its health care system and hired other contractors to take over. The state estimates it will spend \$110 million for prisoner health care services in fiscal year 2005-06, a 60% increase over the \$68 million it spent the previous fiscal year.

But the very development of the new system has caused controversy. In September 2004, the state hired PHS co-founder Jacqueline Moore of Jacqueline Moore and Associates to write the parameters for the new contract. Moore, who started PHS in 1978 with her then-husband, claims there is no conflict because she has not been affiliated with the company since 1990. Critics, however, remain skeptical.

The new plan, which took effect July

1, 2005, divides prisoner health care into different categories and uses multiple private contractors. Despite its supposed bad experience in Maryland, PHS submitted a bid for the medical service component, the largest contract. That contract was ultimately awarded to PHS's main rival, St. Louis-based Correctional Medical Services (CMS). CMS has been the health care provider for the three prisons in Hagerstown since 2000.

The new system eliminates the flat-fee contracts. Instead, contractors will be reimbursed for certain expenses such as hospital stays. Pittsburgh-based Wexford Health Sources, another for-profit company, was picked to oversee and manage the use of hospitalization, said Richard Rosenblatt, who oversees medical care for the DPSCS. The contract provides Wexford financial incentives to keep costs down. "The more they can hold down costs, the more money they make," Rosenblatt said. The new system will ostensibly incorporate quality control measures and greater accountability for sick call services, and will treat prisoners infected with hepatitis C.

Prisoner advocates are not convinced the new system will solve the problems as the state contends. A better option, they say, would be for the state or a nonprofit teaching hospital or other nonprofit organization to handle prisoner health care. As with other for-profit prison health care providers, PHS, CMS, and Wexford have sordid histories of patient neglect, haphazard care, and watered-down standards. And why wouldn't they? It's a simple equation, after all: less treatment equals more profit.

Take the tragic case of Marcela N. Leski, 39. In March 2002, Leski was jailed in the Baltimore Women's Detention Center for failing to appear in court on a drug-possession charge. Twelve days later, her legs had to be amputated below the knees. PHS doctors had failed to diagnose an infection that


is easily treatable with antibiotics. Her brother, John Leski, said the lack of treatment was inexcusable. "Any decent human being would say, 'Get her checked out,'" he said.

Leski's family has filed a lawsuit alleging doctors failed to perform a medical test that could have detected the infection. The suit also contends that Leski was "deemed to be a malingerer" and given only over-the-counter pain medication, even though she could hardly walk and was in excruciating pain. The charges against her were eventually dropped as her health deteriorated. Several months later, Leski contracted a staph infection and died.

PLN reports extensively on prison health care issues, including privatization. See indexes for more. ■

Sources: *Baltimore Sun*, *citypaper.com*

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2005 Audit of California Parole Board Reveals Ongoing Deficiencies

The California Office of the Inspector General (OIG), the state's official "watchdog" agency, conducted an audit of the Board of Prison Terms (BPT) in July 2005 to determine compliance with the OIG's prior recommendations to correct deficiencies and inefficiencies it identified in its 2002 and 2003 audits of the BPT. It found that the BPT over reported by 4,000 the number of "lifer" parole consideration hearings it conducted over the past three years, had a growing backlog (1,607) of overdue parole consideration hearings, had inadequate supervision and time management of its 74 Deputy Commissioners, held 700 meaningless Mentally Disordered Offender hearings per year and failed to review all BPT decisions as required by law. On the plus side, the OIG found that the BPT had mooted its previous backlog of 2,200 overdue responses to prisoners' administrative appeals of its decisions by abolishing the entire appeals process, and had vastly improved timeliness of parole revocation hearings (because the situation had become so dire that the federal courts had to step in and order the BPT to change its ways). (See: *Valdivia v. Schwarzenegger*, 206 F.Supp.2d 1068 (E.D. Cal. 2002); *PLN*, Jan. 2003, p.16 and Apr. 2004, p.24, and Jan. 2006.)

Lifer Parole Hearings

As early as March 2000, the OIG noted that the BPT had a large number of lifer hearings overdue by six or more months. By December, 2001, that figure was 1,400. Since then, the backlog has increased 15% to 1,607. At the same time, the BPT reported that it conducted an

average of over 4,600 parole consideration hearings per year. The OIG determined that, upon closer inspection, both figures were misleading.

First, the "backlog" figure counted only BPT-induced late hearings; "prisoner requested" postponements were disregarded. However, the latter category includes the all-too-common event where at the hearing, the panel announces it wants a new psychological report, and if the prisoner doesn't "agree" to postpone, it will give him a multi-year denial. In other words, the BPT forces the lifer's hand to "score" a postponement, thereby at once relieving its immediate workload while excusing its resultant tardiness. Of the 1,623 postponements granted between August 2004 and April 2005, 1,001 (62%) were "requested" by the prisoners, thus significantly reducing the BPT's future "backlog" report by this sleight of hand. As a result, the lifers are forced to do the extra time, the taxpayers must fund this largesse at \$50,000/head/yr., and the BPT gets itself off the hook.

While the normal pattern is that 20-22 hearings are scheduled for a Monday-Friday BPT lifer calendar, enough postponements are secured to compress the schedule into Monday -Thursday, yielding a three day weekend for the panel. Parenthetically, the OIG recommended that the BPT reschedule its 1:30 PM monthly meeting from Tuesdays to Mondays, to allow Board members to conduct one extra Tuesday of lifer hearings per month. The present "dead" Monday would appear to extend three day weekends to four days, once per month.

Second, the claimed 4,600 annual hearings "conducted" is a false figure. The audit revealed that that figure was the number of hearings scheduled, but after subtracting postponed and canceled hearings, the true "conducted" figure was 4,000 fewer over the past three years. And the numbers continue to worsen each year. The BPT scheduled 4,826 hearings in 2002, 4,498 in 2003 and 4,450 in 2004, but only conducted 3,926, 3,138 and 2,844 hearings, respectively. Hearing postponement rates grew from 18% in 2002, to 30% in 2003 to 37% in 2004. For the period August 2004 through April 2005, the postponement rate leaped to 44%.

Meanwhile, between 1990 and 2004, the number of lifers more than tripled from 8,153 to 27,375 — while the number of BPT Commissioners authorized remained flat at nine. (There have often been three vacancies out of these nine over the past three years, as gubernatorial appointments have flagged.)

Worse yet, the true number of overdue hearings — from any "cause" --- is unknown because the OIG found that the BPT still has no management tracking system, relying instead upon Department of Corrections (CDC) employees at each of the 31 prisons housing lifers to tell the BPT on a monthly basis what to do next. In the month of March 2005, 313 (86%) of the 362 lifer hearings scheduled were late by an average of over three months.

Recently, the BPT was superseded in name by the Board of Parole Hearings, whose staffing complement for adult matters is statutorily set at 12 Commissioners. But, true to past form, the Governor saw fit recently to only appoint seven, thereby ensuring the continuing hobbling of timely lifer parole hearings. With the number of lifers growing and with the less than 1% release rate resulting from hearings actually conducted, the next OIG audit of the BPH's timeliness will probably not be much more inspiring, unless the Marin County Superior Court forces relief in the pending statewide class-action suit *Rutherford v. Margarita Perez*, Case No. SC135399A. The BPT's response to the OIG's 2002 criticism that 2,200 administrative appeal replies were overdue was to abolish their appeals system. The BPT noted that 97% of prisoner appeals were denied, with the other 3% ascribed to correcting clerical or ministerial errors. The new procedure permits only writing a letter to the BPH's Quality Control Unit, explaining the alleged clerical error.

Parole Revocation Hearings

In the OIG's 2003 review, over 7,000 incarcerated parolees were awaiting revocation hearings. 81% had already been locked up more than 45 days and 7% for more than 100 days. Many wound up doing more time waiting for their hearing than they were sentenced to at the eventual hearing. The OIG's recommendations to fix the problem were subsumed by

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the federal court's intervening *Valdivia* Remedial Plan, which requires revocation (*Morrissey*) hearings within 35 days of arrest, among the other due process protections. Delays, as a result, have been vastly reduced, but 231 violators had to be administratively released when timely hearings did not occur. The BPT forecasts it will get 85,000 parole violation referrals from CDC in fiscal 2005 2006, and will have to conduct 28,900 revocation hearings. (Sixty-six percent of violation cases are resolved before a hearing.)

Deputy Commissioner Supervision

In January 2003, the OIG determined that the 74 Deputy Commissioners' time was so poorly managed that their task could be completed by just 39. Deputy Commissioners conduct revocation hearings and attend lifer hearings. In this 2005 compliance audit, the OIG found an improvement in the supervisor-to-commissioner ratio, but not in the results. There is still no time-management recording system in place, and the OIG re-recommends one be implemented. With the advent of the *Valdivia* plan, the BPT has scheduled its revocation hearings to be held in 13 regional units, which should improve efficiency. The BPT did comply by installing a computerized revocation scheduling and tracking system as part of its *Valdivia* upgrade.

Mentally Disordered Offenders

The BPT is required to hold automatic 60 day placement hearings for mentally disordered offenders. The flaw pointed out by the OIG in 2003 is that 99% of such Department of Mental Health (DMH) patients remain incarcerated rather than gain out patient placement, because the time for DMH to conduct such a study exceeds those 60 days. The OIG recommended changing the hearings to a 90 day interval. It further recommended that one Deputy Commissioner, not two, is all the task requires. To the extent that such changes would require amendments to Penal Code § 2964(b), the OIG recommended that the BPT so request of the state Legislature.

Decision Reviews

While the law presently requires the BPT to internally review all of its decisions, few are reviewed. For example, in lifer hearings, all grants of parole (a couple percent) are fully reviewed for accuracy and "public safety," while

none of the 98% denials of parole are ever looked at. Moreover, the OIG found that the BPT reviewed none of its 38,000 parole revocation decisions each year.

The OIG felt a better system would be one that samples each category for accuracy. This would be more realistic, given the numbers involved, while providing the oversight intended by the Legislature. The OIG recommended amending the BPT's regulation 15 CCR § 2041 accordingly.

Summary

The 2005 compliance review showed that the BPT was still mired in its tasks, not gaining ground on many long-standing problems. Its major "successes" seemed to be only in response to court orders. The BPT's budget for 2005-2006 is \$72,852,000.

But if 44% of lifer hearings are admittedly delayed by three months, the cost of procedurally incarcerating these 2,000 souls, at \$50,000 each per year, wastes \$25 million of the budget. And if the BPT were to end its political no-parole policy (2% grant rate) in concert with the Governor (rejects 80% of that 2%) for an estimated 7,000 long overdue-for-parole lifers, the \$350 million resultant savings per year could instead be used to retire the cost of the new \$5 billion San Francisco Bay Bridge in 14 years, with no bridge toll at all (vs. the \$4 toll recently approved for this cost.) Did the OIG look far enough? 🐻

See: *Accountability Audit, A Review Of Board Of Prison Terms 2002-2003 To Determine Compliance With Previous Recommendations Of The OIG, July 2005, Office of the California Inspector General. Available at www.prisonlegal-news.org.*

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Habeas Hints: How to Get DNA Testing

by Kent Russell

This column is intended to provide "habeas hints" to prisoners who are considering or handling habeas corpus petitions as their own attorneys ("in pro per"). The focus of the column is habeas corpus practice under the AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

DNA Testing: How To Get It And Use It To Prove Your Innocence

By far the most successful habeas corpus petitions have been those which have relied on DNA testing to show that the person who was convicted could not possibly have committed the crime which landed them in prison. Nevertheless, most convicted prisoners lack the money and/or the legal knowledge to bring favorable DNA evidence to the attention of the courts. Therefore, even though news accounts, TV shows, movies, and plays are now focusing the public's attention on people who have been wrongfully convicted, an unknown number of prisoners whose innocence could be proved through DNA testing remain in prison.

Solving this problem could be easy enough if each state would set up procedures by which prisoners who claim that DNA could prove their innocence could have counsel appointed to bring appropriate claims before the courts. However, despite the budding DNA revolution, many states still don't have laws that provide DNA testing for inmates. Furthermore, in states that do have such legislation, too many prisoners remain ignorant of what to do and how to do it. The purpose of this column is to provide some "habeas hints" for prisoners seeking to prove their innocence through DNA testing.

Almost all DNA claims raised on habeas corpus are similar in the sense that they are based on the following common elements: (1) The identity of the perpetrator was the primary issue in the case; (2) The defendant was identified as the perpetrator based on eyewitness identification for which corroboration was either non-existent or inconclusive; (3) The perpetrator left blood, semen, hair, or some other substance capable of

being submitted to DNA testing; (4) The evidence per #3 was either not subjected to DNA testing at the time of trial, or the DNA testing that was done was unreliable or inconclusive; (5) The evidence was preserved so that it is available for DNA testing at the present time.

Notwithstanding these common elements of DNA claims in general, DNA testing in a particular post-conviction case will usually have to be pursued on the basis of state law, which varies from state to state. Therefore, I've organized this column as follows: prisoners who were convicted in California courts should review § I, below, to see what to do. Prisoners convicted in other states will first have to find out whether their particular state has any law allowing for DNA testing. (I suggest that prisoners try to do this by getting hold of the Penal Code for their state, looking up "DNA" in the index at the back of the code, and then searching for a sub-heading such as "convicted felons", "post-conviction testing", "motions for DNA testing", or "habeas corpus".) If a DNA testing statute is located, then proceed to § II, below. If not, then go to § III.

I. California Prisoners

California, the most populous state, has had a DNA testing statute on the books since 2001. Moreover, the current version of § 1405 of the California Penal Code, entitled "Motion for DNA testing," is an *extremely* prisoner-friendly statute, because it provides that a prisoner seeking DNA testing has the automatic right to the appointment of counsel to make the motion – a right which kicks in merely upon the filing of a simple written "Request" in the sentencing court, which states as follows:

Request For Appointment Of Counsel To Make Motion For Dna Testing, Per Cal. Pen. Code § 1405

- (1) I am an indigent prisoner.
- (2) I was not the perpetrator of the crime of which I was convicted and sentenced, and DNA testing is relevant to my assertion of innocence.
- (3) I have not previously had counsel appointed for me under this section.

I declare under penalty of perjury that the foregoing is true and correct.

All a California prisoner has to do is to sign and date the above Request, file it with the superior court where s/he was convicted, and serve a copy on the County District Attorney and the California Attorney General. Once that is done, the court *must* appoint counsel to make the motion for DNA testing which will include the specific facts the prisoner will have to show to actually get the DNA testing he seeks. (See: *In re Kinnamon* (Oct. 2005) 133 Cal.App.4th 316, 34 Cal. Rptr. 802.)

II. Other States Which Have DNA Testing Statutes But No Automatic Right to Counsel

Although I have not personally researched the DNA statutes in the other 49 states, I am fairly sure that the current California procedure is rare, because it provides a right to the appointment of counsel to make a motion for DNA testing without even requiring the prisoner to state the specific facts which would actually entitle the prisoner to DNA testing in a particular case. Furthermore, even though the California court in *Kinnamon* did hold that counsel had to be appointed solely upon filing the brief Request set forth in § I, that court's opinion virtually begs the California Legislature to amend § 1405 to remove the requirement for appointment of counsel until after a preliminary showing of entitlement to DNA testing is made by the applicant – an amendment that, in my opinion, the California Legislature is likely to enact.

Therefore, prisoners in other states which allow for DNA testing but not for appointed counsel, as well as California prisoners who may at some point be faced with a California law that has been amended to require a detailed factual showing before counsel will be appointed, should be prepared to state facts which demonstrate, at a minimum, the five common elements that were listed in third paragraph of the introductory section of this column.

Precisely what else a specific prisoner will have to do to get the benefit of a DNA testing statute will depend on the requirements of the particular state statute being used to obtain DNA testing, and it's best to use a lawyer to comply with these requirements. Therefore, the prisoner should

first review his state's DNA statute to determine if it provides for appointment of counsel to make a DNA testing motion. If so, that provision should be complied with to get counsel appointed. If not, the prisoner should consider contacting a lawyer, such as one of the referral attorneys listed by *Prison Legal News* on a state-by-state basis. If these efforts fail, then the prisoner will have to make the required showing for entitlement to DNA testing in pro per. In that regard, as an aid to prisoners attempting to obtain DNA testing on their own, I have included in section IV of this column a Questionnaire which asks the critical DNA questions, and which the prisoner can use in preparing the specific DNA testing motion that will be required by state law.

States Where There Is Currently No DNA Testing Statute On the Books

Prisoners in states which lack any DNA testing statutes at all will have to fall back on traditional habeas corpus principles to allege a federal constitutional basis for their claim of entitlement to DNA testing. This is certain to be a very difficult task for the average prisoner, so I strongly recommend that the prisoner attempt to obtain legal assistance to the extent it is available. Fortunately, there are organizations which have been set up and funded to provide free legal assistance to prisoners seeking DNA testing, the best of them being the "Innocence Project". The central mailing address is: Innocence Project; 100 Fifth Avenue, 3rd Floor; New York, NY 11011. The phone number is 212-364-5340, and the web address is: info@innocenceproject.org. The Innocence Project now has offices in several states throughout the country, and prisoners who contact the NY office will be routed to a local office if there is one.

Finally, whether prisoners are seeking appointment of counsel, a private lawyer, or proceeding on their own, I suggest that they use the Questionnaire in the following section in order to focus attention on the questions that must be answered and the information that needs to be provided to establish the basic elements of a successful DNA testing request. The prisoner can then use the completed Questionnaire, either in correspondence with prospective attorneys, or as the basic source of the information that is going to be required for any DNA motion that is submitted in pro per.

IV. DNA Questionnaire

Instructions: Answer the following questions truthfully and as thoroughly as possible. Use a separate sheet of paper for your longer answers, referencing them by the letter and number assigned to the corresponding question (e.g. B.1.a, B.2.a, B.2.b, etc.).

I. Name:

II. Prison Number:

III. Mailing Address:

A.Conviction History.

1.Case number:

2.Court where convicted:

3.Crime for which you are serving time:

4.Date sentenced:

5.Length of sentence:

6. Name and address of trial and appellate counsel:

B.Appeal History.

1. Did you appeal your conviction? If so, identify the appellate court, the date of the opinion, and the principal arguments raised on the appeal.

2. Was Identification argued on appeal?

a. If yes, what was the argument and court's reasons for rejecting it?

b. If not, why wasn't identity challenged on appeal?

3. Have you ever sought DNA testing in a previous habeas corpus application?

a. If so, identify the court and the date of the decision in that court.

b. What argument(s) did you make?

c. What were the court's reasons for rejecting your arguments?

C.Reasons for DNA testing in your case.

1. Was identity of the perpetrator a significant issue in your case? Explain.

2. What specific evidence other than eyewitness testimony did the prosecution use at trial to link you to the crime (e.g., ballistics, gunshot residue, fingerprints, admission or confession, etc.)?

3. How did your defense counsel challenge each of items listed in #2?

4. What other arguments that weren't raised at trial could be raised now to challenge the evidence listed in your answer to No. 1?

5. Were there other suspects?

a. If yes, list each suspect with a brief explanation of their initial connection to the crime.

b. On what basis were these suspects excluded by the prosecution?

4. For each eyewitness who testified against you at trial:

a. List their names and a summary of what they testified to.

b. What, if anything, was used to corroborate their testimony?

c. How can their testimony be attacked?

D.DNA testing and availability.

1. Was DNA evidence used to convict you at your trial? If so:

a. What substance was tested?

b. Why are these results unreliable (contamination, tampering, bad test, etc.)?

2. If DNA evidence was not used, what is your understanding of why it wasn't used, and did you gain that understanding from your lawyer or some other source?


3. What is the source of the DNA material that you want to have tested now?

a. Was the material introduced in evidence? Retained by the police? Other?

b. Was this material found directly at the crime scene? Please explain.

c. How long after the crime had occurred was the material discovered?

d. Has DNA testing been performed on this particular sample before? Explain.

e. To your knowledge, where is the sample now? 

Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which explains habeas corpus and the AE-DPA. The latest edition (Ed. 4.04.1, revised in May of 2005) is now shipping, and can be purchased for \$29.99 (cost is all-inclusive for prisoners; others pay \$5 extra for postage and handling). No particular order form is necessary; just send your check or money order to the Law Offices of Russell and Russell, 2299 Sutter Street, San Francisco, CA 94115.

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***Prison Reform Revisited: The Unfinished Agenda*, Pace University Law Review, Vol. 24, No. 2, Spring 2004 (softback, 460 pp.)**

Reviewed by John E. Dannenberg

In October 2003, Pace University Law School hosted a three-day symposium at its White Plains, New York campus, widely attended by leading academics, attorneys, prison reformers, judges and prison officials, to discuss how to advance the cause of prison reform in the United States. Vol. 24, No. 2, of the *Pace University Law Review* is a reprint of the papers presented at that conference. The organizer of the confab, and the resulting Law Review publication reviewed here, was Pace law professor Michael B. Mushlin, well known to prisoners nationwide who regularly rely on his three-volume book, *Rights of Prisoners*, dealing with civil rights of institutionalized persons.

Prison Reform Revisited contains 24 papers grouped into five chapters: (1) Accomplishments and Failures of Prison Reform Litigation; (2) The Modern American Penal System; (3) Anatomy of the Modern Prisoner's Rights Suit; (4) The International Context of Prison Reform; and (5) The Future of Prison Reform Efforts.

Chapter 1 takes stock of the successes in the past three decades of prison litigation. Noted prison monitor Vincent Nathan propounds that major advances have occurred via the courts relative to severe prison conditions, inadequate medical care, overcrowding, excessive force and unfair disciplinary proceedings. Professor Nathan lauds two consequences of this litigation, the impact upon the mindset of prison administrators, and the restoration of dignity to prisoners as not being mere throwaways. He notes that the results do not yet reach the goal of reducing reliance on incarceration as the sole punitive sanction, nor has racial discrimination behind the walls been solved.

Observing from the other end of the telescope, U.S. District Judge Morris E. Lasker, wrote from his thirty years experience with litigation over conditions in the New York City jails. He believes that the federal judiciary has significantly improved prison conditions, but laments that courts may not reach further to achieve "reformation of incarceration policy."

Indeed, Professor Malcom Feeley and Van Swearingen point to the defen-

sive reaction of prison systems to harden their bureaucracies, making prisons arguably more legitimate with even stronger controls. They call this the "iron cage of bureaucracy." Authors James Jacobs and Elana Olitsky argue that as a result, if lasting positive change is ever to be achieved, prison officials must adopt a more humane and professional posture, for which courts can at the least set standards. The development of a cadre of professionals to deliver on such an agenda presupposes the existence of "the best national prison and jail college in the world," which does not exist.

Chapter 2 addresses ongoing problems in America's prisons, including supermax isolation, sexual abuse and mistreatment of the mentally ill. Writers Jennifer Wynn and Alisa Szatrowski note the proliferation of the supermax concept, which disaffects their populations by relinquishing "social control" to technologically controlled cold boxes. James Robertson's article, *A Punk's Song*, addresses male prisoners who assume the role of submissive females in the prison subculture, i.e., what amounts to prison rape.

Writer-activist Vince Schiraldi describes the extensive use of incarceration in the states, which has literally redefined our society's functionality, noting that 1 in 15 Americans born in 2001 will spend some time in prison in their life, that an African-American male born today has twice the chance of landing in prison rather than college, and that spending for incarceration has grown at 2% times the rate of increase in spending for education. Schiraldi's principal thesis is that the only real weapon against this self-extinguishment of society is to make the public more aware of the magnitude of the problem.

An analytical perspective by Eric Lotke and Peter Wagner exposes the economical and political distortion of apportionment of government funding that flows from prisoners being counted in the census of the town where the prison is located, not their home towns. Thus, farming out prisoners to private prisons in other states literally costs the sending state twice; perhaps now they will think twice about this self-defeating process. Finally, Ohio's Director of Corrections and

Rehabilitation Reginald Wilkinson writes about a partnership between the courts and corrections to effect prison reform through enhanced reentry programs.

In Chapter 3, the technical difficulties attending getting a prisoner's rights suit into court are discussed. A perspective from William Collins, formerly with the Attorney General's office in Washington State, tells of the road blocks put forth by the Prison Litigation Reform Act (PLRA), concluding that use of the federal court to bring about major prison reform "is something whose heyday has passed."

David Fathi, senior counsel of the ACLU's National Prison Project, writes more encouragingly, noting that a whole new body of favorable supermax litigation cases has added to protection of prisoners' basic rights. Heather Barr, attorney for the Urban Justice Institute, recounts litigation victories for the mentally ill. William Dean, of Volunteers for Legal Services, notes the entrance of Wall Street firms to provide attorneys to aid prisoners' rights suits. The settlement of an Arizona protective segregation lawsuit is analyzed by both opposing attorneys and by the court's special master.

Carl Reynolds of the Texas Department of Criminal Justice discusses how a conscientious prison administrator should respond to court-ordered prison conditions suits, relying upon administrators "good faith." Elizabeth Alexander of the ACLU retorts that this is simply inadequate.

International context of U.S. prison reform, in Chapter 4, reminds us of the impact of international human rights laws. Two guest speakers from Great Britain observed that the United States uses prisons not to control crime, but to control marginalized elements of society -- "an expensive experiment in making bad people worse." Baroness Stern bluntly called the U.S. prison system "monstrous, deformed and abnormal."

The concluding chapter's discussion of future prison reform efforts is personified in Alvin Bronstein's instruction, namely that prison reform is not about improving prison conditions, but is about reducing the use of imprisonment, taking a page from the book of progressive

foreign nations. Michele Deitch closes the conference with a self-motivating talk entitled, "Thinking Outside The Cell...," wherein she envisions a "transformed prison." That is, while litigation

is yet necessary for reform, a clean-slate reinvention of the prison model is what is actually needed.

In all, this is a fascinating, well documented reference, written by some of the

best-informed minds in the business. Back copies of the *Pace Law Review* may be obtained by writing William S. Hein & Co., 1285 Main St., Buffalo, NY 14209 (www.wshein.com). ■

Arkansas Considers Prison Rape Law, Problems Evident

by Michael Rigby

Nearly two years after the Prison Rape Elimination Act, (PREA) passed unopposed in the U.S. House and Senate, an attitude of indifference and skepticism surrounding prison sexual assaults still permeates the Arkansas Department of Corrections (ADC).

Signed into law on, September 4, 2003, as Public Law 108-79, the PREA authorizes the Bureau of Justice Statistics to collect statistical data and calls for a federal commission to devise standards aimed at combating prison rape. The law also requires states to track prison sexual assaults and encourages prison officials and lawmakers to attack the problem at the state level.

Because Arkansas stands to lose money if it doesn't comply--federal funding to states failing to meet the standards will be reduced by 5% a year--the Arkansas Board of Corrections met on June 9, 2005, to vote on the state's planned compliance. For Arkansas, which augments its annual \$231 million prison budget with \$840,000 in federal grant money, the reduction equates to a loss of \$42,000.

According to the text of the law, an estimated 13% of the nation's 2.1 million prisoners have been sexually assaulted in prison. Experts note the consequences are far reaching--especially since an estimated 95% of prisoners will someday be released. "The risks associated with sexual assault in prison ... extend beyond prison walls," testified Lara Stemple, executive director of Stop Prisoner Rape, before the U.S. Senate Judiciary Committee in 2002. "Upon release, rape survivors may bring with them emotional scars, sexually transmitted infections and learned violent behavior that continue the cycle of harm."

The ADC's sexual assault statistics are drastically lower than what national estimates would suggest for a prison system with 13,000-plus prisoners. In fact, over the past 5 years Arkansas prison officials referred just 34 sexual assault cases to the State Police for investigation. Only 3 were prosecuted.

Some prison officials concede the numbers are underreported. But rather

than address the true culprits--skepticism, indifference, fear of retaliation--they blame the victims. "A lot of these inmates fall into the age-old trap of 'bought you four Honey Buns, now pay up,'" said ADC spokeswoman Dina Tyler. She didn't say how prisoners invite sexual assault by guards.

Others infer the problem is exaggerated. "I'd like to think our institutions are safe," said ADC Director Larry Norris at a recent conference in Hot Springs. "ADC is just a big old family," he continued. "Even convicts are part of the family." If so, the relationship is one of violence and incest.

When Kendell Spruce arrived at the Cummins Unit in the early 1990's, he was sexually assaulted within days. Then 28, Spruce had been imprisoned for forgery. By the time he left Cummins in 1992, Spruce said he had been sexually assaulted hundreds of times by at least 27 different men.

"It was regular, hourly. Oh Lord, I was dead. I was tossed aside, and here comes another one," said Spruce, now 42. He said the prisoners bribed guards with candy, soda, and cigarettes to "turn a deaf ear" to his cries for help. Spruce filed seven federal lawsuits between 1991 and 1997 alleging prison officials failed to protect him from the assaults: but all were dismissed. "They didn't want to hear it," he said. "They said it was because I was gay. It doesn't matter. Rape is rape."

Tyler claimed Spruce's allegations were unsubstantiated. In 1998, however, the U.S. 8th Circuit Court of Appeals noted that then-Cummins Warden Willis Sargent testified in federal district court that "inmates in prison had to 'fight' against sexual aggressors; i.e. it is the inmates own responsibility to 'let people understand that [they're] not going to put up with that.'"

Even when sexual assault complaints are substantiated, it means little. In October 2002, Guard John Berry, 40, was fired for sexually assaulting a prisoner at the Tucker maximum-security prison. Now he guards kids at two juvenile prisons. According to a June 16, 2005, *Associated Press* article, Berry is employed full-time at a juvenile

prison in Pine Bluff and part-time at the Alexander Youth Services Center (AYSC). The Alexander prison is operated by Cornell Companies Inc., a private contractor. It's unknown if Berry has molested any of the children at those prisons. ■

Sources: *Arkansas Democrat-Gazette*, *AP*

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Florida's Privatization of Prisoner Canteen Services Under Scrutiny

by David M. Reutter

An October, 2004, report issued by Florida's Auditor General (AG) criticizes a contract awarded to Keefe Commissary Services (Keefe) for the operation of the Florida Department of Corrections' (FDOC) 240 prison canteens. The three-year contract that privatized FDOC's prisoner canteen services became effective on October 9, 2003.

To obtain a contract, Keefe, which services 65 percent of the nation's prisoners in jails and prisons, agreed to pay FDOC \$.82 per prisoner per day on FDOC's mid-night count. Since the contract went into effect, it has been amended three times. Keefe's ability to increase its revenue has been enhanced by FDOC's raising of the amount prisoners can spend each week, an increase in canteens Keefe operates, and Keefe's act of raising canteen prices 40% or more since assuming operations. Despite Keefe's revenue increase, FDOC does not receive more money.

In examining the Keefe/FDOC contract, the AG made five findings for future action by the Legislature or FDOC. First, the AG recommended the Florida Legislature revise statutes "to include provisions for the competitive procurement of revenue-generating contracts." Current law for such contracts does not ensure all eligible contractors are notified of the prospective state procurement and are given a reasonable opportunity to compete for the contract. Amendment of current law, the AG concluded, is necessary "to ensure that revenue-generating contracts are equitably awarded and provide the greatest amount of revenue for the best available services."

While FDOC maintained it was not required to put the canteen service contract out for bid, the AG noted FDOC contacted three vendors to submit a best and final offer. FDOC provided those vendors a financial analysis that showed FDOC profited \$15 million annually or \$0.602 per prisoner per day from canteen operations. FDOC received the following bids: Ara-

mark Corp., \$0.7408 per prisoner per day; Trinity Services Corp., \$0.7500; and Keefe Commissary Network, \$0.8200. While the AG found the contract went to the highest bidder, "the usefulness of [FDOC's] analysis as a meaningful tool to evaluate potential canteen revenues" due FDOC is "limited." The problem is that the analysis included prisoner canteen operator salaries and "some materials, supplies, and equipment costs will continue to be paid by" FDOC rather than be borne by Keefe. The AG said all elements of an analysis should be included in the contract.

In its third finding, the AG criticized the FDOC for making three contract amendments that have the potential to increase FDOC's "costs for canteen operations" without completing a "cost analysis or other written justification for each contract change" prior to execution of each amendment.

The first amendment, executed on February 25, 2004, substantially increased Keefe's revenue potential. That amendment allowed FDOC's 85,000 prisoners to increase their weekly spending from \$65 to \$90 per week. Another windfall came in November, 2004 when the weekly limit was increased to \$100. While prisoners' funding limits increased over 45%, the amount of money paid to the state did not increase.

FDOC officials said they do not know how much Keefe earns on canteen sales, and neither would they nor a Keefe representative say why the spending limit was increased. Sen. Victor Crist, R-Tampa, speculated, "They under-estimated their cost of doing business and they needed to have some adjustments in order to continue providing services."

Since the AG's report was issued, FDOC has again increased Keefe's revenue potential. Since 2000, visitors and prisoners were serviced through vending machines in the visiting park, which FDOC received commissions on. Beginning in November 2004, FDOC allowed Keefe to open canteens in the visiting parks. This new source of revenue was not contemplated in the original contract or FDOC analysis.

Another source of increasing revenue is the contract's provision that item prices may be "increased by up to 10% every six months until" fair market price is reached. Upon taking control, Keefe raised prices

dramatically over items in the canteen, and has imposed 310% across-the-board increases. For Florida prisoners, the issue is what is fair market value? Keefe considers that to be whatever prisoners will pay, regardless of prices for like items in free world stores.

The AG also criticized the May 3, 2004, amendment that reduces the canteen supplies Keefe is required to provide; thereby, increasing FDOC costs. That amendment also required Keefe to install its own canteen operation computers and gave it ownership of the software.

The July 25, 2004, amendment acknowledges that the rights and responsibilities of FDOC's Access Catalog contract, which provides sales of radios, shoes, and clothes to prisoners, was assigned to Keefe. The AG said FDOC's failed to do a cost analysis to assure the increase of \$0.007 per prisoner per day was sufficient to maintain FDOC's profits from Access orders.

The AG also lambasted FDOC for failing to assure a transition period existed in the event Keefe discontinues services. With Keefe installing its own computer system and with FDOC's system being outdated, FDOC cannot guarantee continued canteen operations if Keefe pulled out. The AG said the costs of replacing the canteen computer service "may negate any cost savings or revenue enhancements realized by FDOC from the current contract."

Finally, the AG noted FDOC could not confirm if or when criminal history background checks were completed on Keefe employees assigned to FDOC prisons as required by the contract.

FDOC defended each of its actions relative to the Keefe contract by arguing FDOC earned \$23 million in 2004, which is \$7.4 million more than when FDOC operated the canteens. The question FDOC wants to ignore is whether it would have realized that \$7.4 million had it raised the spending limits and prices as has occurred since executing the contract.

State legislators are looking into that question. "Obviously, it looked like a pretty sweetheart deal to me," said Rep. Susan Bacher, D-Royal Palm Beach. ■

Sources: *Palm Beach Post*; The AG's report No. 2005-044 is available at www.prisonlegalnews.org.

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Oregon Criminalizes Sex with Prisoners; & Other Legislative Developments

In the wake of a huge scandal involving several high ranking, veteran prison officials engaging in sexual activity with female prisoners of the Coffee Creek Correctional Institution, Oregon has enacted legislation criminalizing custodial sexual misconduct.

The law, which became effective July 13, 2005, creates the offenses of Custodial Sexual Misconduct in the First Degree, a Class C felony – punishable by up to 5 years in prison – and Custodial Sexual Misconduct in the Second-Degree, a Class A misdemeanor – punishable by up to 1 year in jail.

It is a felony for any person “employed by or under contract with the state or local agency that” is the arresting, confining or supervisory agency, to engage “in sexual intercourse or deviate sexual intercourse with...or penetrate the vagina, anus or penis of another...with any object other than the penis or mouth of the actor” if the other person is “(A) In the custody of a law enforcement agency following arrest; (B) Confined or detained in a correctional facility; (C) Participating in an inmate or offender work crew or work release program; or (D) On probation, parole, post-prison supervision or other form of conditional or supervised release[.]”

It is a misdemeanor for employees or contractors to engage in any other “sexual contact” with a prisoner or offender described above. However, the law does not define “sexual contact.”

Consent of the prisoner or offender is expressly precluded as “a defense to prosecution,” because the power differential between prisoners and those with authority over them makes consent impossible. However, “lack of supervisory authority over the other person...when [that]...person is on probation, parole, post-prison supervision or other forms of conditional or supervised release,” “is an affirmative defense to prosecution.” The law also exempts penetration if that “is part of a medically recognized treatment or diagnostic procedure; or...in order to search for weapons, contraband or evidence of crime.” See: 2005 Oregon Laws, Chapter 488.

As we’ve previously reported, a similar Pennsylvania law withstood a constitutional challenge by a female guard who was prosecuted for engaging in oral

sex and other sexual contact with at least three prisoners. A unanimous Pennsylvania Supreme Court rejected her claims that the statute was unconstitutionally vague, overbroad and violative of due process for lacking an expressed mens rea requirement. See: *Pennsylvania Statute Banning Sex between Staff and Prisoners Upheld*, [PLN, March 2005, p. 34]. We are not aware of anyone being prosecuted under the Oregon legislation yet.

The 2005 Oregon Legislature also enacted Senate Bill 181, which amended ORS 30.643 to authorize a court “on its own motion or on the motion of a public body,” to “review if the pleadings are the inmate in an action against a public body at the time a request for waiver or deferral of filing fees or court costs is made. If the court finds that the pleadings failed to state a claim for which relief may be granted, the court may decline to waive payment filing fees or court costs.” The amendment becomes effective January 1, 2006. See: 2005 Oregon Laws, Chapter 530.

Senate Bill 181 was part of a larger effort by ODOC officials to enact provisions akin to those of the federal Prison Litigation Reform Act (PLRA), and which were designed to make it more difficult for prisoners to access the courts and outside regulatory agencies. ODOC introduced House Bill 2140 which would have required prisoners to exhaust administrative remedies before filing complaints with health professional regulatory boards. House Bill 2143 would have required prisoners to exhaust all administrative remedies before filing actions against a public body. It also provided that in an action for loss or destruction of property, a prisoner may recover only an amount equal to the lost or destroyed property.

Opponents of HB 2140 and HB 2143 included Western Prison Project, ACLU and Michelle Burrows, class

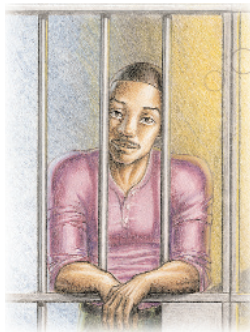
counsel in *Anstett v. Oregon*, USDC No. CV-1619-BR, related to ODOC’s failure to treat prisoners infected with the hepatitis C virus.

The Director of the Oregon Psychological Examiners Board expressed concerns about HB 2140, while opponents testified to countless medical care and grievance abuses by ODOC.

Those testifying in favor of the Legislation were ODOC Director Max Williams and ODOC Chief Medical Examiner Steven Shelton, MD. In an ironic twist of fate, however, it appears that it was Dr. Shelton’s embarrassing temper tantrum during a January 20, 2005 hearing before the Judiciary Committee that killed the bills. Legislators were noticeably irritated by Dr. Shelton’s note book throwing outburst in response to testimony about the federal court’s critical findings against ODOC in *Anstett*. Neither bill moved any further. Thank you Dr. Shelton! 📖

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If the Shoe Fits: Did Colorado Prison Officials Look the Other Way While a Guard's Fetish Turned Violent?

by Alan Prendergast

Suppose that you're the warden of a women's prison. Among your valued employees is a prison guard named Dave, whose job puts him in charge of dozens of female prisoners for long, lonely nights.

Dave is a popular guy among his colleagues. But there's also something odd about him. One day you learn that local police suspect him of being a world-class perv. They believe he's been stalking at least three women in the metro area for years — burglarizing their homes, leaving them disturbing and graphic messages, boldly pursuing an elaborate kink that involves intimate relations with a certain brand of sneakers. He's already been identified by two victims, and the cops plan to arrest him as soon as all the evidence is in.

What do you do, boss? Do you:

A. Tell Dave to seek other employment, possibly at Foot Locker.

B. Reassign him to a job that doesn't involve custodial supervision of vulnerable women.

C. Sit tight and wait for the other shoe to drop.

In the case of David Christensen, Colorado Department of Corrections officials decided on the third option. And that decision is now at the heart of a lawsuit filed by a female prisoner who was raped by Christensen in 2002 at the Denver Women's Correctional Facility, where the 40-year-old prison guard continued to work the graveyard shift while under investigation in the stalking cases.

Attorneys for prisoner Penifer Salinas say that Warden Joanie Shoemaker and other DWCF officials knew that Christensen was the prime suspect in several sexually charged criminal acts months

before he assaulted Salinas, but did nothing to protect female prisoners from him. Salinas also claims that administrators retaliated against her after she reported the rape. The federal case is one of several arising from sexual misconduct by male guards at women's prisons in Denver and Pueblo (See previous issues of *PLN*.)

The stalking cases date back to 1999, when a Jefferson County woman left her home and discovered a pair of red Keds sitting on top of her car. She removed them and drove to her job at King Soopers; shortly after her arrival, a caller to the store reported that her lights were on. She went to the parking lot and found a white pair of Keds on her car.

More Keds showed up over the next few months, in various colors. One pair came with a note. The writer addressed the woman by name and claimed to be sexually aroused by the sight of females in Keds. "I'd love to watch you tickle a little boy some day," the note said. "Keds...they feel good!"

In the summer of 2000, while the woman and her husband were on vacation, someone burglarized their home. The thief took the multiple pairs of Keds that had been piling up in her closet and photos of her but didn't touch the couple's money or jewelry. The Jeffco investigator assigned to the burglary soon found a similar case in Greenwood Village — and later, another one in Lakewood.

As the investigation heated up, so did the bandit's weird behavior. He made hang-up calls from pay phones to the victims' homes. The Keds kept coming, but now they were inscribed in blue ink with graphic sexual messages: "I love baby boy boners." "I love to suck small boys and tickle and rape them." "If I had a cock I'd fuck little girls." "I'm a closet child molester." Some of the sneakers appeared soiled, as if the suspect had — well, had his way with them.

In 2001 Greenwood Village police almost caught the suspect when he approached a victim's front porch at midnight carrying a pair of sneakers. The man got away, but a surveillance camera had captured his image. One victim identified him as a former employee at the King Soopers where she shopped. The woman who worked at King Soopers recognized

former co-worker David Christensen, whom she'd dated briefly ten years earlier. The relationship had never been an intimate one, she added, but Christensen had stalked her for months afterward.

Police soon learned that Christensen was now a state prison guard. He was from a respectable Catholic family and had been trying to get into law enforcement most of his adult life, applying to the Denver police, Jefferson County, and the state highway patrol without success. He was not married; he would later tell investigators that he'd been a compulsive masturbator since high school and was "not good with women."

Warden Shoemaker and other officials at the women's prison were notified of the investigation of Christensen in late 2001. They provided the police with a handwriting sample from Christensen, a critique he'd written of a DOC sexual harassment training video in which he'd appeared in various roles. The sample came back as a "highly probable" match to the writings about child molestation scrawled on the shoes.

Yet prior to his arrest, no one seems to have given serious thought to moving Christensen from his duties on the graveyard shift, where he was left alone with up to 72 female prisoner for hours at a time. There had been several prior incidents of staff misconduct at the prison, but the DOC had not yet got around to putting in surveillance cameras in the living quarters or the janitor's closets, where most of the instances of sexual relations between prisoners and staff occurred.

On the night of April 1, 2002, prisoner Salinas, who was serving two years for car theft, went into one of the closets for cleaning supplies. She was followed by Christensen. The guard made her perform oral sex on him, she later told an investigator, then raped her, telling her to keep quiet or "she would never get paroled." The sex was rough and left her bleeding from her vagina.

The arrest warrant for the stalking cases was signed that same day. A search of Christensen's home turned up drawings he'd done of the torture and sodomization of small children. The drawings were on the back of a DOC policy manual.

CORRECTION

In the October, 2005, issue of *Prison Legal News* we reported *Bringing Down the Brotherhood* by Alan Prendergast. Through an omission we neglected to mention the article originally appeared in the Denver, CO alternative weekly *WestWord*. It was reprinted in *PLN* with permission.

Investigators also found a blond wig that he'd stolen from a Cherry Creek store and other paraphernalia that seemed to be part of his fetish rituals.

Christensen's immediate supervisor told people he was shocked by the arrest. He wrote Christensen a letter, offering to be a character witness. "I have seen fifty or a hundred people get into trouble over the last fifteen years I've been with DOC, but none have ever affected me like this," he wrote. "I like to think I'm a pretty good judge of character."

But a sergeant at the prison would later tell investigators that he wasn't shocked at all. After the arrest, he'd even reminded the supervisor of an incident in 1998, when the sergeant had caught Christensen running out of a women's bathroom, nervously wiping the front of his pants. In the bathroom was a female prisoner with her breasts exposed. The sergeant claimed to have reported the incident to Christensen's supervisor, but no written record of the incident was ever made.

Salinas didn't report her rape for months. When she did, she also admitted to a consensual sexual relationship with another guard. According to her attorney, Julia Yoo, Christensen's supervisor tried

hard to discredit her.

"This has been devastating to her," Yoo says. "It wasn't just the rape itself but the way it was handled when she came forward. Nothing was explained to her. She was put in the hole and felt totally isolated. She didn't have access to her legal mail or letters from her mother. And other officers were retaliating against her. She had no idea Christensen had even been removed or arrested."

Attorneys for Shoemaker and other DOC officials have argued that they couldn't predict that Christensen would assault prisoners, but Yoo insists they should have taken more precautions after learning about the Keds investigation. "They knew he was a predator and a dangerous person," she says. "Would they have taken that kind of risk if the potential victim was somebody related to them? I don't think so." Christensen denied the rape. He was found guilty of sexual assault by a Denver jury and sentenced to five years to life. He pleaded guilty to burglary and stalking counts in the Keds cases and got six years, to be served concurrently.

Penifer Salinas, Yoo says, still has anxiety attacks when she hears keys rat-

ting, as if her attacker is coming back for her. Now doing time at a private prison, Christensen has his own demons to confront — including the hazards of being an ex-guard surrounded by prisoners.

"I hope they don't know much about him," Yoo says. "Even though I'm disgusted by what I've seen in this case, nobody deserves to be attacked in prison. I wish he had received some help. His life didn't have to spiral out of control like this." ■

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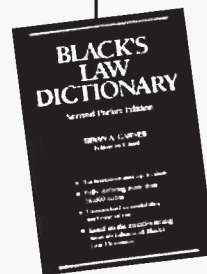
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Whistleblowers Nail Cheating California Corrections Employees

The California State Auditor detailed four investigations of California Department of Corrections (CDC) employee misconduct completed between July 1 and December 30, 2004, where the tip-offs of miscreance were reported through California's Whistleblower Protection Act (Government Code § 8547 et seq.). Reportable transgressions under the Act include official government wrongdoing that violates federal or state laws, is wasteful, or involves dishonesty, incompetence or inefficiency.

In Allegation No. I2003-0834, the Auditor determined that CDC had improperly granted 25 CDC nurses pay increases totaling \$238,184 between July 1, 2001 and June 30, 2003. Nurses, like other CDC non-custody staff, receive a monthly pay premium of \$446 if their job also entails supervising two prisoner workers, each of whom works at least 173 hours/month doing what would otherwise have been performed by state civil service employees. State regulations and the nurses' employment contract provide that any overpayment shall be reimbursed, provided the action to recoup is initiated within three years of the overpayment.

When challenged, CDC could not provide documentation in 17 of the 25 cases because the prisons audited (Avenal State Prison, California Institution for Women, California State Prison (Sacramento), and Chuckawalla Valley State Prison) either had no supervisory hours to report, did not require nurses to track these hours, lacked documentation to support the hours, or had destroyed all timekeeping records related to prisoner supervision. In the other eight cases, the 173 hour minimum was not met. A detailed analysis showed that for the 25 nurses audited, the average percentage of supervisory payments that was improper was 93.2%, with 21 of the 25 gaining 100% improper payments.

The Auditor noted that CDC's improper payments violated the Financial Integrity and State Managers Accountability Act of 1983 (Government Code § 13400 et seq.) by making a "gift" of public funds. As of March 22, 2005, CDC was still "reviewing" the problem, although as of January 5, 2004, the 25 audited nurses stopped receiving prisoner supervision pay. It would appear that the 25 owe the State an average of \$9,527 each (plus interest and penalties).

Misuse of computers and attendance abuse were the subject of Allegation No. I2004-0745. Employee A used her state computer to shop on line and contact a dating service. On one occasion, surveillance agents followed her to another city 40 miles away where she conducted personal business. She falsified her time sheets saying she worked 8 hours that day. Five such instances revealed \$2,200 in fraud. Employee B was also followed, often running personal errands and reporting to work hours late. Not only did she cheat the State out of \$1,700 via falsified time sheets, she was unable to complete the work required for her position.. As of March 22, 2005, CDC had taken no corrective or disciplinary actions.

The third Allegation, No. 12003-0915, detected falsified time sheets by a CDC employee in the Paroles division. She regularly "modified" her work hours, took long lunch breaks and often failed to perform her duties. CDC issued a "letter of instruction" which gave the employee a time period in which to correct casework deficiencies and required her to work regu-

lar hours and to perform all of them. Her supervisor is to retain copies of all time sheets for three years.

Allegation No. 12003-0896 involved mismanagement of fees collected from movie studios who were using California State Prison (Los Angeles) facilities for a TV production, and who reimbursed CDC for extra guard duty. A conniving employee diverted one \$1,500 payment from the general fund to the prison employee's association account. Worse yet, prison officials participated in a plan to launder \$4,150 of such reimbursement funds from production companies through a prisoner religious account before transferring the money into the employee association account, so that the donors could claim a tax deductible contribution.

The TV studio may be missing a good bet here; its own malodorous plot of prison corruption sounds like a great story line for a new made-for-TV movie. ■

Source: California State Auditor Report No. 12005-1, March 22, 2005. Available on www.prisonlegalnews.org.

New York Prisoner Attacked On Bus Awarded \$600,000

On April 28, 2005, a New York prisoner was awarded \$600,000 for injuries he sustained when other prisoners attacked him on a prison bus.

Plaintiff Daniel Arroyo, 17, was convicted of a youthful offense. On November 9, 1994, while being transported from court to the Rikers Island Correctional Facility, Arroyo was attacked by several other prisoners. At least one assailant used a razor blade to slash Arroyo, who sustained multiple lacerations. The lacerations resulted in facial scars and/or disfigurement.

Arroyo's mother, Elba Arroyo, sued the city of New York on her son's behalf and individually alleging that the city failed to provide adequate security on the bus. The mother's individual claim was dropped when her son reached the age of majority prior to trial.

Arroyo claimed that guards failed to properly search prisoners boarding the bus; failed to separate prisoners known to be dangerous; and did nothing to stop the assault. Arroyo further claimed that crowded conditions on the bus increased

the likelihood of slashing incidents, which were common at Rikers Island.

The city contended that prisoners were properly searched and that strip searches were not required; civil liberty considerations required strict adherence to the department's search policy; and that intervention was precluded because the bus was not in a secured area and because departmental rules prohibited guards from entering the prisoner section of the bus. The city also claimed that systematic segregation was not feasible and that the assailants' security classifications did not warrant segregation.

After deliberating 1.5 hours, the jury found the city liable and awarded Arroyo \$600,000 (\$550,000 past pain and suffering, \$50,000 future pain and suffering). Arroyo was represented, by Evan M. Goldberg of the New York City law firm Trolman, Glaser & Lichtman, P.C. See: *Arroyo v. City of New York*, Bronx Supreme Court, Case No. 16241/95. ■

Source: *VerdictSearch New York Reporter*

Florida DOC's No Bid Pharmaceutical Contract Scrutinized and Criticized

by David M. Reutter

A September 2004 Florida Auditor General's Report found numerous deficiencies in the Florida Department Of Corrections' (FDOC) pharmaceutical contract with Terry Yon & Associates, Inc. (TYA). The current three-year contract became effective January 1, 2004. Its estimated worth is \$72 million.

To distribute prescribed pharmaceuticals, FDOC operates four "cluster" pharmacies where health services' staff, records, equipment, and pharmaceutical inventories are consolidated. These four pharmacies provide pharmacy support to neighboring institutions.

The FDOC did not put its pharmaceutical contract out for bid prior to signing with TYA, concluding it was not required to under law because the contract was for health services involving examination, diagnoses, treatment, prevention, medical consultation, or administration. The Auditor General, however, concluded the contract with TYA does not appear to provide for health services described by law, making the service susceptible to open bidding.

The Auditor General further found that TYA is providing commodities that are available from other vendors. The repackaging of pharmaceuticals for unit dosing is not included in the list of statutory health services. Absent competitive procurement, FDOC cannot demonstrate the contract provides the best value for the state or that the contract was equitably awarded. That finding was amplified by FDOC's comparison of TYA prices with those of another pharmaceutical vendor, which found the other vendors repackaging prices were lower by about 30 percent than those of TYA.

The Auditor General found the contract disclosed several deficiencies. First, the contract pays TYA the vendor's medication cost plus 1.45 percent, plus a fee for the pharmaceutical package. The contract fails to address rebates or discounts that are common in the pharmaceutical industry. Second, the contract fails to contain a provision requiring TYA to advise FDOC of any complaint filed, investigations made, warning letters or inspection reports issued, or any disciplinary actions imposed on TYA by any

federal or state oversight agency. A check of state oversight agencies reveals TYA received a warning letter on August 6, 2002, but the same letter never appeared in FDOC's records. Finally, the contract requires TYA to abide by all pertinent requirements of specified Florida Statutes and Administrative Codes. The contract cites rules repealed or transferred prior to the effective date of the contract.

The Auditor General's review found that TYA did not always fulfill the contract responsibilities and conditions. First, FDOC was never provided a copy of TYA's Florida Department of Health Pharmacy license or Federal Drug Enforcement Agency registration. TYA, also is required to provide FDOC a financial and compliance audit. One has never been provided. Next, TYA is supposed to provide a procedure manual for all four FDOC pharmacies. Two did not have a manual, and the manual the other two had were outdated. Moreover, TYA did not always recognize order limit maximums set by FDOC.

The Auditor General also found that contract monitoring by FDOC was extremely flawed. The Contract Manager had no training and utilized checklists that were not signed or dated, making frequency of monitoring visits undocumented.

TYA was also found by the Auditor General's report to have failed to timely fill orders as required by the contract. Eight of 40 orders reviewed were not timely filled. Those 8 orders were filled 1 to 10 days late. Because the date stamps on receiving reports did not always agree with the invoice, an additional 22 orders could not be determined for timeliness. Yet, the Contract Manager found TYA "Met" the contract timeliness requirement.

The Auditor General's review found that 34 of the 40 invoices from TYA were not supported by adequate documentation. "Specifically, the order forms or receiving reports for these 34 invoices are not available; did not identify the pharmacy placing the order; or were not properly signed to indicate the person who placed the order, authorized the order, accepted the order, or approved the order received." 37 of the 40 invoices were not reviewed

or approved by a FDOC Lead Pharmacist or designee prior to payment. These failures may allow the misappropriation of pharmacy supplies to occur and not be timely detected.

The Auditor General's final finding addressed credits for returned pharmaceuticals. TYA was selected over the cheaper vendor because of its "policy on returned medications." Yet, TYA did not comply with that policy when crediting FDOC. TYA's return policy was to credit FDOC the applicable item listing, which is regularly revised. Rather than credit FDOC for the prices it paid, TYA credited FDOC under the most current item listing. Additionally, the Auditor General "noted some minor errors in pricing and instances in which the number or type of items credited did not agree with [FDOC] records of the number or types of items returned."

In response to the report, FDOC agreed with most of the findings and agreed to make changes. FDOC, however, flatly disagreed that it must put the pharmaceutical contract out for bidding, but would "consider" doing so when the TYA contract expires in 2006. In recent years, FDOC has entered into contracts to privatize its foodservice, canteen operations, transportation of work release prisoners, housing of prisoners, and medical services. Each such contract has been challenged or is under scrutiny by legislative bodies. ■

Sources: Department of Corrections a Pharmaceutical Contract Operational Audit. Available at www.prisonlegalnews.org.

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Bait and Snitch: The High Cost of Snitching for Law Enforcement

by Alexandra Natapoff

The t-shirts scream “Stop Snitchin’!”

From Baltimore to Boston to New York; in Pittsburgh, Denver, and Milwaukee, kids are sporting the ominous fashion statement, prompting local fear, outrage, and fierce arguments over crime. Several trials have been disrupted by the t-shirts; some witnesses refuse to testify. Boston’s Mayor Thomas M. Menino has declared a ban: “We’re going into every retail store that sells them,” he declared to the *Boston Globe*, “and we’re going to take them off the shelves.” With cameo appearances in the growing controversy by NBA star Carmelo Anthony of the Denver Nuggets and the rapper Lil’ Kim, snitching is making urban culture headlines.

The “Stop Snitchin’” T-shirt drama looks, at first blush, like a dustup over a simple counterculture message launched by some urban criminal entrepreneurs: that friends don’t snitch on friends. But it is, in fact, a symptom of a more insidious reality that has largely escaped public notice: For the last 20 years, state and federal governments have been creating criminal snitches and setting them loose in poor, high-crime communities. The backlash against snitches embodies a growing national recognition that snitching is dangerous public policy—producing bad information, endangering innocent people, letting dangerous criminals off the hook, compromising the integrity of police work, and inciting violence and distrust in socially vulnerable neighborhoods.

The heart of the snitching problem lies in the secret deals that police and prosecutors make with criminals. In investigating drug offenses, police and prosecutors rely heavily—and sometimes exclusively—on criminals willing to trade information about other criminals in exchange for leniency. Many snitches avoid arrest altogether, thus continuing to use and deal drugs and commit other crimes in their neighborhoods, while providing information to the police. As drug dockets swell and police and prosecutors become increasingly dependent on snitches, high-crime communities are filling up with these active criminals who will turn in friends, family, and neighbors in order to “work off” their own crimes.

Critics of the T-shirts tend to dismiss

the “stop snitching” sentiment as pro-criminal and antisocial; a subcultural expression of misplaced loyalty. But the T-shirts should be heeded as evidence of a failed public policy. Snitching is an entrenched law-enforcement practice that has become pervasive due to its crucial role in the war on drugs. This practice is favored not only by police and prosecutors, but by legislatures: Mandatory minimum sentences and restrictions on judges make snitching one of the only means for defendants to negotiate in the face of rigid and drastic sentences. But the policy has turned out to be a double-edged sword. Nearly every drug offense involves a snitch, and snitching is increasingly displacing more traditional police work, such as undercover operations and independent investigation.

According to some agents and prosecutors, snitching is also slowly crippling law enforcement: “[I]nformers are running today’s drug investigations, not the agents,” says veteran DEA agent Celerrino Castillo. “Agents have become so dependent on informers that the agents are at their mercy.” According to a study conducted by professor Ellen Yaroshefsky of Cardozo Law School, some prosecutors actually “fall in love with their rats.” A prosecutor in the study describes the phenomenon: “You are not supposed to, of course. But you spend time with this guy, you get to know him and his family. You like him. [T]he reality is that the cooperator’s information often becomes your mindset.” In this view, criminal snitching is a sort of Frankenstein’s monster that has turned on and begun to consume its law enforcement creator.

The government’s traditional justification for creating criminal snitches—“we-need-to-flip-little-fishes-to-get-to-the-Big-Fish”—is at best an ideal and mostly the remnant of one. Today, the government lets all sorts of criminals, both big and little, trade information to escape punishment for nearly every kind of crime, and often the snitches are more dangerous than the targets. As reported by *Wall Street Journal* reporter Laurie Cohen last year: “The big fish gets off and the little fish gets eaten. . . . [T]he procedure for deciding who gets [rewarded for cooperation] is often haphazard and tilted toward higher-ranking veteran criminals

who can tell prosecutors what they want to know.”

Snitching thus puts us right through the looking glass: Criminals direct police investigations while avoiding arrest and punishment. Nevertheless, snitching is ever more popular with law enforcement: it is easier to “flip” defendants and turn them into snitches than it is to fight over their cases. For a criminal system that has more cases than it can litigate, and more defendants than it can incarcerate, snitching has become a convenient case-management tool for an institution that has bitten off more than it can chew.

And while the government’s snitching policy has gone mostly unchallenged, it is both damaging to the justice system and socially expensive. Snitches are famously unreliable: A 2004 study by the Northwestern University Law School’s Center on Wrongful Convictions reveals that 46 percent of wrongful death penalty convictions are due to snitch misinformation—making snitches the leading cause of wrongful conviction in capital cases. Jailhouse snitches routinely concoct information; the system gives them every incentive to do so. Los Angeles snitch Leslie White infamously avoided punishment for his crimes for years by fabricating confessions and attributing them to his cellmates.

Snitches also undermine law-enforcement legitimacy—police who rely on and protect their informants are often perceived as favoring criminals. In a growing number of public fiascos, snitches actually invent crimes and criminals in order to provide the government with the information it demands. In Dallas, for example, in the so-called “fake drug scandal,” paid informants set up innocent Mexican immigrants with fake drugs (gypsum), while police falsified drug field tests in order to inflate their drug-bust statistics.

Finally, as the T-shirt controversy illustrates, snitching exacerbates crime, violence, and distrust in some of the nation’s most socially vulnerable communities. In the poorest neighborhoods, vast numbers of young people are in contact with the criminal-justice system. Nearly every family contains someone who is incarcerated, under supervision, or has a criminal record. In these communities, the law-enforcement policy of pressuring

everyone to snitch can have the devastating effect of tearing families and social networks apart. Ironically, these are the communities most in need of positive role models, strong social institutions, and good police-community relations. Snitching undermines these important goals by setting criminals loose, creating distrust, and compromising police integrity.

The "Stop Snitchin'" T-shirts have drawn local fire for their perceived threat to law-abiding citizens who call the police. But in the outrage over that perceived threat, the larger message of the shirts has been missed: Government policies that favor criminal snitching harm the communities most in need of law-enforcement protection. [Editor's Note: The purported concern over t-shirts ignores the far more pervasive form of witness intimidation and organized crime practiced by police officers and

prison and jail guards alike with their infamous "wall of silence."]

While snitching will never be abolished, the practice could be substantially improved, mostly by lifting the veil of secrecy that shields law-enforcement practices from public scrutiny. As things stand, police and prosecutors can cut a deal with a criminal; turn him into a snitch or cut him loose; forgive his crimes or resurrect them later, release him into the community; or decide to pick him up. They do all this at their discretion, without legal rules, in complete secrecy with no judicial or public accountability. As a result, we have no idea whether snitching even reduces crime or actually increases it, and we can only guess at the collateral harms it imposes on high-crime communities.

The government should reveal snitching's real costs, including data on how many snitches are released into high-crime

neighborhoods and what sorts of snitch crimes are forgiven. The government should also be required to establish the concrete benefits of a policy that releases some criminals to catch others, by accounting for how much crime actually gets stopped or solved by snitch information. Only then can we rationally evaluate how much government-sponsored snitching makes sense. Until we can know the real value of snitching, the T-shirts remain an important reminder that this particular cure for crime may be as bad as the disease. ■

Alexandra Natapoff is an Associate Professor at Loyola Law School, Los Angeles, and the author of a University of Cincinnati Law Review article entitled, Snitching: The Institutional and Communal Consequences. This article originally appeared on Slate.com. Reprinted with permission.

Chicago Settles Another Jail Brutality Suit for \$362,500

On December 17, 2004, the Cook County Board's Litigation Subcommittee approved a settlement of \$362,000, including attorneys' fees, in a case involving brutality against a Cook County jail prisoner by the jail's infamous Special Operations and Response Team (SORT). We have previously reported the brutality of the guards in the Chicago jails. [PLN, Feb. 2004, p. 12; May 2005, p. 39].

Cello Pettiford, 46, was a jail prisoner the evening of February 24, 1999. He was in his cell making tea when a 40-man SORT led by Lt. Richard Remus entered his tier to conduct a shakedown. According to Pettiford, the shakedown was triggered by a gang-related stabbing that had occurred in his division three days earlier.

Pettiford alleged that two guards came into his cell and began to punch and slap him without provocation. He alleged he ran out of his cell, only to be rounded up along with other prisoners, all of whom were stripped shirtless, lined up, then assaulted by guards who walked down the line punching prisoners as they passed. The guards also allegedly threatened them with unmuzzled dogs.

Pettiford filed a civil rights suit in federal district court under 42 U.S.C. § 1983 against Division IX superintendent James Edwards, SORT Commander Remus, Sheriff of Cook County Michael Sheahan, and Cook County, alleging excessive use of force and denial of medi-

cal care following the assault. He alleged a cover-up of the incident that was a part of an overall pattern at the jail and that he suffered injuries to the head and neck, unconsciousness, and bruising due to the assault. He did not claim any permanent injuries.

The defendants claimed that Pettiford's cellmate, Leonard Stafford, stated under oath that Pettiford had faked the whole thing as part of a plan to extort money from Cook County. They also claimed that a Sheriff's Department investigator who had filed a report favor-

able to Pettiford had personal animosity toward Sheehan and had faked portions of the report.

The parties agreed to settle for \$362,000, which included plaintiff's attorney fees due under 42 U.S.C. § 1988. The defendants did not admit liability and claimed they only settled because it would cost more to defend against the claims. Pettiford was represented by attorneys David J. Bradford, Jean Maclean Snyder, and David S. Weissman of Chicago. See: *Pettiford v. Sheehan*, USDC ND IL, Case No. 02-C-1777. ■

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Nebraska Native American Prisoners' Religious Program Reinstated

by John E. Dannenberg

Native American prisoners and Nebraska's then Director of Corrections, Harold Clarke, reached a settlement agreement on March 15, 2005 in U.S. District Court (D. Neb.) to reinstate the Native American prisoners' club (Native American Spiritual and Cultural Awareness) (NASCA) and to permit medicine men and other religious volunteers to attend Native American spiritual meetings at the 1,200-prisoner Nebraska State Penitentiary (NSP). In so doing, the parties agreed to the termination (with prejudice) of prior consent decrees from 1974 and 1976.

Up until two years ago, NSP's 43 Native American prisoners had enjoyed NASCA associational, long hair, sweat lodge (inipi) and ceremonial privileges granted in the 1974 consent decree. However, NSP disbanded the program when complaints were received about membership discrimination wherein NASCA had adopted a policy of not permitting bloodline "qualified" non-Native prisoners to be club members and/or officers.

Richard Walker, a Winnebago serving 10-life for second degree murder, then filed the lawsuit complaining that NSP was not permitting Native Americans to practice their religion.

With the agreement, NASCA modified (and NSP approved) its bylaws to remove the objectionable language restricting membership or creating subclasses of membership based upon "Native American blood quantum." Specifically, all interested NSP prisoners must now be permitted to attend NASCA activities, subject to disruptive visitors being reviewed by administration for restriction.

NSP officials averred that they value religion on prison grounds. NSP spokesman Win Barber noted that "I've met a large number of inmates, rather hard customers if you look at their record, who I think genuinely have a sense of atonement for what they've done and are genuinely looking for some kind of forgiveness. ... We try to give each faith group a reasonably equitable opportunity to practice their faith...."

Community volunteer Bill Achord, who works with NASCA, said that he sees the challenges to prisoners when they seek such simple things as more wood for their sweat lodge or getting medicine men and

tribal elders to come to the prison.

Nonetheless, he believes that American Indian spirituality gives the prisoners a way to connect with something outside of themselves and helps them cope in the difficult NSP environment. "These men, whatever crimes they've committed, ... when they purify ...[and] go through the ceremony, ... come out reborn. In a sense, [they have] come out of the mother's womb. All [their criminal past] is washed away." Lifer Jan Amaya agreed, saying that the American Indian culture he was introduced to has helped him come to terms with life in prison. "It keeps your mind and spirit free. In here, that's all we've got."

For NSP Native American prisoners, the reinstated practice now includes each having a prayer feather, pipe and medicine bag containing sacred herbs which guards agree not to touch (subject only to security needs). They also get two pow-wows per year, one of which may be a ceremonial banquet including traditional foods of fry bread, corn, berry dish, water and beef.

Additional foods may be permitted provided they are based upon theological tenets of the faith group, community standards of that faith group, and do not require special handling unavailable in the prison context. They are permitted

two sweat lodge ceremonies per week in their lodge built of willow branches. Although tobacco is banned in prison by state law, the Native Americans may smoke Chinshasha (made from the bark of the red willow tree) at the end of each sweat. Importantly, they may meet as a club for religious and cultural education, where they may gain counsel of outside volunteers from their spiritual communities. The agreement further provides that any remaining Chinshasha stashes shall be divided among Native American prisoners requesting it for ceremonial use. Thereafter, Chinshasha may only be donated by outside agencies or individuals to the faith group for use in ceremonies. Their first post-settlement pow-wow, on September 30, 2005, included drum ceremonies and songs of their ancestors, fry bread, wojapi and Chinshasha.

The settlement also waived the plaintiff prisoners' attorney fees and costs. The NASCA prisoners were represented by Omaha attorneys Bassel F. Kasaby and Jonathan M. Cohn. See: *Indian Inmates of the Nebraska Penal and Correctional Complex v. Clarke*, U.S.D.C. (D. Neb.), Case No. 4:72-CV-156. ■

Other source: *Lincoln World-Herald Bureau*.

Federal District Court Awards Missouri Prisoner \$2,500 For Excessive Force

On January 25, 2005, a Missouri prisoner was awarded \$2,500 for pain and suffering incurred when guards kicked him in the groin.

Lance A. Cole, 24, was arrested for violating his probation by possessing a gun. A day earlier Cole had injured himself while out socializing with friends: he fell causing a gun concealed in his pants to discharge into his groin, wounding his penis. After being treated at a hospital, Cole was taken into custody.

While in the St. Louis County Jail, Cole repeatedly asked to return to the hospital. His requests were denied. Cole subsequently caused a loud commotion, which prompted jail officials to move him to another location.

Cole claimed that during transport defendant guards Michael Hurt and Joshua Miklovic kicked him in the groin,

knowing he had suffered the gunshot wound about 24 hours prior. Cole sued Hurt and Miklovic in the U.S. District Court for the District of Missouri alleging they violated his civil rights by subjecting him to excessive force and for deliberate indifference to his medical needs.

At trial Cole was awarded \$2,500 on his claim against Miklovic, but lost his claim against Hurt. Cole's motions for new trial and judgment notwithstanding the verdict were denied. Before trial, defendants had offered to settle for \$5,000; Cole had demanded \$25,000.

Cole was represented by attorney Michael T. George of St. Louis. See: *Cole v. Hurt*, USDC ED MO, Case No. 4:03-CV-00622. ■

Source: *St. Louis Verdict Reporter*

All Alone in the World: Children of the Incarcerated

By Nell Bernstein, The New Press; 303 Pages; \$25.95

Reviewed by Sheerly Avni

In part because of the war on drugs, in part because of mandatory sentencing laws such as California's "three strikes" law, and in part because we have gradually shifted our concept of justice from rehabilitation to punishment over the past 30 years, the United States now ranks as the world's most prolific jailer.

The greatest increases in the prison population have occurred among drug offenders—and in particular among women, whose numbers in jail have increased eightfold over three decades. One disturbing by-product of all these imprisonments is that there are now 2.4 million American children who have a mother or father in jail. One in 10 American children has a parent under some sort of probationary supervision.

The consequence to American families has been devastating: In her remarkable new book, *All Alone in the World: Children of the Incarcerated*, Bay Area youth advocate and journalist Nell Bernstein sets out to explore the crisis -- one which she suggests will be "the civil rights issue of the 21st century." Bernstein introduces us to families struggling to stay together through imprisonment, and through the programs dedicated to trying to help them: a care facility in a prison in Oregon that allows children to spend meaningful time with their mothers in jail, a re-entry program in New York that provides family counseling and parenting classes, an organization in Kansas dedicated to helping grandparents file for financial aid when they suddenly find themselves the sole custodians of their grandchildren.

Chapter by chapter, Bernstein takes us through each lamentable phase of the incarceration cycle, from arrest to sentencing, to visitations and foster care and finally re-entry. She interviews scores of experts—police officers, criminologists, sociologists and dedicated service providers, many of them reformed offenders

who would never have been released from prison had they committed their crimes today.

But Bernstein, also a former editor of the magazine *Youth Outlook* (this reviewer worked in the same office as Bernstein for a year in the late '90s), derives her best expert testimony from the families themselves, whom she treats not as victims of an unjust system but rather as experts and resources, the best available analysts of their own experience and needs.

And what do these families need? One another. As the 15-year-old son of a drug-addicted mother explains, "Using drugs, she's hurting herself. You take her away from me, now you're hurting me."

But in a system that almost seems designed to separate families (one incarcerated mother calls it "the great baby-snatching era"), relying on the work of isolated innovators is like treating a pandemic with cough syrup. In the cost-cutting and dehumanizing world of the prison system, the last thing administrators think of is the prisoners' private lives. Visiting hours are cut, parole hearings rarely take children into account, and transfers move fathers and mothers hundreds of miles away from their children.

In a particularly wrenching example, Bernstein describes a videoconference between a fourth-grader in Washington, D.C., and his father, jailed in Ohio. Like most people in poor neighborhoods, the boy is on dial-up, and as the video crashes the computer again and again, the boy gradually loses interest in his father's stut-

tering image. Conversation is impossible: The literal and figurative connection failure highlights a stopgap measure that, as the author writes, "can best be described as better than nothing."

Bernstein has ideas for something better than "better than nothing," which she lays out in her concise conclusion, where she offers 18 policy suggestions. Most of them are pure common sense—remove financial barriers to communication (like the hiked-up fee for collect calls from jail), keep prisoners near their families so they can receive visits, and of course revisit our failed drug policies. What her suggestions have in common, besides being relatively easy (and cheap) to implement, is that they are focused on the basic premise that crime is reduced by keeping families together, not ripping them apart.

In terms of elegance, breadth and persuasiveness, *All Alone in the World* deserves to be placed alongside other classics of the genre such as Jonathan Kozol's *Savage Inequalities*, Alex Kotlowitz's *There Are No Children Here* and Adrian Nicole LeBlanc's *Random Family*. But to praise the book's considerable literary or sociological merit seems beside the point. This book belongs not only on shelves but also in the hands of judges and lawmakers. ■

Sheerly Avni is a Bay Area journalist and a workshop facilitator for the Beat Within, a weekly publication by and for incarcerated youth.

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Court Halts Practice of California Prison Guards Getting Unlimited Paid Time to Conduct Union Business on the Job

In a recent expose, the *Sacramento Bee* revealed that the California prison guards union (CCPOA) cut a side deal two months after its last five-year contract was negotiated in 2001 that removed a cap of 10,000 union member-donated hours available to CCPOA representatives to use for paid leave to conduct union business on the job. As a result, over 120,000 such hours have been billed since 2001.

At issue was a "side letter" outside the main contract that removed the 10,000-hour cap in one part of the 300-page contract, but left the cap in another part. Only recently learning of this, the Department of Personnel Administration tried to block further allocations of "release time" to save an estimated \$3 million cost overrun. But in June 2005, an arbitrator determined that since both the state and the CCPOA had "verbally" agreed to this unwritten contract change, the open-ended agreement would be enforced.

In practice, any union member may donate hours of his or her personal vacation or holiday leave to the "release time bank," which union reps can draw upon to pay their own salaries for union business. Union commentators noted that if those hours were not used by the donors, they would become payable to them nonetheless; thus, no loss to the state would accrue. However, as a result of this vacation/holiday relief, other employees might need to be called in to work at costly overtime rates. The contract attempts to depreciate this by permitting the state to refuse a "donation" if the coverage would require overtime. But the fatal flaw in this scheme is that those in control of approving any such overtime are CCPOA members, whose pecuniary interest lies with the union.

Both state Senator Jackie Speier and state contract negotiator Linda Buzzini wrote responsive letters to the *Bee's* excoriating editorial. Senator Speier introduced Senate Bill 621 to require full disclosure and pre-finality review of any ratified state labor contract for at least 25 days to "add sunshine to the darkness of late-hour labor negotiations."

Senator Speier noted candidly that historically, "the CCPOA has outmaneuvered ... CDC [California Department of

Corrections], at times due to pressure from various governors to give the CCPOA what it wanted."

Senator Speier went on to characterize the union contract as so ill-structured as to "guarantee mistakes, honest or otherwise." Among the policy "enigmas" Speier noted was the contract provision requiring CDC to spend \$245,332 to cover the salaries of guards who attended the CCPOA's 2004 convention in Las Vegas. Ms. Buzzini commented, "A deal is a deal."

Following the arbitration decision in favor of the CCPOA, the state filed suit to halt the use of unlimited union member-donated hours to offset union costs. On November 29, 2005, Sacramento County Superior Court Judge Shellyanne Chang found the arbitrator had overstepped her authority, and held the contract itself was

the only relevant document. CCPOA officials denounced the decision, saying the suit was an effort by Gov. Schwarzenegger to cripple the union, which helped defeat the governor's ballot agenda in a November, 2005 special election. "The only reason they are making this an issue is to shut us up because we are critical of them," said CCPOA spokesman Chuck Alexander.

The union announced it would appeal Chang's decision. The CCPOA has an annual budget of \$25 million, not including the leave-time expenses at issue. If all of the donated leave was valued at the top pay rate for CDC guards of \$34 per hour, the 120,000 accumulated hours of time would be worth about \$4 million. ■

Sources: *Sacramento Bee*, *San Mateo County Times*

California and Connecticut Reinstate Jobs of Fired Guards

In a process fabled for reinstating 60–70% of the jobs of fired prison guards, a unanimous California State Personnel Board (SPB) ordered the positions of six previously dismissed Youth Authority guards restored with full back pay. And in a strikingly similar case, Connecticut did the same for one guard.

California guards Delwin Brown, Marcel Berry, Linda Bridges, Steve Chiu, Danny Torrez and Robert Dutra had been fired from their jobs at the N.A. Chadgerian Youth Correctional Facility after an internal investigation there revealed that they had used excessive force in subduing wards. In a much publicized video recording of the January 20, 2004 incident wherein Brown was depicted sitting atop one of the wards and "flailing him with a series of lefts and rights to the head," the guards were dismissed. (See: *PLN*, April, 2005) Voicing approval of the dismissal were State Senator Gloria Romero and Corrections Secretary Roderick Hickman. According to guards' union (CCPOA) spokesman Lance Corcoran, the guards had acted in self-defense from the wards' assault on them that began before the video coverage started.

Although an administrative law judge

overruled the dismissals upon finding the guards' witnesses more credible than the State's (findings upheld by the SPB), Secretary Hickman "strongly disagree[d] with this decision" and will "review our options ... where staff are allegedly abusive or dishonest," including taking the matter to Superior Court. Senator Romero was outraged, but "not completely surprised." She supported Hickman's continuing prosecution of the case "to crack this code of silence and send a message that we're serious about reform ... [and] won't tolerate this."

In an unrelated use-of-force incident, Superintendent Steve Kruse (Chadgerian's ninth Superintendent in five years), was himself fired on August 10, 2005. (See: *PLN*, December, 2005)

The state has halted admissions to Chadgerian while it considers public pressure to close the facility.

Mirroring the above scenario, the Connecticut Department of Corrections (CDOC) reinstated a guard with \$20,000 in back pay on September 16, 2005, one year after firing him for savagely beating a disruptive prisoner. Guard Patrick Maia, aided by his union, convinced a mediator to reduce his punishment to a 30 day suspension, transfer and re-

medial training. CDOC spokesman Ed Ramsey nonetheless admitted "this was an extremely serious incident involving conduct that the [CDOC] does not tolerate."

The 49 page CDOC report on the Somers Northern Correctional Institution incident showed that after prisoner Robert Joslyn broke a sprinkler head and flooded his cell, guards beat him in the head, leaving him with lumps on his head, lacerations on his nose and his right eye swollen shut. Denial of culpability for the beating was impeached by a CDOC video tape leaked to a local TV station. It showed Maia and three other guards using excessive force on Joslyn in his cell, from which the report concluded that Maia "was less than truthful when asked how Joslyn sustained those injuries." The other three guards were also suspended.

Joslyn claimed he was the target of guards in retaliation for his earlier grievances. Originally incarcerated in 1992 for burglary, Joslyn amassed 92 disciplinary reports, including assaults on staff. His current four-year term is for possession of a weapon in prison.

Joslyn's attorney vowed to sue in

federal court against all of the involved guards, noting "a culture of abuse and neglect that pervades CDOC." ■

Source: *Associated Press, Sacramento Bee, Los Angeles Times, Journal Inquirer of Manchester, www.newsday.com.*

Kentucky Prisoner Injured In Transport Vehicle Awarded \$9,000

On June 3, 2005, a Kentucky jury awarded \$9,000 to a prisoner who was injured while riding in a jail transport vehicle.

Plaintiff Steven Jarmon was imprisoned in a Louisville jail on robbery charges. On February 15, 2000, Jarmon, 38, and several other prisoners boarded a paddy wagon for appearances at the Hall of Justice.

During transport several prisoners complained about the jail food. Guard Larry Smith, the driver, responded that he would be eating steak that night. The prisoners then let loose a barrage of insults.

Seeking revenge, Smith drove erratically, causing the prisoners in the rear to slide around. The prisoners, who wore shackles and handcuffs, were not buckled in.

Upon the vehicle's arrival at the Metro Jail, Jarmon was evaluated by a nurse and taken to the emergency room. He was later treated for soft-tissue injuries.

Jarmon sued jail officials alleging that Smith recklessly operated the vehicle, negligently or intentionally, because he had been insulted by the prisoners. Jarmon sought damages for pain and suffering, which are capped at \$20,000.

Smith claimed the occupants could not see outside the van and therefore couldn't appreciate the road hazards and that the van jerked when he ran over a bump. Much of Smith's testimony consisted of "I don't recall." Smith no longer works at the jail.

The jury found that Smith negligently operated the vehicle and awarded Jarmon \$9,000 for pain and suffering. A consistent judgment followed. Smith was represented by Richard L. Decker of The Lohman Law Offices in Louisville. See: *Jarmon v. Metro Corrections*, Jefferson Circuit Court, Case No. 02-1251. ■

Source: *Kentucky Trial Court Review*



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American Bar Association Recommends Expanded Prisoner Telephone Access

by John E. Dannenberg

The Criminal Justice Section of the American Bar Association (ABA) made a formal recommendation in its "Report to the House of Delegates" (August 2005) ("Report") that the ABA go on record as urging all federal and state governments to afford Prisoners "reasonable opportunity to maintain communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates."

Recognizing numerous studies that have shown a direct correlation between prisoners' outside community support and their eventual reintegration success, the ABA took a pro-active stand to promote public interest in a responsible corrections telecommunications policy. The Report added that telephone access can contribute to safer prisons by reducing tension via improved morale and better staff-prisoner interactions. Voice communication becomes literally a lifeline since at least 40% of the national prison population is known to be functionally illiterate.

Notwithstanding the accepted need to put controls on telephone abuse by prisoners, the Report noted that many detention entities install draconian limitations that instead frustrate the beneficial purpose of telephone contact. The limitation of collect-only calls severely limits contact with attorneys, a result found by many courts to be unconstitutional. Observing that 82 percent of state felony detainees are represented by public defenders, the ABA called the resulting levy of such exorbitant rates (up to 65% kickback) onto unsuspecting taxpayers "particularly pernicious."

The Report was critical of excessive-rate practices because they indiscriminately punish innocent family and friends of prisoners. But even for those who can pay the fare, many are excluded by contractor practices wherein calls are blocked unless the person called subscribes to that telecommunications carrier, a restriction known to exclude up to 80% of prisoners' contacts.

Technology is hurting prisoners as well, the Report notes, because many free people now have only cell phones or use voice-over-internet-protocol, neither of which is set up to process collect billing.

Attorneys, who must maintain telephone contact with prisoners to protect their constitutional right to counsel, are also financially burdened. Worse yet, most, prisoners must make their collect calls on phones that are monitored and/or recorded, violating attorney-client privacy, a policy the ABA calls "presumptively unconstitutional."

The Report notes that easy money, unchecked by the courts or regulatory agencies, is the root of the evil. "Entering into such an arrangement [65% kickback] creates an ethical quagmire of both real and perceived conflicts which compromise both the professional integrity of correctional officials and the Public's Perception. Given the penological and societal benefits that occur when incarcerated people are able to maintain contact with the outside world, the monetary advantages are not worth the human costs."

Accordingly, the ABA is on record as recommending that correctional officials obtain the broadest possible range of

calling options consistent with security, to include toll-free calling, debit calling and less oppressive restrictions. They emphasize the calls should be at the lowest possible rates—not the highest—obtained by soliciting competitive, non-exclusive contracts with multiple vendors. Finally, the Report implores that call-blocking never be imposed for failure to have the call recipient subscribe to a particular telecommunications carrier. Call-blocking should only occur for legitimate security concerns, customer requests or non-payment of bills. "Limits should be as flexible and generous as possible in light of the many benefits of maintaining ties between incarcerated people, their families, and their communities."

PLN readers and their families should quote this ABA Report in fighting repressive prison telephone policies. ■

Source: American Bar Association, Criminal Justice Section, Report to the House of Delegates (Aug. 2005)

Florida Jury Awards \$225,000 in False Arrest/Malicious Prosecution Claim

A Florida jury has awarded \$225,000 in a case against the City of Clearwater and an individual detective on a claim of false arrest, malicious prosecution, and intentional infliction of emotional distress. The Plaintiff claimed he was falsely arrested on child molestation charges and the prosecution was continued by the defendants in reckless disregard for his civil rights.

The Plaintiff was involved in a live-in relationship with a woman who had a two-year-old daughter. The woman threatened that if he ended the relationship she would go to the police and make a false accusation that he sexually molested her little girl. She did exactly that when Plaintiff ended the relationship. Plaintiff was arrested for committing a lewd and lascivious act on a child under 12 years of age.

After spending 166 days in jail, the plaintiff fired his public defender, represented himself pro se, and it was acquitted of the charges or a jury. He then filed suit

against the defendants and the woman, but dismissed her prior to trial.

Plaintiff testified at the civil trial that he had given the detective the names of at least four people, including his ex-lover's foster mother who was an employee of Child Protective Services at the time. He contended he had informed these witnesses of the threats the ex-lover had made, but the detective did not interview these witnesses. The detective also falsely reported the time of the alleged molestation occurred at 10:00 a.m., a time plaintiff was at home. The ex-lover, however, told another officer that the incident occurred at 4:30 p.m., a time plaintiff was at a job interview.

The jury found for plaintiff on January 19, 2005, awarding him \$150,000 against the city for false arrest and \$75,000 against the detective for malicious prosecution. A \$100,000 statutory cap applies. See: *Plaintiff v. City of Clearwater*, Florida Pinellas Circuit Court, Case No. 99-008583. ■

Massachusetts Prisoner Awarded \$250,000 for Assault During Strip Search

On March 25, 2005, a federal jury awarded a Massachusetts prisoner \$250,000 in damages for injuries sustained when he was assaulted by a guard during a strip search.

Guards William Shugrue and a Jeffrey Padula were members all the Inner Perimeter Security Unit (IPS) at the Massachusetts Correctional Institution—Cedar Junction, in Walpole, Massachusetts. The IPS investigates crimes within the prison.

On January 26, 2001, Shugrue and Padula searched the cell of prisoner Robert Veins, who was confined in cell 34 of the Essex I housing unit. During the search, Justin “Orwat, who was housed in cell #32, held a mirror out of his cell to see what was going on...Padula told Orwat to take a mere back into cell... Initially, Orwat refused, but ultimately complied.”

Padula and Shugrue then decided to search Orwat’s cell, complaining “that, in passing by Orwat’s cell... they observed Orwat jump up to flush the toilet; they believed he was disposing of contraband.” Orwat claimed, however that “Padula and Shugrue decided to enter [his] cell with the intention to confront and assault [him] in retaliation for exchanging insulting words.”

Upon entering Orwat’s cell, “Padula, in an attempt to position himself at the back of the cell, squeezed by Orwat, who

asked ‘why are you walking so close to me?’” Orwat was then ordered to strip and he flipped Padula the bird. Padula responded by hitting Orwat several times, fracturing his jaw. Orwat spent two days at the Boston Medical Center and approximately 3½ weeks in the prison infirmary, recovering from his injuries.

“Padula filed a disciplinary report... charging Orwat with several disciplinary offenses... Following his release from the infirmary, Orwat was placed on ‘awaiting action’ status pending the hearing on the matter.” In August 2001, Orwat was found in violation of the charges but the hearing officer found that the eight months he has served in segregation were sufficient sanction.

Orwat sued Padula, Shugrue and numerous other prison officials. Defendants moved to dismiss, but the district court denied the motion on all but two of Orwat’s ten claims. Defendants then moved for summary judgment.

The district court denied summary judgment on Orwat’s Eighth Amendment excessive force claim against Padula, concluding “that Orwat... produced sufficient evidence to create a triable issue.” The court determined that it “must assume that Padula hit Orwat in the face, even though Orwat’s gestures and words, though conceivably belligerent, were not threatening. Furthermore, Orwat’s testimony could support an inference that Padula hit Orwat

with the intent to cause [him] harm in retaliation for [his] belligerence.”

The court also rejected Padula’s qualified immunity defense, finding that “the Eighth Amendment’s proscription against the use of excessive force was well established at the time of the incident” and “Orwat... produced sufficient evidence from which an inference may be made that Padula knowingly violated Orwat’s Eighth Amendment rights.” The court then granted summary judgment to all defendants on Orwat’s remaining claims. See: *Orwat v. Maloney*, 360 F.Supp.2d 146 (D. Mass 2005).

A jury trial was ultimately convened on Orwat’s excessive force claim against Padula. On March 25, 2005, the jury found in favor of Orwat and awarded him \$250,000 in damages. Department Of Corrections spokeswoman Diane Wiffin indicated that Padula was never charged criminally for assaulting Orwat, and the DOC expects to appeal the decision. 📰

Additional Source: *The Boston Herald*

U.S. Supreme Court: Faretta Does Not Establish Right Of Pro Se Defendant to Law Library Access

In a per curiam ruling, the U.S. Supreme Court reversed the Ninth Circuit’s grant of habeas relief (*Espitia v. Ortiz*, 113 Fed. Appx. 802 (2004)) to a California prisoner who, after choosing to represent himself at trial per *Faretta v. California*, 422 U.S. 806 (1975), complained that he was prejudicially denied his right of access to the courts by his denial of law library access in county jail.

The Supreme Court recognized a split in the circuits as to pre-conviction law library access, but declined to reach the merits of whether a *Faretta* pro per litigant has in fact such a right. The

Court only disagreed with the Ninth Circuit’s holding that *Faretta* had established such a right, noting that “*Faretta* says nothing about any specific legal aid that the State owes a pro se criminal defendant.” Since *Espitia* was prevented by the AEDPA from bringing a 28 U.S.C. § 2254 habeas action absent a pre-existing U.S. Supreme Court ruling on point (§ 2254(d)(1)), habeas relief was procedurally unavailable. Accordingly, the Court reversed the Ninth Circuit and remanded for further proceedings consistent with the Court’s opinion. See: *Kane v. Espitia*, 126 S.Ct. 407 (2005). 📰



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Poor Substance Abusers Imprisoned En Masse Without Treatment

by Michael Rigby

More than two-thirds of U.S. jail prisoners in 2002 were found to be dependent on drugs or alcohol or to abuse them. But many never get the help they need, a study by the Bureau of Justice Statistics (BJS) reveals.

According to the July 2005 report, *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002*, 68% of jail prisoners met substance abuse or dependence criteria as defined by the Diagnostic and Statistical Manual of Mental Disorders, fourth edition. Even more striking, at least 85% of convicted jail prisoners met the criteria,

Despite these alarming numbers, more than one-third of all jail prisoners who met the criteria never participated in substance abuse treatment or other alcohol or drug programs. What's more, over half (53%) of jail prisoners had never "received treatment or participated in other substance abuse programs while under correctional supervision."

The report, based on interviews conducted with 6,982 prisoners at 417 jails, revealed a number of other important trends as well. For instance, race and age were factors in the rate of substance dependence or abuse. White prisoners had the highest rate (78%), compared to blacks (64%), and Hispanics (59%). Jail prisoners between ages 25 and 44 were also more likely to dependent on or to abuse substances (70%), while those age 55 or older had the lowest rate (50%). The prevalence of dependence or abuse between men and women was roughly equal at 68% and 69%, respectively.

Family background also played a role. More than 1 in 5 jail prisoners who were diagnosed with substance dependence or abuse claimed to have been physically or sexually abused in the past, compared with 1 in 8 for other jail prisoners. Moreover, prisoners who were dependent on or abused substances were more likely (50%) than other prisoners (38%) to have had a family member who had been imprisoned.

Substance dependent or abusive prisoners were also more likely to have had past trouble with the law. While 80% had previously been imprisoned or placed on probation, the rate was only 60% for other prisoners. In addition, more than half of these prisoners (47%) had had three

or more prior sentences to probation or imprisonment--nearly twice the rate of other jail prisoners (22%).

Among the various offenses, jail prisoners charged with drug and property offenses were most likely to be dependent on or to abuse substances or alcohol. Those charged with burglary had the highest rate (85%), followed by driving while intoxicated/under the influence (81%), weapons charges (79%), and drug possession (75%).

The study further found that those on probation or parole were more likely to receive treatment or to participate in a program for substance dependence or abuse than those imprisoned. Though more than 1 in 4 dependent prisoners received treatment while in the community; just 1 in 5 had received treatment

while imprisoned.

Racial disparities were also seen in treatment rates. While 40% of white prisoners who met the criteria for substance dependence or abuse received treatment under correctional supervision, only 30% of black and Hispanics received such treatment. White prisoners (23%) were also nearly twice as likely as Hispanic prisoners (12%) to have received treatment in prison or jail.

Based on these findings, it seems clear the focus of government intervention should be on substance abuse awareness campaigns and treatment programs, rather than massive imprisonment. Get a copy of the report, NCJ 209588, online at www.ojp.usdoj.gov/bjs or by writing NCJRS, P.O. Box 6000, Rockville, Maryland 20849-6000. ■

Shackling of Women Prisoners During Labor and Delivery Ended In California

by John E. Dannenberg

California's Governor Schwarzenegger improved health care for women prisoners by signing AB 478 into law, which makes it illegal to deny prenatal and postpartum care (to include basic dental cleaning) and bans shackling during labor and delivery in a locked hospital ward. Assembly Member Sally Lieber (D - San Jose), author of AB 478, noted that "The United Nations has established minimum rules for treatment of prisoners and California has not been following them."

The American College of Obstetricians and Gynecologists weighed in, stating, "Physical restraints have interfered with the ability of physicians to safely practice medicine by reducing their ability to assess and evaluate the physical condition of the mother and the fetus, and have similarly made the labor and delivery process more difficult than it needs to be; thus, overall putting the health and lives of the women and unborn children at risk."

The California Medical Association added, "Prenatal care has consistently been shown to be a cost-effective tool in preventing birth defects and protecting the health of the infant and the mother. Additionally, shackling of a prisoner during

childbirth may be unnecessarily uncomfortable and dangerous for the female inmate, while providing little additional public safety protections."

Lieber lamented, "It is inconceivable in this day and age, that human beings would be shackled while giving birth." But from the state that brought you 24 hour/day double-guarding of brain-dead prisoners shackled to their hospital beds (see: *PLN*, July 2005, p.24), maybe one shouldn't be so shocked. With broad support from the Legal Services for Prisoners with Children, ACLU, National Association of Social Workers, California Attorneys for Criminal Justice, Planned Parenthood, California Catholic Conference, California Association for Nurse Practitioners, Family Council, Friends Committee on Legislation and California National Organization for Women, the California Legislature, splitting largely along party lines, voted over 2 to 1 to pass the bill. Apparently, Republican tough-on-crime mongers would rather augur for future votes than uphold the United Nations' human rights conventions. ■

Source: *Medical News Today*.

Prisoners Labor at Wisconsin Wal-Mart Site

by Michael Rigby

Wal-Mart is using prison labor to build a new distribution center in Beaver Dam, Wisconsin. Local residents have expressed safety concerns and also worry that lower paid prisoners are siphoning jobs away from the community.

Prisoners working at the Wal-Mart site come from the Fox Lake Correctional institution, where about 130 of the prison's 1,330 prisoners participate in work release programs. Guards drop the prisoners off at the site and pick them up after work. The prisoners, who perform manual labor-type tasks, are supervised by their employer while on the job.

Some nearby residents are concerned about possible violent prisoners. Senator Scott Fitzgerald (R-Juneau) responded by asking the Department of Corrections (DOC) to "ensure that no inmate convicted of a violent or drug related crime is being permitted to work in such close proximity to a residential area."

Most prisoners working at the site have been convicted of non-violent crimes and are close to release. The number of prisoners varies by day but appears to be between 5 and 8. The placements began in October 2005 and were scheduled to end in December 2005.

Out of the original 7 workers, 4 had been removed by November 10. The fired prisoners were serving time for burglary, battery, armed burglary/battery, and manufacturing and delivering cocaine--crimes Fitzgerald was fretting about.

Hansen-Rice, the building contractor employing the prisoners, is a general contracting company based in Idaho. Lafe Herrick, the company's Beaver Dam project manager, said Hansen-Rice was the only company using prison labor at the site. Wal-Mart later instructed him not to speak with reporters.

The prisoners earn an average of about \$9 per hour, depending on the type of work, said John Dipko, a spokesman for the DOC. From the wages, prison officials deduct room and board, transportation expenses, child support payments, fines, and restitution. "When wages are worked out, they are based on what the employer would pay somebody hired off the street," said Dipko. "They are having a tough time hiring enough people from the general public to get the job done."

But some area residents are skeptical.

Anne Breuer, who lives near the construction site, said she did not recall seeing ads for such jobs. Others decry Wal-Mart's use of prison labor. Mike Grater, business agent for the Menasha-based Laborers Local 330, said he would prefer to see local residents hired--for good wages and benefits--to do the jobs the prisoners are doing. However, Wal Mart does not seem to hire anyone but managers for good wages and benefits.

Most of the state's 1,100 work release prisoners are employed at food plants or do assembly work at factories. "These offenders gain valuable work experience. They can build good work habits and learn what it takes to be successful on a job. The ultimate goal is being gainfully employed, productive members of the community upon release from prison," said Dipko. "Stable employment is directly linked to a lower likelihood of re-offending, so it ultimately helps promote public safety."

Dipko's sentiments are admirable and may well be true. But many employers only hire prisoners to increase profit margins. The companies save money by paying

prisoners less than the prevailing wage and avoiding such frivolities as insurance and retirement benefits.

Rose Lynch, a spokeswoman for the Wisconsin Department of Workforce Development, said private projects are not required to abide by prevailing wage statutes. "A private entity such as Wal-Mart is not covered," she said.

One advocacy group, Wisconsin Democracy Campaign, has also questioned the correlation between Wal-Mart's political contributions and its sizeable aid and tax relief package.

Wal-Mart has received \$2.2 million in state transportation and commerce assistance and \$7.8 million in tax breaks since 1999 to open facilities in Beaver Dam and Tomaha. In the spirit of reciprocity, the Wal-Pac political action committee and Wal-Mart Stores employees donated \$87,775 to Governor Jim Doyle, Wisconsin legislative candidates, and party committees from July 1, 2003 to June 30, 2005. ■

Source: *madison.com*

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Utah DOC Settles Wrongful-Death Suit Involving Exonerated Suspect For \$150,000

by Michael Rigby

On September 29, 2004, the widow of a one-time suspect in the Elizabeth Smart kidnapping settled her wrongful-death lawsuit against the Utah Department of Corrections (DOC) for \$150,000.

When 14-year-old Elizabeth Smart was kidnapped from her Salt Lake City home on June 5, 2002, police were desperate to name a suspect. With no leads, the investigation quickly focused on Richard Ricci, a paroled handyman who had performed odd jobs at the Smart's home. Nine days after the kidnapping, Ricci 48, was arrested for allegedly drinking a beer, a violation of his parole.

Ricci was quickly returned to the Utah State Prison. Two months later, on August 30, 2002, he collapsed and died from a cerebral hemorrhage. He remained a suspect until Elizabeth Smart was found March 12, 2003, walking in Sandy, Utah, with homeless street preacher Brian David Mitchell and his wife, Wanda Barzee. Mitchell and Barzee have both been charged in the abduction, though Barzee was declared mentally incompetent.

Ricci's widow, Angela Ricci, brought separate federal lawsuits against the DOC, the Salt Lake City Police Department, and police officers.

In her wrongful-death suit against the DOC, Ms. Ricci alleged that a prison employee disregarded her husband's history of hypertension and that other workers altered his medical records to cover their mistakes.

"The way he was treated at the prison was regrettable," said D. Bruce Oliver, who represented Angela Ricci. "He was placed in solitary confinement, he had no hot meals, he was shackled every time he stepped out of a cell and he was hooded." Her husband was subjected to the harsh conditions, the lawsuit contended, because police had asked prison officials to make him uncomfortable in order to gain information.

Rather than go to trial, the DOC agreed to pay Ms. Ricci \$150,000 but denied any wrongdoing.

As for Angela Ricci's lawsuit against the Salt Lake City Police Department, Police Chief Rick Dinse, and at least six investigators, U.S. District Judge Ted

Stewart dismissed the case on July 6, 2005. Ms. Ricci had alleged wrongful death, cruel and unusual punishment, false arrest and slander.

In his ruling, Judge Stewart chided Oliver as unprofessional for failing to provide witness statements or documents to help prove the case. Oliver, who was not sanctioned, said he will appeal Stewart's ruling to the 10th U.S. Circuit Court of Appeals.

Still pending is Ms. Ricci's suit against Cory Mack Lyman, a lead investigator in the Smart kidnapping. That suit contends Lyman fingered Ricci as a suspect to avoid public pressure and allegations of incompetence even though no evidence linked Ricci to the crime. Lyman is now chief of

police for Ketchum, Idaho.

Another suspect in the kidnapping also sued the Salt Lake City Police Department. In his lawsuit, Pete Romero, an ex-convict, alleged false arrest, libel and slander, unlawful use of police authority, baseless prosecution, and cover-up. Romero had been required to wear an ankle monitor for 5 months during the investigation. He also contended that police investigators subjected him to "Gestapo-style interviews and interrogations." The suit was dismissed in 2005. See: *Estate of Ricci v. Salt Lake City*, USDC D UT, Case No. 2:03CV00749 TS. ■

Sources: *Salt Lake Tribune*, *Deseret Morning News*

Georgia DOC Settles Failure-To-Protect Suit for \$15,000

by Michael Rigby

In September 2004, the Georgia Department of Corrections (CDC) settled for \$15,000 a prisoner lawsuit alleging that understaffing at the maximum-security Georgia State Prison (GSP) compromised prisoner safety. The GDOC also agreed to increase staffing levels in prisoner housing areas at the prison.

GSP prisoner Gregory M. Lamb claimed that on January 21, 2001, he was beaten and stabbed by four other prisoners who were attempting to rob him. The attack reportedly happened when guard Virginia Williams opened Lamb's locked cell door at a time when the prison was severely understaffed.

Lamb contended that only one guard had been assigned to cover four dormitories, when in fact one guard should have been assigned to each dorm. Lamb also claimed, among other things, that he was seriously injured in December 2001 when four John Doe guards attacked him; he was misclassified; he received inadequate medical treatment following the attack; and prison officials placed him in solitary confinement in retaliation for attempting to write a prison newsletter.

Lamb and four other prisoners alleging similar failure-to-protect claims—

James Chapman, Frederick Murray, Ché Clemons, and Phil Mincey—also sought to join a class action with GSP prisoner David Roberts in quest of an injunction to restore security to the norm established by *Guthrie v. Evans*, Civ. A. No. CV3068 (USDC SD GA 1973) (civil rights/prison disciplinary procedures/class action desegregation GSP); 93 F.R.D. 390 (USDC SD GA 1981) (procedural history). Until it was terminated in the wake of the Prison Litigation Reform Act of 1995 (PLRA), *Guthrie* mandated that a guard must be assigned to each dormitory except at night. To support their request for class action certification, the prisoners introduced evidence showing that in the previous several years, GSP prisoners "suffered 1,129 violent assaults and 4 deaths due to the lack of security."

In a bifurcated opinion filed July 7, 2004, the U.S. District Court for the Southern District of Georgia first dealt with the request for class action certification. After making several determinations favorable to the prisoners, the Court granted in part and denied in part "Roberts's class-action motion without prejudice to his right to renew the denied portion" at an ensuing evidentiary hearing.

Next, the Court addressed the summary judgment motions of Lamb and the defendants. As it did throughout the opinion, the Court criticized the defendants' failure to provide evidence supporting their assertions (i.e., that staffing levels were sufficient to ensure prisoner safety). Moreover, prison officials admitted in court documents that only one guard was assigned to work 2 or even 4 dormitories during some shifts and that at times they have even failed to protect prisoners in protective custody. Consequently, the Court held that "a reasonable jury could view these materials as proof that GSP lacked sufficient security with which to reasonably protect Lamb" the day he was attacked.

To further support his claim, Lamb admitted evidence showing that a guard was murdered at GSP in 2002; two prisoners were stabbed in January 2003—one of them fatally; prisoner Jerome Barton (one of Lamb's alleged attackers) stabbed another prisoner around January 2001; prisoner Mark Gross was seriously beaten and suffered massive brain trauma in June 2001; prisoner Doak Collingsworth was gang attacked; prisoner Terry Battle was beaten with a stick in spring 2001; prisoner Michael Wise was stabbed in 1999; prisoners Edward Gamble, Larry Sanders

(twice), Phil Mincey and an unidentified prisoner were stabbed between 2000 and 2002; and prisoners Myles Lundy and Justin Laister were attacked by other prisoners in July 2002.

Based on this, the court held that "a material issue of fact precludes defendants' summary judgment motion on [Lamb's] failure-to-protect claim." However, the court also held that Lamb had not shown entitlement to summary judgment, either.

In September 2004, shortly after the ruling, the GDOC agreed to settle the complaints of Lamb and the other prisoners, including the Roberts class action. At mediation a judge set Lamb's damages at \$15,000. (It's unknown how much the other prisoners received.) The GDOC also stipulated to essentially follow the *Guthrie* staffing orders, resulting in an increased presence of guards in the dormitories.

Lamb was represented by attorney McNeil Stokes of Atlanta, Georgia. Robert W. Cullen, who represented Roberts and also participated in the *Guthrie* case, appeared as co-counsel with Stokes on Lamb's motion to join the Roberts class action. See the full opinion on *PLN's* website at www.prisonlegalnews.com. See: *Lamb v. Smith*, USDC SD GA, Case No. 602-CV-094. ■

Company Uses Prison Slave Labor for \$100 Million Military Contract

The prison and military industrial complexes have collided, with a private military contractor poised to make millions off the sweaty backs of prisoners.

Pennsylvania-based Woolrich Inc. plans to use the labor of federal prisoners to fulfill two multi-million-dollar contracts with the Defense Department, according to an October 2, 2005, article in *The Patriot-News*. In April 2005 the company was awarded a 5-year contract worth between \$68 million and \$100 million, to manufacture approximately 75,000 pair of Army pants annually. Woolrich was awarded a second contract in July 2005 for between 5,000 and 25,000 cold-weather jackets per year for air crews. That contract was valued at between \$4 million and \$19 million.

The pants and jackets will be manufactured by federal prisoners earning

between \$0.23 and \$1.15 an hour. Given the low profit margin involved, the company could not be competitive if it paid a wage comparable to that in the community, lamented Woolrich president Roswell Brayton Jr. And because products for the military must be totally American made, Woolrich was unable to use its overseas sweatshops. Prison slave labor was the next logical step.

Federal prisoners in Atlanta, Georgia, and Beaumont, Texas, are already sewing army combat pants for Woolrich. By the end of 2005, Woolrich sewing operations will commence at prisons in Big Sandy, Kentucky, Yazoo City, Mississippi, and a fifth, as yet undisclosed prison. Manufacturing of the air crew jackets was slated to begin in November 2005 at federal prisons in Miami, Florida, and Safford, Arizona. ■

Source: *The Patriot News*

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Registered Sex Offenders Murdered By Vigilante in Washington

by Matthew T. Clarke

On August 27, 2005, two registered sex offenders were murdered in Bellingham, Washington, by a vigilante posing as an FBI agent. The killer got the victims' names, address and photographs from the Whatcom County Sheriff's Sex Offender Notification Web Site.

In letters to *Seattle Times* reporter Mike Carter, Michael Anthony Mullen, 36, confessed and even bragged about murdering Victor Vazquez, 68, and Hank Eisses, 49. Mullen claimed that he was sickened and prompted to vigilante action when he learned the details of notorious case of Joseph Edward Duncan III, 42, a Tacoma, Washington, sex offender who is accused of having murdered three members of the Groene family in Coeur d'Alene, Idaho, in order to kidnap their two children to sexually abuse them. The body of one child, Dylan, 9, was recovered from a Montana campground. His sister, Shasta, 8, was rescued on July 2, 2005, at a restaurant in Coeur d'Alene.

The details of how the burly 6'-5" goateed and tattooed Mullen gained access to the Bellingham where the murders took place are well known. Eisses owned the small blue house with a white picket fence and had been renting a room to Vazquez. Both lived there quietly for over three years. Recently, another registered sex offender who had been released from prison five years earlier, James Russell, 42, had rented another room from Eisses. Russell was at home when Mullen arrived, wearing a blue jumpsuit and FBI-logo cap. Mullen claimed to be an FBI agent investigating the internet posting of a "hit list" of registered sex offenders as a possible hate crime. Mullen then "interviewed" the three. Russell soon had to leave for work. When he returned, he found his roommates dead of bullet wounds to the head.

Mullen stayed in the house about two hours "interviewing" the men. He then called the same woman, an unknowing accomplice, who had given him a ride to the house, to pick him up. Mullen claims that he allowed Russell to leave because he showed remorse and murdered the others because they appeared to be bragging about their crimes. Mullen turned himself in on September 5, 2005, after having written several letters to media outlets threatening to kill other Washington state registered sex offenders. Prosecutors

contest Mullen's version of events. They assert that he came to the house with the intent of murdering the men and that his claiming they expressed no remorse is merely his attempt to justify his deeds. Either way, Mullen claims he murdered the victims to send a message to other registered Washington sex offenders that abuse of children would not be tolerated.

This abuse of the information in the sex offender web site has led to a discussion on the sex offender registration laws Washington has had on the books since 1990. Washington was the first state to enact such a law, but the federal government has since required all 50 states to pass sex offender registration laws.

John Q. La Fond, retired law professor from the University of Missouri-Kansas City, believes the sex offender registration law should be repealed. Arguing on the behalf of the ACLU, he noted that research has proven sex offender registration and notification laws do not reduce the number of sex offenses or make the crimes easier to solve. Instead, it virtually "invites society to take the law into their own hands." He referred to the laws as

"symbolic but futile gestures" of a society grappling with a "complex problem."

Indeed, in this case, the vigilante punishment was inflicted on two sex offenders who had been living quiet lives, obeying all the laws, rules and regulations set down by the state for them. At the time his crimes were committed, Duncan was on the run for failing to register as a sex offender. Thus, it seems that the sex offender registration and notification laws may merely serve to make targets of the sex offenders who are obeying the law while doing nothing to help apprehend those who are violating the law.

Mullen, who has a long criminal history, mostly for nonviolent felonies such as theft and bad checks, now claims that his goal is to die before Duncan so he can "be there when he arrives." Mullen's announced intention was to plead guilty and seek the death penalty. Instead, on March 10, 2006, Mullen pleaded guilty to two counts of second degree murder and was sentenced to 44 years in prison. ■

Sources: *Seattle Times*, *Associated Press*, *Seattle Post-Intelligencer*, *Houston Chronicle*, *Los Angeles Times*.

NY State Prisoner Receives \$400,000 Liver Transplant

by John E. Dannenberg

An NBC News I-Team 10 investigation caused considerable media controversy when it reported that a New York state prisoner with end-stage liver disease had received a \$400,000 liver transplant in November, 2005, at state expense. This is significant because most states will not approve transplants for prisoners.

Prisoner Wilfredo Rodriguez, convicted of a string of robberies which involved one victim being shot to death, is doing 8 1/3 to 25 years at maximum security Wende Correctional Facility. Aware that he has become the center of a medical ethics debate, he agreed to talk to I-Team 10's Brett Davidson about it.

In New York State, the liver transplant waiting list is 2,200 people long. Many will die awaiting a donor. The purported ethical question is whether a prisoner who took a life should be

entitled to have his life saved at state expense. Rodriguez, who had perhaps two months to live without the donor organ, said he felt that everyone should be entitled to medical care, regardless of their status. A prior non-prisoner recipient, Ronald Goehle, disagreed, stating that he would draw the line for one who has taken a life.

But the United Network for Organ Sharing, which oversees organ donor waiting lists, puts prisoners on equal humanitarian footing. Dr. David Kaufman, medical director of Strong Memorial Hospital where Rodriguez received his transplant, stated, "You get a liver transplant because you meet the very strict criteria, not because we like you," noting that the sickest people get priority.

But Rodriguez' situation will likely be repeated with other prisoners, who

languish ever longer in prison under harsher sentencing guidelines while suffering disproportionately from Hepatitis-C, a leading cause of liver transplants. Assemblyman Joe Errigo, defending against taxpayer liability for transplants, opined that "it will break the bank." He felt that dying for want of

an organ transplant was a "consequence of being in prison."

When asked if he thought that people might tear up their organ donor cards if they knew their organ might go to a prisoner, Rodriguez answered, "It shouldn't matter. If they're giving it up... there shouldn't be no preference."

Rodriguez has much to be thankful for. He is eligible for conditional release in May 2006, and said that his transplant gives him the chance to be a productive citizen once he has completed his sentence. ■

Source: *10nbc.com*

New York Prisoner Awarded \$2,500 for Delayed Eyeglasses

On February 9, 2005, a New York court of claims awarded \$2,500 to a state prisoner whose replacement eyeglasses were delayed for 10 months.

Marc Herouard, a prisoner at the Fishkill Correctional Center, discovered on February 7, 2001, that his eyeglasses had been broken in storage while he was confined in the special housing unit. The New York Department of Correctional Services agreed to replace his glasses, but he did not receive them until December 4.

Herouard sued the state of New York, pro se, alleging that the prison failed to replace his glasses in a reasonable amount of time. He contended that his sight deteriorated as a result of the

delayed replacement and that his request for a job change from his assignment as a law library clerk, which he claimed caused him to have blurry vision and headaches, had been denied. He presented no expert testimony.

The prison health services director testified that the lack of glasses would not have caused blurry vision, but that Herouard's headaches may have been caused by eyestrain. He also testified that prisoners usually receive glasses one month after they are ordered, and that a delay of even 3 months was excessive.

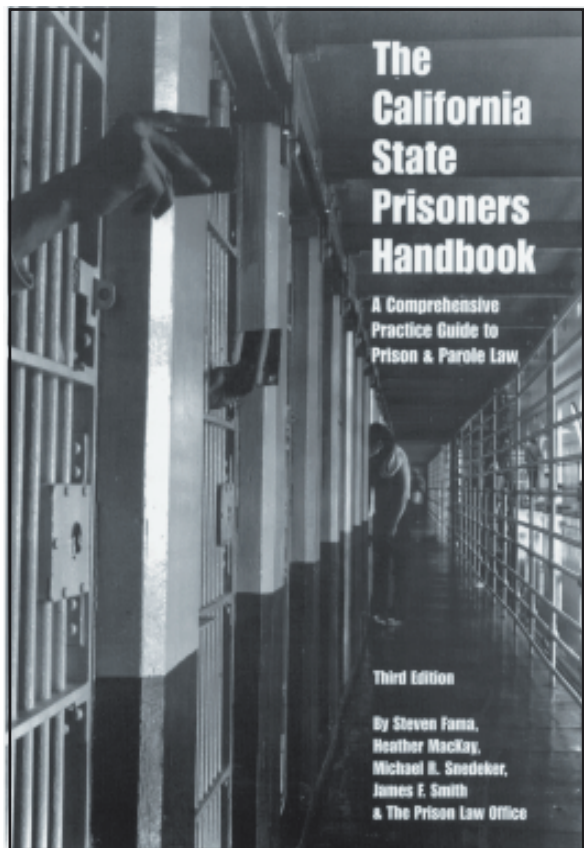
Judge Terry Ruderman concluded that Herouard had failed to prove that his sight deteriorated from his lack of

glasses. However, she further ruled that the prison caused him discomfort by failing to provide his glasses in a timely manner. Accordingly, she awarded him \$2,500. See: *Herouard v. State of New York*, White Plains Court of Claims, Case No. 104423. ■

Source: *VerdictSearch New York Reporter*

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News in Brief:

Arizona: On July 10, 2005, Jerry Booker, 57, a guard at the Arizona State Prison Complex-Eyman in Florence was pistol whipping and threatening to shoot Nyeema Irby, 23, to collect a \$50 drug debt Irby owed him when Irby pulled his own pistol and shot and killed Booker.

Arkansas: On April 10, 2005, Curtis Parks, 28, a guard at the Ouachita River Unit prison in Malvern was arrested when prison officials discovered him smuggling 4.8 ounces of tobacco and an ounce of crack cocaine into the prison.

Burundi: On March 28, 2005, 20 to 30 prisoners escaped from the main prison in Ruyigi by climbing over the walls at noon. Prison guards shot and killed five prisoners and wounded one during the escape. Most of the prisoners have been convicted on charges of genocide for participating in massacres in 1993.

California: On January 11, 2005, Rohnert Park police arrested Forrest Mills, 44, a guard at the Pelican Bay State Prison in Crescent City on one count of assault with a deadly weapon for shooting at a homeless man after the homeless man shouted at Mills to slow down while driving. Police arrested Mills at a nearby Target store where he was shopping with his family and found a loaded Glock 9 mm pistol in his pick up truck.

California: On July 15, 2005, 20 prisoners in the Riverside County Jail stuffed their cell toilets and flooded their cell block. Officials locked down the jail for 12 hours. Officials claimed the prisoners were "upset with each other."

Colorado: On June 1, 2005, Gregory Joiner, 43, a prisoner in the Administrative Maximum section (ADX) of the US Penitentiary in Florence died of injuries he sustained in a fight with another prisoner on May 27.

Connecticut: On April 6, 2005, Jose Rivera Sanchez was arrested in Waterbury after being on the run for more than 11 years. Sanchez had been one of ten prisoners to escape from the Bayamon Regional jail in Puerto Rico by digging a 100 foot tunnel with spoons and their hands. Eight of the escapees were quickly recaptured but Sanchez and another prisoner, who is still unaccounted for, were not. Sanchez had been arrested on drug charges in Connecticut in 1998 and 2001 but no one in Puerto Rico had given his fingerprints to the FBI. When that occurred in 2005 a

match was made leading to his arrest.

District of Columbia: In July, 2005, the Bureau of Prisons announced that it would install electrified perimeter fences at prisons in Coleman, Florida; Tucson, Arizona; Terre Haute, Indiana; Hazelton, West Virginia; Pine Knot, Kentucky and Pollock, Louisiana. The fences deliver lethal doses of electricity when touched.

District of Columbia: On June 29, 2005, an unidentified 33 year old federal prisoner in the Bannum Place work release center was shot to death. The halfway house is operated by the private company Bannum Inc., on contract for the Bureau of Prisons. Police were annoyed that security cameras in the facility were not working and did not record the shooting.

Florida: In April, 2005, the Broward County Sheriff's office and the state Department of Corrections announced the donation of computers, medical supplies, sanitation products, an x-ray machine and medical equipment to the Haitian Prison Authority to help run the Haitian prison system. Apparently local and state tax payers can afford to run not only their own prisons and jails but those of neighboring countries as well.

Florida: In July, 2005, an outbreak of tuberculosis at the women's Lowell Correctional Institution resulted in 3,100 prisoners and employees being tested for tuberculosis and resulted in three confirmed cases of the disease and five suspected cases.

Louisiana: In April, 2005, Richard Chambers, a former policeman and head of the Orleans Parish district attorney's unit on child support enforcement, resigned when he finished last in an election for court constable when it came to light during the campaign that he was over \$11,000 in arrears on his own child support payments.

Louisiana: In May, 2005, Jason Thibodeaux, 24, a guard at the Louisiana State Penitentiary in Angola was arrested after prison employees discovered him smuggling 129 grams of marijuana into the prison.

Mexico: On April 14, 2005, Jose Contreras, 25, and his brother Jorge, 31, both US citizens, were stabbed to death by other prisoners in the CERESO II prison in Nuevo Laredo.

New Jersey: In July, 2005, Ocean County jail guard Richard Peterson Jr.,

49, was charged with raping two female prisoners at the jail as well as official misconduct. This is not Peterson's first brush with the law. In 1995, he was charged and acquitted of raping an estranged girlfriend. He was found guilty of violating a restraining order in that case but kept his job as a jail guard.

New Jersey: On June 1, 2005, Troy Cates, 37, a state prison guard, was arrested and charged with videotaping members of his family while they used the bathroom.

New Jersey: On June 22, 2005, former Morris county jail prisoner Karen Ryerson, 42, and Leslie Harwell, a food employee of Aramark who works in the jail cafeteria, were arrested in charges of heroin distribution. Police claim Harwell brought heroin into the jail to sell to prisoners and Ryerson was Harwell's supply source.

New Mexico: On July 12, 2005, David Nicholson, 29, a guard at the San Juan County Juvenile Detention Center was sentenced to 12 years in state prison after pleading guilty to soliciting first degree murder, bribing a witness and contributing to the delinquency of a minor. Prosecutors claimed Nicholson set up his own gang among the children prisoners and ordered them to retaliate against rival gang members who were then beaten in their cells or showers.

New Mexico: On July 8, 2005, Scott Richter, a guard at the Bernalillo County jail was arrested on charges of extortion, criminal sexual contact and receiving illegal kickbacks. Richter was employed in the community custody program where he monitored prisoners wearing ankle bracelets. Police claim Richter would take money, gift cards and football paraphernalia in exchange for allowing prisoners to fail drug tests. He also apparently sexually assaulted the wives and girlfriends of prisoners.

New York: On April 6, 2005, Anthony Simpson, 36, a guard at the Rikers Island jail was arrested and charged with defrauding the city welfare system by setting up phony housing accounts whereby crooked city employees would sent rent checks to fake landlords to pay for housing for homeless welfare recipients who had no idea their names were being used in this manner. The scam took in more than \$130,000 over a three year period according to police.

Ohio: In March, 2005, Major John Morrison, the head of security at the Mansfield Correctional Institution was demoted to Lieutenant and his pay reduced by \$17,829 a year from \$71,241 a year and Ronald Pawlus was demoted from death row unit manager to store keeper, a pay drop of \$21,583 a year. The discipline was in response to the attempted escape by two death row prisoners on February 3, 2005. Ten other prison employees, including the warden Margaret Bradshaw, were disciplined in the incident. Investigators learned that prisoner informants had told Pawlus of the upcoming escape and he did nothing.

Oregon: Unable to find housing for convicted sex offenders in Polk County, district attorney John Fisher in April, 2005, sought permission to house up to 15 sex offenders a year, for no more than 60 days, in his home until they can find employment and housing on their own. Fisher said he hoped this would move the county to find a solution to short term sex offender housing. "Some means need to be found to transition these people back to society," he said. "From a gut perspective, I'm probably less afraid than the general public of these people. Rightly or wrongly, they are seen as inhuman monsters, but mostly they're pathetic human beings."

Pennsylvania: On June 2, 2005, Theodore Mason, 35, a prisoner at the Westmorland county jail was sentenced to 10 to 20 years after being convicted of assault for biting off the ear of his cellmate, Adrian Alleyne. While awaiting sentencing Mason was involved in a fight with another prisoner at the jail, this time he bit off a portion of his own tongue.

Texas: In July, 2005, federal prisoners Todd Christian, 26, Arzell Gully, 34 and David Jackson, 45, escaped from the Correctional Services Corporation run Beaumont jail while awaiting trial on charges they murdered another federal prisoner in 1999. All three were later recaptured. The prisoners used pepper spray and a homemade shank to escape from the jail.

Texas: On April 26, 2005, Roberto Ballones Jr., 32, a prison guard with the Texas Department of criminal Justice, was sentenced to 15 years in federal prison after being caught driving 45 pounds of cocaine from the Mexican border to the parking lot of the state prison in Hondo. Two other prison guards, Javier Cisneros and Daniel Mendoza, had already been sentenced for their role in the scheme.

Texas: On July 12, 2005, Homer Brown, 34, attempted to escape from the Chambers County jail by jumping from the roof of the jail's recreation yard. Brown broke his ankle and two toes in the jump and hobbled 200 yards before being recaptured.

Vermont: In April, 2005, the Department of Corrections unveiled a new complaint hotline that can be called by prisoners and staff with complaints 24 hours a day, seven days a week. Within 72 hours more than 100 prisoners had made complaints. The system was instituted after a governor's investigation concluded that all too often Vermont prisoners' complaints went unheeded leading to several suicides and medical neglect deaths.

Virginia: In July, 2005, Stephen Greenlee, 34, was sentenced to five years in prison with all but six months suspended after pleading guilty to involuntary manslaughter stemming from the death of Glenn Schlomer, 20. On August 27, 2004, Greenlee punched Schlomer in the face while they were both imprisoned in the Virginia Beach City jail, Schlomer fell unconscious and hit his head on the concrete floor and died. Greenlee denied he intended to harm Schlomer and testified he was only acting in self defense. This is not the first time Greenlee had killed someone with his bare hands. In 1998 he was attacked by two men in a strip club parking lot in Nashville, Tennessee, when he punched one man who later died from the blow. Two punches, two deaths.

Washington: On April 7, 2005, Seattle public defender Theresa Olson was suspended for two years from the practice of law by the state Supreme Court for engaging in sexual conduct with client Sebastian Burns in a Seattle jail attorney visit room in 2002. Burns was later convicted of three counts of first degree murder. Washington's Rules of Professional conduct prohibit sexual relationships between attorneys and their clients.

Washington: On July 12, 2005, Jon Hines, a guard at the King County jail in Seattle was charged with choking his wife in their home.

Washington: On March 24, 2005, Charles Smith, 56, a state parolee allegedly raised a shotgun towards Mason county sheriff's deputies and three Department of Corrections parole officers who were attempting to arrest him on parole violation charges, was shot twice by police and died. Smith had a lengthy history of mental ill-

ness, violence and imprisonment.

Washington: On September 23, 2005, Richard Welty, 36, a guard at the Airway Heights Correctional Center, was sentenced to 34 months in prison after pleading guilty to two counts of third degree child rape. Welty confessed to having sex between 6 and ten times with a 13 year old girl over a two year period, including in front of her 11 year old sister and a 12 year old friend. Welty met the victim in an internet chat room and told her he was 26 and his name was "Chad." Welty thanked the victim's mother for reporting his rape of her daughter to police and claims he has had a "religious experience that changed his life."

Wisconsin: On March 28, 2005, Green Bay Correctional Institution guards Russell Kuchta, 29, Linn Kamin, 31 and sergeant Robin Norton, 37, were charged with misconduct in public office, battery and disorderly conduct for harassing an unidentified prisoner at the facility by, among other things: going to his cell, wrestling with him, holding him down and tickling him, and made sexual comments to him. Norton also kissed him on several occasions while the other guards held him down. ■

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Low Pay Drives Tennessee Guards to Smuggle Drugs, Contraband into Prisons

Tennessee lawmakers are complaining that their prison guards are helping to drugs and other contraband into the state's prisons. They specifically are bemoaning that those guards are being allowed to quit or resign without facing criminal prosecution when caught.

Tennessee employs more than 2,400

employees in its 15 prisons. Salaries begin at just over \$21,000 a year.

Lawmakers' position that guards caught smuggling without facing prosecution are misfounded. Of 17 guards that were terminated or resigned for drug violations since the beginning of 2004, more than two thirds were prosecuted criminally. Eight of those were accused of smuggling drugs into prisons. One guard smuggled 2 pounds of marijuana to prisoners.

Tennessee Department of Corrections (TDOC) officials say the failure to prosecute all guards terminated for drug violations is due to lack of evidence or the local prosecutor not pursuing charges. One lack of evidence case involved a guard who had marijuana seeds found in his vehicle, which was insufficient for a possession conviction.

An example of a guard smuggling to supplement his income involved Jamie Bizzle, 27. Drugs and other contraband were mailed from a prisoner's home to Bizzle's home in Newbern. One shipment contained

a \$100 money order and a \$20 bill.

The discovery of these actions cost Bizzle his job and disqualified him from working for the state in the future. "That was fair," said Bizzle. "I regret that and it wasn't right what I had done. At the time, I was living off \$750 a month, basically. That's not much when you're trying to raise four kids and (have) a wife. It ain't too easy. (I was) thinking about giving money to pay bills."

To keep drugs from entering prisons, Tennessee legislators appropriated \$480,000 for six drug-sniffing dogs. The legislator, however, said it did not have \$19 million to bring Tennessee guards' pay up to that or their counterparts in the Southeast.

The TDOC seemed to have no regard for the pay of its employees. "Some employees are going to make the wrong choices regardless of pay, training, or the law," said TDOC spokesman Amanda Sluss. ■

Source: *The Tennessean*

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Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news

about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

Western Prison Project

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Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$11.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

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States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World, by Danny Cox & John Hoover, 256 pages, \$14.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

BOP Occupational Training Programs Directory, 124 pgs. \$10.00. Directory listing vocational and education programs available to prisoners in every federal prison. Includes contact info for BOP national, regional and CCM offices, and BOP facilities. Invaluable if considering a training or education transfer. 1053

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Dedicated to Protecting Human Rights

March 2006

Federal Court Seizes California Prisons' Medical Care; Appoints Receiver With Unprecedented Powers

by Marvin Mentor

The California Department of Corrections and Rehabilitation (CDCR) is forcefully having its failed healthcare system both corrected and rehabilitated. Despite court-ordered healthcare remediation and monitoring over the past 25 years, CDCR's performance continued to fail Eighth Amendment standards proscribing cruel and unusual punishment. Citing continuing preventable prisoner deaths in CDCR at the rate of 64 per year, a frustrated but undeterred Senior U.S. District Court Judge Thelton E. Henderson stripped the \$1.2 billion CDCR healthcare authority from then Corrections Secretary Roderick Hickman and, after appointing

interim receiver John Hagar in November 2005, appointed highly acclaimed health administrator Robert Sillen, 63, on February 14, 2006, to take control. Effective April 17, 2006, Sillen will begin his \$650,000/yr. post to take over CDCR's healthcare by hiring his own management team.

Judge Henderson's February 14th order granted Sillen the unprecedented power to hire, fire and discipline staff; to make and break contracts; to write and discard policies; and to control every healthcare dollar he orders used for CDCR's 160,000 prisoners. "If a state law, regulation or contract, including labor agreements [read: the powerful prison guards union (CCPOA)], blocks his way, Sillen may simply ask Henderson to waive it," the order said. CDCR's only remaining healthcare function is to fund the checks that Sillen writes. Sillen can even build new medical facilities and charge it to California's treasury.

But even this action may not be Judge Henderson's final blow. If CDCR custody operations (i.e., the normal prison warehousing function) interfere with Eighth Amendment-dictated healthcare delivery, the Judge warned he would not hesitate to seize all of CDCR to obtain the constitutionally required results.

CDCR Has Priors

Failed healthcare in CDCR has necessitated repeated court oversight. From 1985-1995, San Quentin State Prison was under a consent decree specifying minimum healthcare standards. (*Marin v. McCarthy*, U.S.D.C. (N.D. Cal., Case No. C-80-00012 MHP.) Beginning in 1989, CDCR's prison hospital, the California

Medical Facility (Vacaville), was placed under continuing control and monitoring by *Gates v. Deukmejian*, U.S.D.C. (E.D. Cal.), Case No. CIV-S-87-1636 LKK JFM. A 1987 settlement agreement was inked to properly care for pregnant prisoners at the California Institution for Women (CIW). (*Harris v. McCarthy*, U.S.D.C. (C.D. Cal.), Case No. CIV-85-6002 JGD.)

In the 1990's, improvement in women prisoners' medical care was ordered at the Central California Women's Facility and at CIW. (*Shumate v. Wilson*, U.S.D.C. (E.D. Cal.), Case No. CIV-595-619 WBS PAN.) Severe mental and medical healthcare injuries were abated by Judge Henderson at California's supermax Pelican Bay State Prison beginning in 1995. (*Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995).) A statewide deficiency in mental health care was ordered fixed in *Coleman v. Wilson*, 912 F.Supp. 1282 (N.D. Cal. 1995). CDCR's malevolent disregard for healthcare also spilled over into failure to accommodate prisoners' disabilities as protected under the American with Disabilities Act (ADA) and the Rehabilitation Act (RA). See: *Armstrong v. Davis*, U.S.D.C. (N.D. Cal.), Case No. C-94-2307 CW; *Clark v. California*, U.S.D.C. (N.D. Cal.), Case No. C-96-1486 FMS. And all of the above were just the *class action* healthcare complaints. The individual cases for money damages and injunctions are not included.

Statewide Healthcare Protocol Ordered

Nonetheless, after suffering this withering litany of court lashings, CDCR still didn't "get it." In Spring 2002, they settled

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California Receiver (cont.)

a statewide medical care suit affecting all CDCR prisoners not already under federal court decrees. (*Plata v. Davis*, U.S.D.C. (N.D. Cal.), Case No. C-01-1351 TEH.) Later renamed *Plata v. Schwarzenegger*, this case morphed into increasingly binding agreements as each prior one failed to convince CDCR to deliver what the court expected. In 2003, CDCR was ordered to phase in major improvements in its 33 prisons on a court-approved four-year schedule. Detailed in a 1,000 page Policies and Procedures Manual, the plan covered specified needs for Reception Centers, sick call, specialty clinics/consultations, Urgent/Emergency response, infirmary care, preventative care, chronic care, diagnostic services, medication, medical diets, transfers and quality monitoring ("QMAT"). Later, protocols were added for TB, HIV, and HCV (hepatitis) treatment.

But this massive plan proved more than CDCR could deliver on. When the first phase of implementations was "done," Judge Henderson inspected nearby San Quentin. He was "horrified" and angry with what he saw. His observations noted a dentist, without washing his hands, using the same glove when moving from one patient's mouth to the next. Clinical treatment rooms had no running water where staff could wash up between patients. Hospital rooms were dank and filthy. Sewage water leaked from one floor to the next. Many hundreds of Reception Center technical parole violators were "housed" on bunks on the floors of the cell blocks, only 12" apart. [This had been a deliberate overpopulation gimmick ("bed-vacancy-driven recidivism") to drive guard overtime to \$1 million per month at San Quentin.] Judge Henderson ordered then-CDCR Director Jeanne Woodford to eliminate those unfit beds immediately. And this is what occurs when a judge is conducting an inspection visit.

The Judge was further concerned by prisoner complaints of transfer in lieu of treatment. Since prisoners in most other prisons were not yet "phased in," San Quentin prisoners whom QMAT technicians deemed needed treatment were instantly put on a bus to facilities with *less* medical care, for the most part, than at San Quentin. Prisoners taking just cholesterol medication were hastily slated for transfer. A life prisoner with high blood pressure (under control with

medications) was whisked to Solano State Prison to live in a triple-bunked dorm, where he saw no doctors and got no medication for weeks. A terminal Hepatitis-C patient who needed a hernia operation and a liver transplant was swept up and taken to rural Soledad State Prison. One "high risk" patient was sent to remote Pleasant Valley State Prison where it was known that they had *no* doctors presently on staff. Thus, the "quality" monitors were actually just doing political damage control. Instead of bringing healthcare to the needy, they removed the needy from their ongoing healthcare, and more importantly, from the court's then-current Phase 1 oversight.

After complaints mounted over the 109 instant transfers ordered at San Quentin, the mass exodus quietly subsided and some improvements were made. The floor bunks were decommissioned (with occasional violations that were hidden from the visiting Inspector General). New blood pressure monitors were purchased. Nurse stations were manned.

But still the system faltered. Doctors' orders were not followed. Surgeries and liver biopsies were delayed or simply canceled. Specialty clinics (outside consultant doctors) were canceled. Many staff quit, including doctors and nurses.

The problem was not unique to San Quentin. CDCR admitted it had 150 doctor vacancies. In addition, CDCR's statewide vacancy rate for registered nurses was 24%. Other openings were: medical technical assistants, 22%; clinical psychologists, 17%; psychiatric technicians, 15%; and psychiatrists, 25%.

Court Warnings Were Clear

Prior to lowering the boom, Judge Henderson gave CDCR ample warning. The threats were not made in an attempt to wield power, but to stem the unabated string of preventable deaths of CDCR prisoners. In his May 10, 2005 Order to Show Cause re Civil Contempt and Appointment of Interim Receiver, the judge referred to a "shocking" February report given by court-appointed experts detailing "widespread evidence of medical malpractice and neglect." [See related story in this issue of *PLN* on the court experts' findings at San Quentin.] They found that 34 of 193 prison deaths in recent years were "highly problematic." And that was for the death records that could be located. The court stated bluntly, "The Governor has appointed,

California Receiver (cont.)

and the State has hired, a number of dedicated individuals to tackle the difficult task of addressing the crisis in the delivery of health care in (CDC), and despite the best efforts of these individuals, little real progress is being made. The problem of a highly dysfunctional, largely decrepit, overly bureaucratic, and politically driven prison system, which these defendants have inherited from past administrators, is too far gone to be corrected by conventional methods.”

The court went on, “The prison medical delivery system is in such a blatant state of crisis that in recent days defendants have publicly conceded their inability to find and implement their own solutions that will meet constitutional standards. The State’s failure has created a vacuum of leadership and utter disarray in the management, supervision, and delivery of care in the Department of Corrections’ medical system.” ... “In light of this crisis and the defendants’ concessions that the constitutional violations will not be corrected for a long time to come, the Court is compelled to take upon itself to construct a remedy that will cure the violations as soon as possible.” The court was highly critical of the “emerging pattern of inadequate and seriously deficient physician quality,” a reference to the many CDCR doctors who had questionable credentials or checkered pasts (19% according to an audit). The Order to Show Cause asked why an interim receiver should not be appointed and set the matter for hearings, with a decision projected by July 11, 2005. State Senator Gloria Romero, a CDCR critic, welcomed the court’s action. In a stunning admission of political and bureaucratic failure, then CDCR Secretary Roderick Hickman conceded that CDCR was unable to manage its medical system.

Horror Stories Continue

Meanwhile, horror stories continued to surface. A prisoner injured in a fight at Salinas Valley State Prison in June 2000 who couldn’t move was not treated because the doctor accused him of “faking it.” The doctor shot him up with a placebo solution to “make him stronger.” Later examination revealed need for cervical fusion that left the prisoner a quadriplegic. The doctor, Dr. Isaac Grillo, was suspended by the Medical Board. A

prisoner with lupus (autoimmune disease) entreated prison officials not to transfer him to a prison with no lupus specialist. But they did anyway, where he was housed in an overcrowded gym with no treatment whatever; after nine months of begging, he was finally transferred again. A prisoner at Pleasant Valley State Prison who waited a year to get his colonoscopy could not undergo the test because by then his tumor mass was so large the scope could not pass through. Separately, a doctor prescribed anti-psychotic medication for a prisoner struggling to breathe with pneumonia. Yet another doctor, whose license had been suspended for seven years due to alcoholism and incompetence, was appointed vice-chairman of a prison’s medical care review committee.

“It is a disaster,” admitted the doctor’s union executive director Gary Robinson. Michael Pickett, former deputy director of CDCR who oversaw healthcare, called CDCR healthcare “a wreck,” adding, “I wouldn’t go to a CDC doc for nothing.” Dr. Michael Puisis, court-appointed expert, testified on his findings for four hours in a May 2005 court hearing, calling the system “anarchy” in which doctors do what they want, without supervision. He described an absence of record keeping, incompetent doctors, filthy conditions and a lack of equipment and supplies. Donald Specter, attorney for the prisoners, called their treatment “cruel.”

On July 1, 2005, Judge Henderson, shouldering the moral responsibility lacking in CDCR, took the unusual step of orally ruling from the bench that he would appoint a receiver, accountable only to him. “We’re dealing literally with life and death.” Doctors’ union vice-president Gary Robinson said “the judge made a very good decision.” Lance Corcoran, vice president of the powerful California Correctional Peace Officers Association (CCPOA), the guards’ union, expressed frustration, “In many ways [prisoners] receive better health care than our elderly and our veterans.” Robin Best, a former psychiatric nurse at Mule Creek State Prison, called the ruling “Good news. They were never going to change the system until somebody forced them to.” Then Secretary Hickman said, “The taxpayers of this state can’t afford to keep paying for repeated lawsuits that result from ... inadequate healthcare [and] poor mental health treatment.” Ebullient *Plata* prisoners’ attorney Specter said, “It’s certainly everything we asked for.” Michael Jacob-

sen, director of the Vera Justice Institute, noted that to make things work, the receiver would have to invoke deep changes reaching into the very culture of prison operations. Judge Henderson, “quietly passionately” reciting for a half hour a trail of mostly broken promises made by previous CDC authorities dating back 25 years [“at times outright depravity, and I intentionally call it that”], observed that “Medical care needs to be elevated to a higher level and freed from control of custodial personnel,” an ominous warning of possible future takeover measures. “My decision to establish a receivership is just a start.”

Pundits estimated that short-term added costs could reach \$100 million per year. These costs were for doctors, nurses, pharmacists and top-level managers, plus a new computerized records tracking system. Prison doctors currently average \$134,000 per year, but it may take another \$30,000 to make their pay competitive and attract good doctors. Yet, with the aging prisoner population, non-parole of lifers and increasing sentences from “three strikes,” costs could easily double from the current \$1.2 billion tab.

Court Appoints Prison Expert

On October 3, 2005, the court issued a 53 page finding in which it concluded, “there is a single root cause of this crisis: an historical lack of leadership, planning and vision by the State’s highest officials during a period of exponential growth of the prison population.” Judge Henderson issued a parallel order immediately appointing John Hagar as Correctional Expert to the Court. Hagar is familiar to California prisoners; he was the special master that Judge Henderson appointed to handle the federal court’s intervention at Pelican Bay State Prison (*Madrid v. Gomez*, supra). Hagar’s number one task was to conduct a nationwide search to find a permanent receiver. He also had the immediate task of coordinating the hiring of physicians and nurses; vacancy rates for nurses at some prisons ran up to 70%.

The 53 page Findings of Fact and Conclusions of Law re Appointment of Receiver summarized the sordid picture of poorly equipped and unsanitary medical facilities, accompanied by haphazard medical and financial record-keeping. Judge Henderson’s unswerving focus was clear: a state-run healthcare system that needlessly kills one more prisoner every six to seven days (a pace that quickened

to one per day in the Spring of 2005) cannot possibly be said to meet Eighth Amendment standards, and if the state won't stop the "unconscionable degree of suffering and death" behind the walls of the 33 CDCR prisons, the court will. The court carefully recounted the historical precedent for receivership, tracing it back to the English Chancery Courts in 1740, invoking the standards therefrom to test for (1) threat of harm, (2) least intrusive means (including lack of effective alternative remedies), (3) continued delay, (4) lack of CDCR leadership, (5) bad faith, (6) wasted resources, (7) likelihood of quick and efficient remedy and (8) other considerations relating to "democratic debilitation" and the lack of political will. The only weapon the court reserved was to hold a contempt citation in abeyance.

One week later, more healthcare gridlock was reported at Soledad State Prison. Guards entered the infirmary waiting room on October 15, 2005 and cleared out all the Blacks waiting for their X-rays. The object was to separate them from Latinos, whom they had had fist fights with recently. But the Blacks lost appointments they had waited months for. This is the classic CDCR problem: custody overrules medical staff, and the prisoners suffer for it. Meanwhile, a local hospital wanted to send back a prisoner dying of liver disease, but Soledad had no facilities to care for him. They scrambled to find another prison that did, while the \$50,877 hospitalization cost for the first 11 days continued to mount.

By November 3, the court realized that "searching" for a receiver needed professional help, and hired Korn/Ferry International to do the job. Korn spokesman Mark Collins said there were lots of candidates, and they were moving with "great speed."

Court Expert's Survey Is Chilling

On November 14, 2005, Correctional Expert Hagar issued his 33 page report on clinical staffing. His findings were chilling. Of the 476 registered nurse positions in CDCR, 300 were vacant despite the use of extensive and expensive contract registry personnel. In court evidentiary hearings in June 2005, CDCR's Director of Health Care Services Dr. Renee Kanan stated that the physician vacancy rate was 150. But by the date of the report (November), the rate had more than doubled. (Pleasant Valley State Prison had but one state doctor for its 6,000 prisoners as of October 11,

2005, yet QMAT transferred "high risk" patients there from SQ.)

Hagar pointed out a fallacy in the accounting of healthcare personnel. He distinguished between Primary Care Providers (PCP), doctors and dedicated specialists (e.g., neurologists, gynecologists) and found that since a preponderance of initial diagnosis and treatment falls to PCPs, *their* reduced numbers masked the true loss of general access to medical care. The problem worsens when one notes the segregated yards at each prison (Corcoran State Prison has 11 clinics alone, for example) and the inability to cover all bases with such severe PCP shortages.

Hagar found that in fact as of November 14, 2005, the staffing crisis had *worsened* since his October 3 appointment, and cited three causative factors. (1) CDCR failed to hire more doctors than it lost. (2) Although CDCR implemented its proposed Quality in Corrections Medicine (QICM) evaluation program to screen existing doctors and potential new ones, the program backfired. Only two existing doctors were found unsuitable for practice, but 60 quit rather than take CDCR's homespun QICM "test." Moreover, CDCR did nothing to stream-

line the bureaucracy of hiring -- often a six month process. Hagar then detailed his plan for effective hiring, including the concept of "posts" for physicians, where sufficient staff are hired to man prison clinics 24/7, just like guards' "posts." Hagar concluded that since "State officials have no coherent or realistic plan to implement corrections actions,... it has become apparent that without orders from the court, [CDCR's] healthcare system may simply collapse."

Predictably, CDCR lawyers reacted by calling Hagar's quick fixes "too quick or costly to be legal or effective." In other words, "let us kill prisoners as usual and save the budget to cover the guards' 2001-2006 37% contract pay increase and overtime."

On November 28, 2005, Governor Schwarzenegger appointed two healthcare executives to oversee CDCR healthcare. Dr. Peter Farber-Szekrenyi, 61, became Chief of CDCR's Division of Correctional Healthcare Services, while Darc Keller, 58, was appointed to assistant secretary for healthcare policy. Requiring state Senate confirmation, the positions pay \$204,000 and \$119,100, respectively. Szekrenyi has 30 years experience in

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California Receiver (cont.)

healthcare administration, albeit none in detention facilities or government.

Judge Takes Gloves Off

But Judge Henderson then “took the gloves off.” He publicly challenged Schwarzenegger to pay for emergency reforms “the same way you find the money to build a tent to smoke cigars,” a sarcastic reference to the Governor’s response when the Legislature outlawed smoking in all state buildings. “Real people are really dying. ... Real action is needed,” the judge said.

An equally angry Senator Gloria Romero, then conducting Senate confirmation hearings for Hickman and Woodford, demanded answers to what happened to \$600 million in appropriations for prison salaries, and why CDCR was unable to pay for healthcare costs. Blindsided by these un-preannounced inquiries, Hickman and Woodford walked out of their confirmation hearing. “I’m not going to be as nice as the judge,” Romero threatened.

On December 1, 2005, Judge Henderson issued a 15 page order dictating to CDCR its new healthcare staff minimum pay scales and how to do its hiring. “They still fail to grasp the gravity of the crisis. I will not sit by while CDCR officials twiddle their collective thumbs,” he chastised. In general, doctors’ base pay was increased to \$154,000 and nurses’ pay to \$84,000. Judge Henderson gave the Governor five days to appoint a healthcare leader (Dr. Farber Szekrenyi). The judge then gave CDCR 14 days to implement a hiring program that would cut the doctor and nurse hiring process to five days, a process to be monitored so as to demonstrate a 90% compliance rate. Furthermore, all job applications must be reviewed with a hire/no-hire decision rendered within 10 days, also at a 90% compliance rate. Contract healthcare providers were ordered to be paid within 30 days. Credentials of their personnel were ordered to be verified within two days.

Next, the court ordered the Governor’s new healthcare director to make his initial status report to the court within 14 days. Finally, the court ordered on-site inspections by Hagar during January and February 2006, and the filing of a status report to the court by March 1, 2006 as to findings at the neediest prisons: Pleasant

Valley, High Desert, Corcoran, SATF, Valley State Prison for Women, Avenal, San Quentin and CIM.

On January 9, 2006, the court stated that it was “more optimistic than I’ve ever been in this case that the ship is turning in a positive way.” Dr. Szekrenyi reported that job offers had been made to 55 doctors and 180 registered nurses, most of which CDCR expected acceptances on. This would begin to close the gap of 76 doctor openings and 368 registered nurse openings. But court expert Dr. Puisis warned that new hires might quit unless proper supervision is offered.

Receiver Is Appointed

On February 14, 2006, Judge Henderson announced his hire of Bob Sillen, 63 as the court’s receiver. Presently retiring from a \$244,129/yr. post managing healthcare for California’s Santa Clara County, Mr. Sillen will report to work on April 17, 2006 to commence his new \$650,000/yr. position. His career experience includes healthcare for Santa Clara County jails and juvenile facilities. Rhonda Brown, executive director of clinics in Santa Clara county, praised Sillen as “progressive, innovative and aggressive,” predicting he will “rip [CDCR healthcare] apart and clean it up and put it back together again.”

Sillen told reporters that he would fire people to improve prison healthcare from its current “Third World” condition. “This state has a tendency to move at a snail’s pace for things they want to do and at a dead snail’s pace for things they don’t want to do,” he mused. Sillen was selected from four finalists nominated by Korn/Ferry. He will reportedly open offices in the San Jose area and hire a staff of 25 to manage the task.

More Than Healthcare Needs Curing

CDCR was studied by a blue-ribbon panel in 2004, reporting to Governor Schwarzenegger. It found that CDCR was simply “dysfunctional” and opined it would *never* get better if it didn’t gain outside civilian oversight. (See: *PLN*, Mar.’05, p.1, “California’s Corrections System Officially Declared Dysfunctional -- Redemption Doubtful.”) Although Schwarzenegger flatly rejected this oversight, he’s getting it anyway. While perhaps thinly disguised in Eighth Amendment clothing, Judge Henderson has forced just such civilian oversight now over healthcare.

But will it end there? This writer

believes not. There is an inherent incompatibility between the missions of custody staff (i.e., guards) and healthcare staff. “Custody” is an ingrained mentality bent on suppressing prisoner mobility. It’s problem is that it hides behind the farcical label of “corrections” (and, recently added, “rehabilitation”). But this is all a snow job by “tough on crime” politicians and the 800 lb. gorilla guards’ union (CCPOA). Simply stated, there is no mission, no goal and certainly no incentive to “correct” or “rehabilitate” so much as one CDCR prisoner. In fact, the incentive (\$8.2 billion/yr. and growing) is just the opposite -- garner more pay by keeping more people locked up and minimizing their chances of recovery if they are ever paroled.

To be sure, while Governor Schwarzenegger’s “cigar tent” has become the court’s symbol of what’s wrong at the top, the Governor is today proposing building two new prisons and locking up 83,000 more of California’s citizens. At the same time, Governor Schwarzenegger faces dismal poll ratings while running for reelection in November 2006. Adding to the mix is the CCPOA’s negotiation for a new guards’ contract effective June 2006. To prepare themselves, the CCPOA levied a special \$30/mo. dues add-on (making monthly dues \$103) to raise a “war kitty” of \$18 million to influence the election. Doubtless, drooling public servant election candidates will swoon to trade promises for dollars. At the end of the day, the near-term increase on prison spending in California -- medical and custody -- will probably surpass \$2 billion/yr. And yet, still no one will be “corrected” or “rehabilitated,” as a measured goal.

But the federal receivership points a way out of this conundrum. When the court hears that custody is impeding constitutional healthcare delivery, it will simply order the take-over of custody. Such a receiver would constitute the complete “civilian oversight” that Governor Deukmejian’s blue ribbon committee insisted was crucial. Then, and only then, might the “dysfunctional” CDCR be redeemed. See: *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), Case No. C-01-1351 TEH. ■

Other sources: *Los Angeles Times*; *Sacramento Bee*; *Associated Press*; *San Francisco Chronicle*; *San Jose Mercury*; *Inland Valley Daily Bulletin*; *Contra Costa Times*; SFGate.com.

Ten Deaths At San Quentin from “Macabre” Healthcare

by Marvin Mentor

San Quentin State Prison (SQ), a scant 25 miles from the San Francisco courtroom of *Plata v. Schwarzenegger* Judge Thelton E. Henderson, was high on the court’s agenda for improved medical care. [See related story, p.1.] In the four-phase *Plata* statewide healthcare improvement rollout, SQ was due to finish court-ordered upgrades by January 1, 2005. The court appointed nationally renowned experts Dr. Michael Puisis and Dr. Joe Goldenson, along with Madie Lemarre, CFNP, to inspect and evaluate SQ’s healthcare commencing January 24, 2005. Judge Henderson personally toured SQ with these experts on February 10, 2005. The experts’ shocking 53 page report to the court of “macabre” healthcare issued April 18, 2005.

We begin with its summary. “[SQ] is so old, antiquated, dirty, poorly staffed, poorly maintained, with inadequate medical space and equipment and over-crowded that it is our opinion that it is dangerous to house people there with certain medical conditions and is also dangerous to use this facility as an intake

facility. In addition, the overcrowding and facility life-safety and hygiene conditions create a public health and life-safety risk to inmates who are housed there. We therefore strongly recommend as a life-safety issue that a census cap be initiated, that the existing Outpatient Housing Unit be closed or used for a different purpose, and that the mission of reception be re-directed to a different facility. SQ should be viewed as needing to start from the beginning. It’s mission should be re-evaluated.”

Decrepit Housing Conditions

“Housing arrangements at SQ are so decrepit that it is degrading and dangerous to house human beings in them for extended periods of time. Hundreds of inmates crowd in long double tiers of double bunks in walkways called ‘broadways’ [where they] are subject to cascading material thrown down from the five tiers above them, including excrement.... Only two toilets were available for somewhere between one and two hundred inmates. ... There were no functional doors for those toilets. The rooms

were filthy. ... Sinks did not appear to work. There was no soap. ... Fire safety ... and local public health authorities should review these conditions.”

“Waste water [from leaking sewer pipes] drips ... onto the floor below creating pools of waste water that staff walk through.” In addition, “inmates take showers in standing water [due to plugged drains] and the water spills ... onto the walkway so that the nurse has to walk through it to get to the adjoining medical room. The [waste] water routinely creeps into this examination area.”

The prison hospital’s Outpatient Housing Unit’s (OHU) 32 cells have solid doors and no paging system. Not one cell can be heard or seen from the remote nurse’s station. One prisoner there had a heart attack and pounded helplessly on the door for hours before guards heard him and alerted healthcare staff. There is no examination room in the OHU, so examination of patients is done in the cells by healthcare staff who must kneel over the 18” high bunks, with no direct lighting. Mental health patients sleep on a mattress



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Medical Deaths (cont.)

on the floor. The cell doors do not admit wheelchairs. Custody severely restricted the schedule when healthcare staff could visit patients. The lack of beds meant sending critically ill patients back to general population, where some died.

The other 50 hospital beds (BHU) have an associated examination room. But BHU is mopped once a week by a prisoner porter, who also then empties the trash. No surfaces are ever sanitized. BHU houses 24 severely ill HIV patients.

Prisoners from general population North Block had sick call in a trailer in the main yard. The "waiting room" for up to 30 prisoners at a time was a locked toilet-less outdoor cage with a dozen chairs, where ill patients had to remain up to five hours in the rain or hot sun to see the doctor.

Death Row prisoners on the night watch were in special jeopardy, because security procedures kept cell keys "several blocks" from their housing, and required the Watch Commander to access them. This virtually ensured that a late night medical emergency could not gain prompt relief.

But these are highlights from only the first 15 pages of the 53-page single-spaced report. The balance of it reviewed ten SQ prisoner deaths and 26 other non-fatal medical files. The ten deaths are summarized below.

Prisoner # 1 went to the emergency clinic on January 28, 2005 at 2015 hours, complaining of an ongoing bad cough. His vital signs were consistent with shock, requiring immediate acute hospitalization. "Dr. X" [later identified as Dr. Garen Vong; see related story in this issue of *PLN*] diagnosed bronchitis and influenza, ordering Tylenol, Benadryl, cough syrup and antibiotics and sent him back to his housing unit. On the way back, he collapsed and was brought back to Dr. "X", who ordered an IV started. Staff was unable to start an IV, so he was returned to his housing unit. The next morning he was seen by a Medical Technical Assistant (MTA) for follow-up. The prisoner said he felt the same. No vital signs were documented. At 1616 hours, after he complained of coughing up blood for two days, he was put on oxygen and taken to the clinic. A different doctor saw him, and recognizing shock, sent him to the outside hospital at 1700 hours. The prisoner died there at 0207, but hospital records were not available. The provisional cause of death was "pulseless heartbeat secondary to irreversible pulmonary hemorrhaging."

Prisoner # 2, a 58 year-old deaf mute with hypertension, was seen in the clinic after he fell back on his head in his cell. He was bleeding from the ear and put on oxygen. By 3 a.m., he was in shock, and Dr. "X" ordered him sent to the prison hospital, planning to see him in the morning. Dr. "X" saw # 2 at 0820 and ordered him sent via Code 2 ambulance for a head CT scan at Novato hospital. That hospital declined on the phone and recommended he be sent to Marin General for a neurosurgeon. Before # 2 was taken anywhere, he died at 0915. The cause of death was not provided.

47 year-old patient # 3 had a history of hypertension and schizophrenia. Dr. "X" saw him in the clinic at 1120 hours, where the patient was disoriented and had blood in his mouth. Dr. "X" referred him to a psychiatrist. At 1240, the psychiatrist observed declining vital signs, blood in his mouth and jaundiced eyes. He sent him back to the clinic where they gave him oxygen and started an IV. At 1400 hours, he had a seizure. Dr. "X" called for an ambulance, but # 3 died shortly thereafter. Cause of death was septicemia (mass infection), with acute respiratory distress, kidney and liver failure.

The experts' assessment of Dr. "X" in all three cases was "extremely poor clinical judgment." Dr. "X" was put on administrative leave because of the death of #1, but not before he had failed the needs of # 2 and # 3.

Prisoner # 4, 54, had never been evaluated at intake or ever filed a health request form. On May 20, 2004, he was seen for a swelling on the side of his head. The doctor gave him a high dose of prednisone for four days but no follow-up occurred. The diagnosis was temporal arteritis (inflamed blood vessel), although this was not supported by the physical exam or lab tests, which indicated an infection (which prednisone is known to exacerbate). By the 24th, the doctor sent # 4 to Novato hospital where his white blood count was 19,000 and a CT scan showed a cranial infection. # 4 refused head surgery, and, after being diagnosed with penicillin-resistant staphylococcus aureus (MRSA), came back to SQ with two oral antibiotic prescriptions. But these were not filled by SQ for two days. On the 26th, the SQ doctor drained the abscess. # 4 died later that day. The assessment was misdiagnosis and wrong therapy, plus failure to give timely medication.

5 was a transferee from a Sacramento prison, who had end-stage liver disease. No doctor at SQ saw him for six weeks after his arrival. Medication was prescribed for two

weeks on the day of his admission, but he was never given it. When he was seen, he was prescribed ten days of medication but not scheduled to be seen for a month. He had gained 25 lbs. of water from liver dysfunction. He went to the clinic three days later with ascites, and lab tests were ordered. He was scheduled to be seen every two weeks for two months, which did not happen. Sonograms were ordered but not performed. His treatment went on for a year, but a serious MRSA infection was not properly treated and he died from an abdominal abscess. The assessment was poor physician management of his liver disease.

Prisoner # 6 survived 1 ½ years at SQ, diagnosed with hypertension. But for almost a year, his medications were not supplied. He went to the clinic October 5, 2004 where he collapsed and vomited. His blood pressure was 193/116, and he died four days later, from a stroke. The assessment was that # 6 "was basically neglected" for over a year.

39 year-old patient # 7 lasted only six months at SQ. He arrived with diabetes and a heart murmur but there was no follow-up. His blood pressure was 134/98. His intake exam showed "normal," in spite of a glucose reading of 242. Three weeks later, he complained of swollen legs and stomach. Lasix and lab tests were ordered, but neither were provided. # 7 wasn't seen again until the sixth month, for declining mental status. He died a week later. Assessment was misdiagnosis of his swollen legs, and failure to give him lab tests while giving him diuretics.

Patient # 8 also lasted just six months at SQ. His intake diagnosis was Parkinson's Disease, weakness, inability to walk, and no bladder control. He had a history of hypertension; his blood pressure measured 184/100. No other evaluation occurred and he was recommended a wheelchair. After one near-death from interaction between blood pressure and Parkinson's medications, he finally succumbed. His death was due to drug interaction caused by substandard patient management.

Prisoner # 9 died of hypertension on December 13, 2003. His last medical visit had been August 5, 2002, where his blood pressure was 211/114, and he was prescribed medications which were continued until he died. There was never any lab work or other evaluation. Assessment: the patient died of abject neglect for 16 months.

Patient # 10 arrived at SQ in October 2003 with a known diabetic condition and hypertension. His triglycerides were a whopping 903 and his cholesterol was 287. Although he was repeatedly seen and

medicated, there were numerous documented major errors, and he died a year later. Assessments were "preventable death," "multiple and repeated medical errors," and "multiple contraindicated medications." "The care was extremely substandard."

The balance of the experts' report covered 26 other cases of substandard medical care, but with the patients still alive.

Additional drama occurred when court

monitors (lawyers from the Prison Law Office (PLO)) were denied answers to their inquiries during the court-ordered evaluation at SQ on April 27, 2005. SQ's Chief Medical Officer Dr. Robert Chapnik said that Warden Jill Brown threatened him with disciplinary action for talking to the plaintiff attorneys. The PLO complained that Brown was invoking a "code of silence" to frustrate the court. Brown was swiftly removed from SQ.

It was perhaps an understatement that the experts rated SQ's compliance with the Plata Agreement, after the one-year long "roll out," as "non-existent." See: *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), No. C-01-1351 TEH, "Medical Experts' Report On San Quentin, April 8, 2005." ■

Other sources: *San Jose Mercury News*; *Los Angeles Times*; *Associated Press*.

California Prison Doctor Suspended Following Three Prisoner Deaths

by Marvin Mentor

A San Quentin State Prison physician, Dr. Garen Vong, whose alleged negligence contributed to the deaths of three prisoner patients since 2002, was suspended with pay (\$11,381 per month) on February 3, 2005 pending investigation. The three "preventable" prisoner deaths were part of the "incompetence and outright depravity in the rendering of medical care" characterized by U.S. District Judge Thelton Henderson in the court's formalized order of October 3, 2005 naming a trustee to take over the California Department of Corrections and Rehabilitation's (CDCR) health care program.

San Quentin prisoner Bobby Lee Duren, 48, went to sick call on February 3, 2005 where he was diagnosed with bronchitis. He was prescribed cough syrup, Tylenol, Benadryl and antibiotics. While returning to his cell, he collapsed. Thirty hours later he was taken out to Marin General Hospital's emergency room exhibiting high fever, low blood pressure, a high pulse, and a fast respiratory rate. This was a "very serious medical problem" that could have been diagnosed by a fourth-year medical student, according to testimony last June by Dr. Joe Goldenson, San Francisco's jail health services director, appearing at Judge Henderson's request. Duren died shortly thereafter when he experienced massive lung bleeding and his heart stopped three times. Goldenson added that if Duren had received proper medical care at San Quentin, he would not have died, calling Dr. Vong's response "another example of bad medical care [from] a physician [known to be] dangerous and responsible for patients dying who was still practicing."

Dr. Vong, originally only referred to in reports as a "Dr. X," admitted treating Duren but claimed he did nothing wrong, adding, "I don't think I should be held responsible." A 1978 graduate of the University of Saigon Faculty of Medicine, Dr. Vong had been em-

ploied by CDCR for three years. He stated he believed he had been cleared of wrong doing in the other two deaths.

In one, a deaf mute prisoner fell from his bunk at 3:45 a.m. on July 5, 2003 and hit his head. The 58 year-old was bleeding and his blood pressure had dropped to a dangerous level. In a telephone order, Dr. Vong ordered him admitted to the San Quentin medical care unit but did not order further testing. The following morning, when he was supposed to be taken to an outside hospital, he was instead sent back to his cell. Later checking on his vital signs, a nurse found him dead.

And on May 27, 2002, Dr. Vong saw a 42 year-old prisoner who appeared confused and disoriented, suffering "dementia." Dr. Vong declared it a "psychiatric problem," but a psychiatrist refused to admit the prisoner to the mental health care unit, saying he "needs to be medically cleared." Goldenson told Judge Henderson that the prisoner "ended up dying of an overwhelming infection," adding, "again, this doctor didn't pick up on the clues, didn't manage it correctly, and the patient died."

Duren's mother, a nurse, has begun legal proceedings against CDCR, alleging deliberate indifference to Duren's serious

medical needs. She wants to make sure Dr. Vong never sees another patient and seeks revocation of his license. "I wouldn't want him to deliver a cow," she said. Her family's claim was rejected by State officials on September 15, 2005, who declared that it "raised complex legal issues that should be resolved by formal legal action." The family's attorney has notified Dr. Vong and CDCR that he will oblige them accordingly.

Duren was finishing a nine year term for assault, anticipating parole in April, 2006. ■

Source: *San Jose Mercury News*.



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From the Editor

by Paul Wright

Sometimes I am asked what PLN does, besides publish a magazine. The answer is quite a lot and we are going to try to do a better job of letting people know about it.

In addition to publishing *PLN* we also have a top notch website that is the number one source of information on all things related to detention facility news and litigation. All 190 *PLN* back issues are on line in a searchable database and the full text of all court decisions we have reported is also online. Users can search on many different criteria, including subject, location, case name, title, case outcome, and much more. We also have a brief bank with pleadings, settlements and similar documents and a publications section that has a wide variety of government reports, advocacy manuals and much more on it. Everything is designed so it can be easily printed and mailed to prisoners who do not have access to the internet.

PLN's website has the largest collection, over 1,000 at last count, of prison and jail verdicts and settlements. When trying to value a case before filing it or determine a reasonable value for settlement purposes, no one else has this information in such an easily accessible format. We also have a free list serv that every day has news about prison and jail litigation, court rulings and more. Prisoners should let their friends and relatives outside prison know about this so they can sign up for it at www.prisonlegalnews.org.

Public advocacy is also an important part of the work that PLN does. In January I spoke to college students at Middlebury College in Vermont about the realities of the US criminal justice system. In March I gave a presentation on the federal death penalty at the Vermont Law School with Lennox Hinds, the New York civil rights attorney and law professor, and Robert Bryan, attorney for *PLN* columnist Mumia Abu Jamal. In late March Alex Friedman, *PLN*'s associate editor, Sam Phillips, one of our office assistants, and I attended a rally at Yale Law School where the Graduate Student Employees Organization had organized a demonstration seeking divestment of Yale funds from Corrections Corporation of America (CCA). Alex, one of the leading experts on the private prison industry, was one

of the featured speakers at the rally.

As the article in this issue of *PLN* mentions, Alex attended a symposium on the death penalty where he was able to question former U.S. attorney general John Ashcroft on the application of the federal death penalty. Alex has also helped support union members and prisoner rights advocates seeking to prevent the expansion and privatization of the Shelby County jail in Memphis, Tennessee, by CCA. Alex also spoke against felon disenfranchisement at a meeting in Nashville, on Valentine's day.

And that is just what we've done in the last few months, plus talking to journalists, lawyers representing prisoners and much more.

Among the things we would like to do in the coming year, as we prepare to celebrate our 16th anniversary of publishing, is to increase our circulation. To that end we

are sending free sample copies of *PLN* to potential subscribers around the country. Readers can do their part by encouraging people they know to subscribe to *PLN*.

This summer we will be revamping and expanding the list of books that *PLN* sells and distributes and we would appreciate hearing from you on both general types of books readers would like to see *PLN* distribute and specific titles (i.e., books readers have found especially helpful, a good value for the money, etc.)

As always, we rely on donations from our readers, above and beyond the cost of subscriptions, to keep doing our work. If you can afford a donation please make one. Every penny goes towards furthering *PLN*'s advocacy on behalf of prisoners and detainees. Enjoy this issue of *PLN* and please encourage others to subscribe. 📖

Los Angeles County Pays \$900,000 to Parents of Murdered Informant in Jail

The County of Los Angeles (L.A.) agreed to pay \$700,000 to the mother, and \$200,000 to the father, of a 20 year old county jail prisoner murdered in his cell by a free-roaming prisoner against whom he had just testified in a murder trial.

Raul Tinajero, a car thief, had been called to testify against Santiago Pineda, 23, in Pineda's murder trial, wherein Tinajero had witnessed Pineda run over his victim with a car. The court had ordered Tinajero to be placed in protective custody, but the county jail's security was so lax that Pineda, a jail "trustee," was free to roam for hours through the jail, be admitted through a double-door salyport into Tinajero's "protected" module, strangle him, stay in the cell with the body until the next day, and then leisurely retrace his steps through "security" back to his own cell. Pineda is now charged with Tinajero's murder.

Tinajero's mother and father, represented by Edward Torres of Pasadena, brought separate suits in U.S.D.C. (C.D. Cal.) against L.A. County and its Sheriff, Lee Baca, alleging violation of Tinajero's civil rights, negligence, failing to properly supervise staff and other misconduct. Their

consolidated claims for \$35 million were settled before trial for \$900,000 on June 30, 2005, in an F.R.Civ.P. Rule 68 offer.

The lax supervision and security at the L.A. County Jail resulted in five murders, including Tinajero's, in a six-month period. (See: *PLN*, Apr. 2005, p.16.) As a result, L.A. District Attorney Steve Cooley set up a task force to establish a witness protection unit. Sheriff's spokesman Steven Whitmore said that internal jail security has been tightened since the slayings. "There's no doubt that it's working because we haven't had an inmate murdered since that time," he added. (An outbreak of riots and murders since rebuts this claim.)

But L.A. County hasn't finished paying for its jail security breaches. Consolidated cases are still pending on similar claims in *Sloan v. City of Los Angeles*, Case No. CV 0501510 SLO(JTx) and *Palacol v. City of Los Angeles*, Case No. CV-05-01511 SLO (JTx). See: *Estate of Raul Tinajero v. County of Los Angeles*, U.S.D.C. (C.D. Cal.), No. 2:04-CV-07033-SJO-FMO. 📖

Other sources: *Los Angeles Times*, *Sacramento Bee*.

NY DOC's 60% Telephone Call "Surcharge" Violates First and Fourteenth Amendments

by John E. Dannenberg

The U.S. District Court (S.D. N.Y.) ruled that the 60% surcharge (kickback) that the New York State Department of Corrections (NYDOC) receives from MCI, Inc. for the privilege of MCI being awarded a sole-source contract for all NYDOC prisoner collect phone calls violates the First Amendment plus the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court therefore permitted a suit brought by prisoners' families in federal court to proceed against NYDOC, but dismissed co-defendant MCI (after delaying the case two years to await MCI's emergence from bankruptcy proceedings).

Over fiscal years 1996-1999, gross NYDOC prisoner telephone call revenue collected by sole provider MCI exceeded \$155 million. Of this sum, a staggering \$93 million (approximately 60%) was kicked back as a "commission" to NYDOC.

Plaintiff Mary Byrd, 79, suffering from chronic lung disease, is unable to visit her two sons who have been incarcerated since 1983. Her voice contact with them is by collect phone calls. But with MCI's exorbitant charges, she was unable to pay her \$150/mo. bills, and was cut off. Although she gets calls via her sister's account now, she is financially restrained from keeping in close contact with her sons. Plaintiff Wanda B. is similarly burdened by child support costs and a low salary, and cannot pay her incarcerated husband's \$350/mo.

MCI bill. Plaintiff Cora W. is disabled and homebound, living on \$563/mo. Social Security income. She is forced to limit her son's calls to \$80/mo. They all sued NYDOC and MCI.

On the NYDOC's motion for summary judgment, plaintiffs unsuccessfully argued that NYDOC's exclusive services contract violated the Sherman Anti-Trust Act. Plaintiffs' challenge to the collect-only aspect of the contract was also denied, because it was deemed a reasonable restriction by prison authorities for prevention of improper phone calls. Additionally, co-defendant MCI's motion for summary judgment was granted because MCI had no real interest in the surcharge, which belongs to NYDOC, and because it was NYDOC, not MCI, that set the rate and benefited from the sums collected. However, the court denied summary judgment as to NYDOC on plaintiffs' complaint that the 60% commission was unconstitutional.

But the court noted that while prisoners do not lose all First Amendment protections at the prison gates, non-prisoners lose none of their First Amendment protections. That the fees appear to limit plaintiffs' right to speak with their incarcerated family members is apparent from the complaint. Moreover, there is no obvious penological interest in fixing the 60% rate. Thus, because the court cannot conclude that there is "no set of facts" upon which

First Amendment relief might be granted, summary judgment must be denied.

The court rejected plaintiffs' confiscation-of-property Fourteenth Amendment claim because the state did not compel plaintiffs to receive calls. However, the court agreed that claims under the First Amendment and under the Fourteenth Amendment (substantive due process protection) were valid because the surcharge "unlawfully burdened [the] rights of familial association by impeding communications, with their [loved ones in NYDOC] concerning matters of health care, marriage, procreation, pregnancy, parenting and other critical family issues."

Finally, the court held that NYDOC offered no rational basis justifying putting the surcharge on the backs of prisoners' friends and families and those individuals providing counseling and professional services [e.g., doctors and attorneys], thereby charging them more per call than similarly situated collect call recipients. Accordingly, the court denied NYDOC's motion to dismiss plaintiffs' equal protection complaint.

Readers should note that this case is far from final. However, it makes important findings of law as to the unconstitutionality of stifling prisoners' families and attorneys for exorbitant telephone fees not related to any penological interest, and thus could have widespread application. See: *Byrd v. Goord*, 2005 U.S. Dist. LEXIS 18544. ■

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Dallas Fake Drug Cases Settle For Millions, Jury Awards Damages

by Michael Rigby

In 2001, police officers in Dallas, Texas, made 33 arrests in what has since become known as the "fake drug scandal." The victims were all charged with possessing cocaine, based on supposedly positive field tests of seized substances, when in fact there was little or no trace of any illegal drug. The "cocaine" turned out to be billiard chalk, or gypsum. At least 18 of those falsely arrested have settled their claims for a total of \$6.5 million, and one case has resulted in a jury award of more than \$400,000.

Jacinto Jesus Mejia was one of those whose lives were wrecked by Dallas police officers Mark De La Paz and Eddie Herrera. On May 22, 2001, Mejia was arrested at his auto shop by an undercover cop--lead narcotics officer De La Paz. The 39-year-old mechanic was charged with delivery of 22 kilograms of cocaine.

Mejia spent five months in jail before the charges were dismissed. In addition, his shop had no business for about two years following the arrest and his home was foreclosed, he said. Mejia further claimed that he and his family, including his two pre-teen daughters, were subjected to ridicule.

Mejia sued the City of Dallas, police chief Terrell Bolton, De La Paz, and Herrera in the U.S. District Court for the Northern District of Texas under 42 U.S.C. § 1983 and the Racketeering in Corrupt Organizations Act for false arrest and false imprisonment. He sought compensatory and punitive damages for loss of income, injury to business, and mental anguish.

On January 21, 2005, Mejia settled his claim in mediation for \$480,000 after judge Ed Kinkeade denied the individual defendants' motions for summary judgment based on immunity. See: *Mejia v. City of Dallas*, USDC ND TX, Case No. 3:03-CV-352.

At the same mediation, Mejia's Dallas attorney, Tony C. Wright, settled three other cases stemming from fake drug arrests involving the same defendants. Lorenzo Escamilia settled for \$435,000. During Escamilia's 4 1/2 months' imprisonment his wife divorced him, moved to Mexico with their children, and remarried. Israel Pineda, who spent two days in jail, settled for \$180,000. George Sifuentes spent one day in jail and settled for \$120,000. Settlement total for the four plaintiffs was \$1,215,000.

Another victim of the fake drug scandal, Abel Santos, was arrested by Herrera and De La Paz at his father's auto shop on July 16, 2001. Santos, 26, was charged with possessing 12 kilograms of cocaine with intent to deliver.

He spent 3 1/2 months in jail before the case was dismissed, and was then deported to Mexico upon his release.

Santos sued the same defendants for false arrest and false imprisonment under 42 U.S.C. § 1983 claiming that no field test had been performed and that the defendants had a practice of not performing the tests and falsifying the records. Santos sought damages for past and future mental anguish, \$6,500 for attorney fees in the

criminal case, and lost wages. A special visa allowed him to attend the trial.

On May 20, 2005, after a 5-day trial and 4 hours of deliberation, the jury delivered a verdict for Santos. They found that De La Paz and Herrera arrested him without probable cause and that no reasonable person in the officers' position could have believed the arrest was proper, lawful, and supported by probable cause. The jury awarded Santos \$406,000 in damages. Santos's Dallas attorney, Don A. Tittle, said that with attorney's fees the judgment is expected to be at least \$500,000. See: *Santos v. De La Paz*, USDC ND TX, Case No. 3:02-CV-649-K.

Tittle noted that five current and former Dallas cops, including De La Paz, Herrera, and a supervisor, invoked the Fifth Amendment and refused to testify at trial. Santos's case was the first arising from the fake drug scandal to go to trial. The suit originally involved 15 plaintiffs who were falsely arrested in the scandal. Represented by attorney Tittle, all but Santos settled for a combined total of \$5.3 million.

Herrera and De La Paz (named 2000 Officer of the Year) were eventually charged with fabricating and tampering with evidence. Several confidential informants who worked with the rogue cops were also charged. An independent panel appointed by the city investigated the fake drug scandal and released a report in October 2004. See *PLN*, July 2003, p. 5 for more. ■

Source: *VerdictSearch Texas Reporter*

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Florida's Private Prison Industry Corporation Sues Spinoff

Florida's private prison industry corporation, Prison Rehabilitation Industries and a Diversified Enterprises (PRIDE), has sued its spinoff company to recover some of the millions spent to prop up that company. The lawsuit comes after over a year of scrutiny into PRIDE's corporate structure. See: *PLN*, January 2005, cover.

PRIDE was created in 1981 by the Florida Legislature to operate the state's prison industries, which were losing money. PRIDE is supposed to be a nonprofit, but began setting up for profit corporations, which were operated and staffed by members of PRIDE's board.

One of those entities was Industries Training Corp. (ITC), which handled payroll and other services for PRIDE. The state's lawsuit comes after ITC sold its employment placement service, Labor Line, to a North Carolina company that recently incorporated in Florida.

The lawsuit illuminates the corporate nepotism that existed, charging R. Michael Smith, ITC's chief financial officer, of breaching his fiduciary duty to PRIDE by helping ITC spend PRIDE's money when he was serving as chief financial officer of both companies.

"Smith placed himself in direct con-

flict of interest that prevented him from promoting the best business and financial interests of PRIDE," the lawsuit charges. The new PRIDE board installed by Gov. Jeb Bush estimates PRIDE spent more than \$67.7 million over six years, keeping ITC afloat while it continuously lost money. Despite losing money, ITC's Chief Executive Officer (CEO), who was also PRIDE's CEO, Pamela Jo Davis was paid \$236,000 a year. Smith also received a large salary for his ITC services. The prisoners who work for PRIDE, by contrast, are paid pennies an hour for their labor. In that respect, PRIDE mirrors private industry.

PRIDE's lawsuit seeks money from the sale of Labor Line because it was a company PRIDE created and gave to ITC in 1999. Thereafter, PRIDE continued to invest hundreds of thousands of dollars in its operation.

PRIDE broke with ITC in January 2005. With it being its own entity, ITC was now free to rein in maximum profit for its stakeholders, all former PRIDE board members. Davis and Smith both left PRIDE to work solely for ITC.

PRIDE's lawsuit was filed in Pinellas County Circuit Court on September 8, 2005. *PLN* will report future developments. ■

Wisconsin Prison Employee Raped By Prisoner Awarded \$366,000

On April 8, 2005, a federal jury awarded \$366,000 to a Wisconsin prison employee who was raped by a prisoner.

The 51-year-old female plaintiff, a non-security employee of the Wisconsin Department of Corrections was raped by a knife-wielding prisoner on December 28, 2001. Eight days prior to the attack, the plaintiff contended, she had expressed fears about the prisoner to her supervisors.

The plaintiff sued under Title VII of the Civil Rights Act of 1964 alleging that prison officials subjected her to a hostile work environment when they allowed the prisoner access to her despite her fears. The defendants claimed there was insufficient evidence to support a hostile work environment claim. However, the plaintiff argued that the prison system's

own policies indicated that supervisors are required to investigate "any" expressions of concern by employees, which they failed to do.

After deliberating for four hours, a jury in the U.S. District Court for the Western District of Wisconsin found for the plaintiff and awarded her a total of \$366,000: \$66,000 in lost wages and medical expenses, \$250,000 in past pain and suffering, and \$50,000 in future pain and suffering.

The plaintiff was represented by Robert J. Kasieta, C. Houston Parrish, and Marc McCrory of Kasieta Legal Group in Madison, Wisconsin. See: *Doe v. Wisconsin Department of Corrections*, USDC WD WI, Case No. 04CO265C. ■

Source: National Jury Verdict Review & Analysis

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Supreme Court: Prisoners' ADA Right to Sue for Damages Trumps State's Sovereign Immunity

by John E. Dannenberg

The United States Supreme Court unanimously ruled that the private cause of action created by the Americans With Disabilities Act (ADA) (42 U.S.C. § 12131 et seq.), which permits disabled state prisoners to sue prison officials for damages resulting from violation of prisoners' Constitutional rights, takes precedence over ("validly abrogates") the state's defense of sovereign immunity, at least as to actual violations of the Fourteenth Amendment.

Tony Goodman, a paraplegic Georgia state prisoner, sued state defendants in federal district court under 42 U.S.C. § 1983 and Title II of the ADA for violation of his Eighth Amendment rights as to cruel and unusual punishment. He alleged, inter alia, that he was confined 23 hours/day in a cell so narrow that he could not turn his wheelchair. The district court dismissed the claims as vague and granted summary judgment on his Title II money claims as barred by Georgia's Eleventh Amendment sovereign immunity. The United States of America intervened in support of the supremacy of its ADA statute. The Eleventh Circuit U.S. Court of Appeals reversed the district court's holding that Goodman had not adduced sufficient facts to support some of his claims, but affirmed Georgia's sovereign immunity defense. The U.S. Supreme Court then granted certiorari solely to decide if Title II validly abrogated state sovereign immunity.

The Court previously held that the ADA applies to state prisons. See: *Pennsylvania Dept. Of Corrections v. Yeskey*, 524 U.S. 206 (1998). Moreover, 42 U.S.C. § 12101(b) (4) expressly announced that "states shall not be immune under the Eleventh amendment ... for an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." *Board of Trustees of Univ. Of Ala. v. Garrett*, 531 U.S. 356 (2001). Then, following *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), [Due Process Clause of the Fourteenth Amendment incorporates the Eighth Amendment's guarantee against cruel and unusual punishment], the Court considered Goodman's Eighth Amendment claims as applied here.

The Court observed that although

Goodman's claims were formulated only under the Eighth Amendment (cruel and unusual punishment), they also appeared to sound, at least in part, in § 1 of the Fourteenth Amendment [no deprivation of life, liberty or property without due process of law]. It is established that state conduct that actually violates the Fourteenth Amendment trumps the Eleventh Amendment sovereign immunity of the states. *Tennessee v. Lane*, 541 U.S. 509 (2004) and *Ex Parte Virginia*, 100 U.S. 339 (1880) [confirming Fourteenth Amendment's § 5 enforcement powers]. Because Goodman had not expressly alleged Fourteenth Amendment violations, only Eighth Amendment ones, the Court held that he should be allowed to amend his complaint, if possible.

Twelve states had urged the Court to rule that prisoners' ADA damage suits should always be barred. The instant ruling does not address all ADA damage suits, just those that "actually violate the Fourteenth Amendment." The Court accordingly reversed unanimously the lower court's sovereign immunity approval (at 120 Fed. Appx. 785) and remanded to the

district court to determine (1) those aspects of Georgia's alleged misconduct that violated Title II; (2) if that misconduct also violated the Fourteenth Amendment; and (3) if it violated Title II but not the Fourteenth Amendment, whether Georgia should yet be barred from asserting its sovereign immunity.

This left the latter question open for future Supreme Court review. Justices Stevens and Ginsburg, in their concurring opinion, added that the whole "constellation of rights applicable in the prison context," e.g., religious rights, freedom from censorship, non-interference with judicial process, procedural due process (including lawyers, legal materials, reading materials, and access to law libraries), might also fall under the umbrella of protection if caused by a Title II violation. See: *United States v. Georgia*, 126 S. Ct. 877 (2006).

Prison Legal News filed an amicus curiae brief on behalf of Goodman urging the supreme court to find that prisoners have a right to sue for money damages under the ADA. The brief is on PLN's website at www.prisonlegalnews.org. 📄

New York City Pays \$75,000 for 28.5 Days False Imprisonment

On September 8, 2005, the City of New York, New York, settled for \$75,000 a prisoner's lawsuit alleging 28.5 days false imprisonment.

Plaintiff William Perocier, Jr., a 31 year old tow truck driver, was sentenced to six months in jail in early 2001 for failure to pay child support. The sentence, imposed by Judge Fran Lubow, was to be served on intermittent weekends. After serving his first weekend, Perocier was released on March 29, 2001, with instructions to return every weekend until he completed his sentence.

In July 2001, Perocier obtained an order from Judge John Hunt specifying the sentence was to be served on alternate weekends. Perocier presented the notice to New York City Department of Correction supervisor Delma Colon, who deemed it a clerical error and ordered Perocier to continue reporting to the jail every weekend.

Perocier completed his sentence on September 17, 2001, after serving 57 days.

Perocier sued the city, the DOC, and Colon contending that Colon's misinterpretation of his sentence resulted in an additional 28.5 days of imprisonment. Perocier further alleged the defendants were negligent for failing to verify the requirements of his sentence. He sought damages for past and future pain and suffering.

After deliberating 30 minutes, a jury found for Perocier. Before commencement of the damages trial, however, the parties agreed to settle for \$75,000. Perocier was represented by attorney Kerry J. Katsorhis of the Flushing, New York, law firm Ginsberg & Katsorhis. See: *Perocier v. City of New York*, Queens Supreme Court, Case No. 16896/02. 📄

Source: *Verdict Search New York Reporter*

Michigan Jail's Disproportionate Treatment of Women Results in \$855,000 Settlement Agreement

A Michigan federal district court has approved a settlement awarding \$855,000 in a class action alleging the conditions of confinement for women at the Livingston County Jail were disproportionate to that of men held at the jail. The suit also involved privacy concerns.

The suit was brought initially filed by an individual prisoner but was quickly granted class certification by the district court.

The first claim alleged the jail denied female prisoners equal work release opportunities available to men solely because of their status as women and has granted such privileges to females in an arbitrary and capricious manner. At the same time, "similarly-situated male prisoners have been provided work release opportunities." Male prisoners were allowed to sleep in a dormitory area at night without being processed into the jail when returning from work release. The few women in that program were strip-searched and processed into the jail to sleep in prison cells.

The suit further alleged that women trustees were given less favorable laundry work

while male trustees were given more favorable jobs in kitchen and clerical positions.

The privacy claim alleged that male guards could view female prisoners' full body while showering. "In addition, the top portion of the one-piece suits provided to females most to females must be removed to use the toilet, allowing male guards to view them from the waist up, because of the toilet facility design. The suit also stated that a hostile environment for women exist, citing male guards inducing an intoxicated female prisoner to perform a videotaped "striptease." Verbal sexual harassment by male guards was common. Guards also restrained a naked female in a chair. Cross-gender pat and strip searches also occurred regularly.

Finally, the suit alleged the jail provided "visitation for male prisoners that is more extensive and available than visitation allowed for female prisoners."

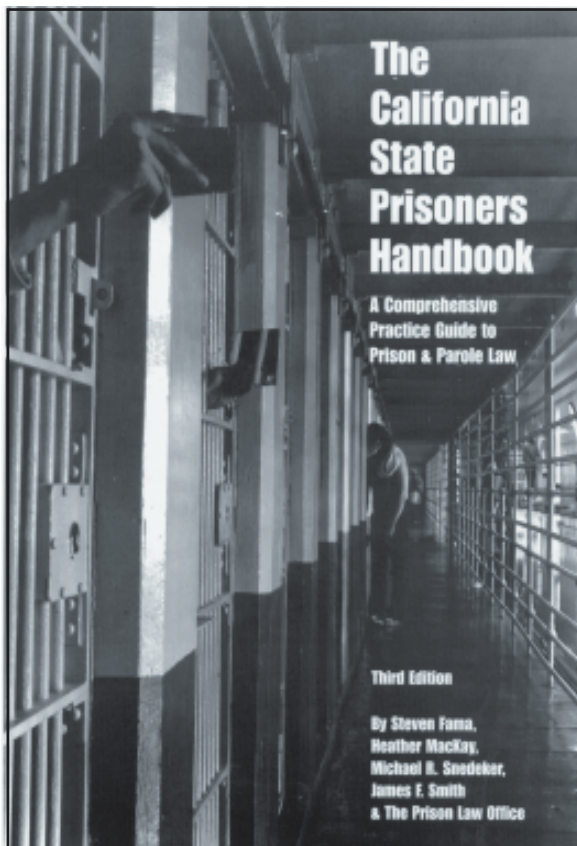
The parties entered 31 hours of mediation that resulted in a settlement agreement. Several areas of equitable relief were reached. The jail agreed to provide females

with two-piece uniforms; privacy shower curtains and windows will be installed in the showers; cross-gender body and pat searches are prohibited; hygiene supplies will be provided and time in holding cells limited; trustee job and work release opportunities for women will be expanded; and jail personnel will receive sensitivity training.

Lead plaintiff Theresa Cox will receive \$25,000 while class representatives Tamara Patrick and Jane Doe received \$15,000. \$2,500 will be paid to 33 class members who provided depositions or affidavits, and \$500 is payable to the 91 class members that answered questionnaires. Each of the 233 class members will then be eligible to receive up to \$1,500 on the basis of a point system assessing their harm.

The attorneys and the ACLU receive \$268,727 for attorney fees and \$43,818 in costs. On April 1, 2004, the district court approved the settlement agreement. See: *Cox v. Homan*, U.S.D.C., Eastern District Michigan, Case No. 00-71310. ■

Additional Source: *Detroit News*.



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Texas Prisoners Again Have Limited Right to Appear in Civil Cases

by Matthew T. Clarke

In a well-reasoned opinion with copious citations, a Texas court of appeals held that Texas prisoners have a limited right to appear in civil cases even if they cannot justify a personal appearance.

C.J., a Texas state prisoner, and D.J. adopted D.D.J., were later divorced and, later still, C.J. was incarcerated. As a condition of divorce, C.J. was made joint managing conservator of D.D.J. and ordered to pay child support. D.J. eventually fell behind in child support and other court-ordered obligations. D.J. then filed a motion to enforce the child support provisions of the divorce decree and modify the parent-child relationship to make D.J. sole managing conservator.

C.J. filed a motion for appointment of counsel because he was indigent and incarcerated. The court denied the motion because the case did not involve termination of parental rights. A final hearing was scheduled.

C.J. filed a motion for a bench warrant to attend the hearing or, alternatively, to appear by teleconference or other alternate means. The court twice denied the motion for bench warrant, but failed to make a ruling on the alternate appearance portions of the motion. At the hearing the only evidence offered was brief testimony by D.J. The court granted all of her requested modifications and signed a judgment against C.J. for child support arrearages with interest, attorney fees, and court costs. C.J. appealed.

The court of appeals held that prisoners do not have an automatic right to appear in court in a civil action, but likewise do not automatically lose the right to access to courts by virtue of their incarceration. To determine whether a prisoner should be allowed to personally appear in court, the courts should weigh the factors set out in *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976) and approved by the Texas Supreme Court in *In re Z.L.T.*, 124 S.W.3d 163 (Tex. 2003). However, “a prisoner requesting a bench warrant must justify the need for his presence and the trial court does not have a duty to go beyond the bench warrant request and independently inquire into the necessities of an inmate’s appearance, regardless of the content of the request.” The prisoner “bears the burden of identifying with suf-

ficient specificity the grounds” establishing the right to a bench warrant. Because C.J.’s motion only mentioned the Stone factors, but did not provide a factual basis for how they applied to his case, the trial court’s denial of the bench warrant was not an abuse of discretion.

The trial court also implicitly denied the request for alternate appearance without even considering alternate means of participation. “All litigants who are forced to settle disputes through the judicial process have a fundamental right under the federal constitution to be heard at a meaningful time in a meaningful manner. Thus, the right of a prisoner to have access to courts entails not so much his personal appearance as the opportunity to present evidence or contradict the evi-

dence of the opposing party.” Should the court find that the pro se prisoner is not entitled to a personal appearance, “the prisoner should be allowed to proceed by affidavit, deposition, telephone, or other effective means.” The trial court abused its discretion when it failed to consider C.J.’s request to appear in trial by alternate means. Therefore, the judgment was reversed and the case returned to the trial court for further proceedings. The court of appeals also noted its “grave concerns” over the paucity of evidence supporting D.J.’s claims and expressed its confidence that “further proceedings that are truly adversary will ensure that D.J. carries her burden of proof on each of her claims.” See: *In re D.D.J.*, 136 S.W.3d 305 (Tex. App. Ft. Worth 2004). ■

Texas Legislature Requires HIV Testing for Prisoners

by Gary Hunter

Texas prisoners must now be tested for HIV before they are allowed to leave prison. Rep. Yvonne Davis, D-Dallas, authored House Bill 43 which was signed on June 19, 2005, by Gov. Rick Perry, and went into effect on September 1st. The bill is based on the paranoid position that prisoners are responsible for spreading HIV to a chaste public.

Vera Johnson, executive director of the Houston AIDS Foundation, points out that Texas prison populations have a higher percentage of AIDS infected patients than the general public. Johnson insists that prisoners “are contracting HIV in prison,” and says “It’s a threat to the public health system and the community right now.”

Johnson also states that infection rates are six times higher in prison than in the general public. What is not mentioned is how the figure correlates to the number of people tested in each population.

Ninety-nine percent of Texas prisoners are tested (voluntarily) for the disease but it is doubtful that ninety-nine percent of the general public is tested. Consequently, Johnson’s figures and conclusions are suspect.

Johnson also points out that the percentage of prisoners with HIV is six times higher than in the public sector

and that ex-prisoners make up seventeen percent of the public population with HIV. Again, no reference is made to the obvious conclusion from Johnson’s figures that 83 percent of the infected public have never been to prison.

Past issues of *PLN* have reported how TDCJ policies and practices have actually helped to create a more deadly and resistant strain of HIV. But in its typical fashion legislators have placed the danger posed to the public squarely on the shoulders of prisoners.

Dr. Owen Murray of the University of Texas Medical Branch (UTMB), which oversees healthcare in most Texas Department of Criminal Justice (TDCJ) prisons says, “that for the most part the education levels of prisoners [concerning HIV] is very high.” A variety of prison programs exist to explain how to avoid contracting HIV and/or what should be done if it is contracted. Prisoners are also counseled both before and after testing regardless of the test result.

The up-side of the bill is that “at least...every offender, when they leave, [knows] their status,” Murray said. Twenty-four prisoners were tested upon entering prison, not leaving. They might receive treatment if infected with HIV. ■

New York City Jail Strip Search Suit Settles For \$30 Million

by John E. Dannenberg

On April 27, 2005, the City of New York agreed to settle a federal court class action 42 U.S.C. § 1983 civil rights suit with 57,634 past misdemeanor prisoners at its city jails, paying \$750 to each person unlawfully strip-searched upon their post-arraignment jail admission in the period from July 15, 1999 through July 22, 2002. The settlement, two years in the making under a Magistrate's purview, also provides \$1,000 for those searched more than once, \$25,000 for the named plaintiffs and \$500,000 in fees to Brooklyn attorney Richard Cardinale and Middletown attorney Robert Isskes.

Kadian McBean and David Cence had brought suits against the New York City Department of Corrections (DOC) in U.S. District Court (S.D. N.Y.), which the court consolidated, alleging unconstitutional strip-searches they endured while in the custody of DOC upon pending minor charges. DOC had a policy until July 23, 2002 of strip-searching all jail detainees irrespective of the nature of their offense or any reasonable suspicion that they were concealing weapons or contraband.

The law on such illegal searches was clear. The Second Circuit U.S. Court of Appeals had found such a blanket

policy unconstitutional at the Nassau County Correctional Center. See: *Shain v. Ellison*, 273 F.3d 56 (2nd Cir. 2001) [PLN, Mar. 2003, Pg. 28]. Similar holdings were reached in *Murcia v. County of Orange*, 185 F.Supp.2d 290 (S.D. N.Y., 2002) [PLN, Mar. 2003, p.26] and *Gonzalez v. City of Schenectady*, 141 F. Supp.2d 304 (N.D. N.Y., 2001) [PLN, Jul. 2002, p.18.].

By altering its policy after the suit was filed, DOC implicitly conceded wrongdoing. The parties proceeded to negotiate a settlement over two years. Compromises reached included excluding certain drug and weapons-related crimes from the presumption of strip-search immunity, accepting all class members without proof of actual individual injury, excluding (but not waiving the rights of) female detainees forced to endure gynecological booking exams, and minimizing administrative costs by agreeing to a one-size-fits-all payment schedule.

Attempting to "spoil" this settlement, attorney Richard Emery appeared at the 11th hour as a plaintiff intervenor, trying to snatch the case from Cardinale and Isskes by alleging the claims were really worth \$25,000 each, and that the present

class attorneys were settling too cheap, at their clients' expense, to unjustly quickly enrich themselves. After protracted proceedings, the U.S. District Court ruled that the settlement already reached was not unfair, was realistic and in any event, not the product of insincere representation by class counsel.

The class certified to receive benefits comprises "pretrial detainees who, during the class period [July 15, 1999 - July 22, 2002], were arraigned on certain misdemeanors, violations, and misdemeanor charges of civil contempt, and non felony warrants regarding same, and who, after arraignment, were strip-searched in DOC jails pursuant to the standard new admission strip search procedure." PLN readers who believe they may be class members should contact the Cardinale, Hueston & Marinelli law firm in Brooklyn. See: *McBean v. City of New York*, U.S.D.C. S.D. N.Y., Case No. 02-5426. ■

Other sources: *New York Daily News*, *Associated Press*, *New York Law Journal*.

Florida Awards \$2 Million to Wrongfully Convicted Man

At its special session in December 2005, the Florida Legislature passed a bill to pay 44-year-old Wilton Dedge \$2 million as compensation for a rape he did not commit. Dedge spent 22 years in Florida prisons for the sexual assault and stabbing of a 17-year-old Brevard County girl.

After a 10-year battle to force a DNA test, Dedge was finally released in August 2004. Since his release, Dedge has been driving a 17-year-old pick up. He had an idea of how he would spend some of his compensation. "Get me a decent car, for one," he said. He also plans to invest some of the money, buy a house, and pay back his parents, who took out a second mortgage on their home and spent their life savings defending him in court.

Yet, money isn't everything. "Honestly, there's nothing anybody can do to make up for 22 years. All that time is

gone," said Dedge.

The Florida Legislature plans to establish a policy to compensate future victims of wrongful incarceration. "I hope we can come up with a policy that will be a lasting policy," said Sen. Daniel Webster, R-Winter Garden. "I think we've laid at least the principles down with their particular bill."

"We must do more for those who are wrongfully incarcerated," said state Rep. J.C. Planas, R-Miami.

Certainly, the Florida Legislature will be tested on this issue. In August 2005, Luis Diaz, 67, was released after 26 years in prison after DNA excluded him as a rapist. In January 2006, Alan Crotzer, was released after 24 years when a DNA test exonerated him of his rape conviction. ■

Sources: *Orlando Sentinel*; *Associated Press*

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California Enacts Strong “Sexual Abuse in Detention Elimination” Act

by John E. Dannenberg

To aid compliance with the federal Prison Rape Elimination Act (PREA) of 2003 (Public Law 108-79), California enacted Assembly Bill 550 (AB 550), the Sexual Abuse in Detention Elimination Act (SADEA), on September 22, 2005. SADEA provides for policies, instruction, counseling and investigation regarding sexual abuse in California’s prisons and juvenile facilities.

Studies in the United States have estimated that one in five male prisoners has been sexually abused, usually by other prisoners. Female prisoners fare worse, with a one-in-four record, but with much of the abuse perpetrated by male guards. Recognizing that the problem will not go away by itself [149 California prisoners reported sexual abuse in 2004 alone], the California Legislature adopted AB 550 to require the California Department of Corrections and Rehabilitation (CDCR) to take a proactive stance against this pervasive problem.

The stated purposes of AB 550 are to protect all CDCR prisoners from sexual abuse; to make this goal a top priority; to require CDCR to implement preventive procedures and to protect victims; to maintain and make public sexual abuse records within all prisons; to increase CDCR’s accountability in preventing sexual abuse; to protect prisoners’ federal and state constitutional rights to be free from cruel and unusual punishment in this regard; to establish the Office of the Sexual Abuse in Detention Elimination Ombudsperson to monitor all CDCR sexual abuse incidents; and to comply with the federal PREA. In addition, AB 550 contains language requiring CDCR to “increase the efficiency of state expenditures on corrections, correctional physical and mental health care, substance abuse reduction, HIV/AIDS prevention, violence prevention and reentry programs for inmates and wards.”

To effect these changes, the Legislature added § 2635 et seq. to the Penal Code (PC), which requires CDCR to make available informational handbooks on sexual abuse to prisoners. Then, mindful of youth offender ward classification standards set forth in *Farrell v. Allen*, Alameda County Superior Court case No. RG 03078344, the Legislature enacted PC § 2636, which requires CDCR to take into

account prisoner risk factors for sexual abuse, to include age, violence convictions, priors and mental illness history. CDCR personnel are required to preemptively intervene when prisoner/ward abuse or intimidation appears imminent.

Section 2637 requires CDCR to establish protocols regarding sexual abuse, including immediate and discreet protection of alleged victims. Importantly, the filing of such complaints shall not be punished and any segregation ordered must be non-disciplinary; retaliation is expressly prohibited. Under no circumstances may staff suggest to complaining prisoners that they should simply fight to protect themselves from abuse. Nor may staff discriminate against any prisoner based upon sexual orientation. Filing false reports is a new punishable infraction.

Section 2638 goes on to require CDCR to provide appropriate health care for apparent sexual abuse victims, with confidentiality to be maintained by mental health care counselors. Section 2639 enacts specific procedures to ensure full investigation and prosecution of sexual abuse incidents. In unambiguous language, § 2639(e) provides that if “any employee has sexually abused an inmate or ward, that employee will be

terminated,” and that administrators are required to report criminal sexual abuse to law enforcement authorities. Section 2640 requires that a sexual abuse data base be established and maintained.

Section 2641 establishes the SADEA Ombudsperson office within the Office of the Inspector General, and further provides that the duties of the Ombudsperson office “may be contracted to outside nongovernmental experts.” Wisely, the Legislature has thus distanced sexual abuse investigation from within the self-protective cocoon of CDCR. Indeed, § 2641(c) permits prisoners to write confidential letters regarding sexual abuse to the Ombudsperson. Section 2641(d) grants power to the Inspector General to investigate all reports of mishandling of sexual abuse incidents, while maintaining victim confidentiality.

Finally, to gain community involvement, § 2642 requires CDCR to permit outside civil rights and human rights organizations and service agencies to offer resources to prisoners. AB 550 is a strong commitment by the California Legislature, and its language appears sufficient to become a sound basis for litigation for sexually abused prisoners whose claims arise from failure to reasonably protect them. ■

Police Department Class Action Fraud Suit Filed Against Stun Gun Maker

by John E. Dannenberg

A class action lawsuit against Taser International, Inc., the Arizona-based manufacturer of police stun guns, was filed on July 18, 2005 in Chicago U.S. District Court on behalf of the Dolton, Illinois police department (DPD), alleging breach of contract, breach of warranty and unjust enrichment stemming from false safety claims and false representation of material facts concerning the product’s safety. In short, the suit claims that Taser fraudulently gained 135,000 stun gun sales to over 7,000 law enforcement agencies nationwide by misleading buyers into believing the guns were safe to use in subduing suspects.

So far, the DPD is the only named plaintiff in the diversity action. The federal court venue was chosen because

Taser is a Delaware corporation, because class members from all states are anticipated and because damages are estimated to exceed \$5 million, according to plaintiff’s attorney Paul Geller of Boca Raton, Florida. Although over 100 deaths from police operated Taser guns have been reported across the country, none has occurred in Dolton, a predominantly black Chicago community of 26,000 people. But Dolton’s police Chief Ron Burge suspended use of the stun guns in May 2005, citing safety concerns. Dolton is suing because it cannot afford to own guns it cannot safely use.

The essence of the complaint is that Taser’s stun guns are in fact dangerous and were negligently marketed based

upon inadequate research, claiming they were safe, non-lethal substitutes for deadly force. "Taser International has no idea of how [its 50,000 volt] Tasers impact ... pregnant women, the elderly, young adults and children, individuals with heart conditions and individuals with implantable cardiac devices," Geller stated.

Of particular interest are recent studies showing the fatal susceptibility to Taser's high voltage shocks by persons who are high on cocaine or are on an adrenaline rush. A number of the 30 Taser-related deaths in Florida alone were suspects known to be high on drugs. Cocaine by itself is thought to cause heart rhythm problems; 50,000 volts from a Taser stun gun might well exacerbate the risk of heart failure.

A *Denver Post* study reported that 90% of person's tasered by the Denver Police Department were unarmed, and 2/3 were only facing a citation or a misdemeanor charge. The *Palm Beach Post* reported that the Palm Beach County police had tasered three pregnant women, an 86 year-old man, and children as young as 13.

It has been suggested that police are falsely lulled by Taser's claims of safety into using Tasers rather than more appropriate lesser force- thus literally increasing the likelihood of the death of suspects.

Taser's own safety studies were reported in the *New York Times* last year to have been conducted on animals. After having safely tested their product on dogs and pigs, Taser recommended in their training manual that police officers undergo sample shocks as part of their Taser training.

Taser International's stock was also stunned. Down from a high of \$33 in the past year, it hovered near \$10 after reporting an 89% drop in earnings on a 19% drop in sales, for the fiscal quarter reported on July 20, 2005. The stock was also hurt by a June 3, 2005 article in *USA Today* likening Taser's X-26 model to an electric chair. Taser is suing the newspaper for libel over this. ☐

Sources: *Palm Beach Post*, *Daily Business Review*, *Washington Business Journal*, *AZ Central.com*.

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New Mexico Jail Prisoners Raped by Judge and Guards Settle for \$890,000

On June 3, 2004, ten female prisoners who were allegedly raped by a New Mexico judge and jail guards settled their lawsuit for \$890,000.

The plaintiffs, who had been confined in the Española City Jail, claimed municipal judge Charles Maestas raped them after they appeared in his courtroom. The victims said Maestas forced imprisoned women to have sex with him in exchange for releasing them from jail or reducing their sentences. Maestas reportedly molested some of the women in his chambers, in his truck, at his home, and at the jail.

The women further contended that the rapes were facilitated by city officials and guards at the jail, who also sexually assaulted some of them. Eight of the victims alleged they were forced to perform sex acts on at least one guard, and four others claimed they were raped on several occasions by different guards. One woman claimed that when she tried to retrieve an impounded automobile, the former judge asked her to run off with him for the weekend. When she refused, Maestas

had cops arrest her boyfriend on an outstanding warrant.

Maestas was ultimately convicted on five counts of rape and sentenced to a whopping three years in prison.

The women sued the City of Espanola and a number of city and jail officials in the U.S. District Court for the District of New Mexico under 42 U.S.C. § 1983, the Racketeering In Corrupt Organizations Act, and for assault, battery, and infliction of emotional distress. (The individual defendants included Maestas and jail guards Isaac Pana, Christopher Duran, Tarra! Seaboy, Moises Peña, Juan Baca, Juan Valdez, Juan Arrellano, Avaristo Lopez, Daniel Sanchez, Abraham Baca, and Chris Archuleta.) The women also alleged that complaints had been lodged over several years, but other than firing a few guards, the city failed to investigate them.

The parties settled before trial for \$890,000. The women were represented by attorney George T. Geran of Santa Fe, New Mexico. See: *Ortiz v. Maestas*, USDC D NM, Case No. CIV 031169 CIV 03-239. ☐



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PLN Questions John Ashcroft on the Death Penalty

by Alex Friedman

On Feb. 13, 2006, former U.S. Attorney General John Ashcroft gave a presentation in favor of the death penalty at Vanderbilt University in Nashville, Tennessee as part of the school's Project Dialog series. The series' theme for 2006 was *Crime and The Ultimate Punishment*.

Ashcroft, who also served as Missouri's Attorney General, Governor of Missouri and a U.S. Senator, resigned after serving as Attorney General under the Bush administration from 2001 through 2005. Perhaps best known for crafting the civil liberty-defying PATRIOT Act, he now operates a lobbying firm, the Ashcroft Group LLC.

Ashcroft voiced his support of capital punishment for two primary reasons: It saves lives (through general deterrence) and it provides closure both for crime victims and society as a whole (calling the death penalty a form of "societal self-defense"). He also noted that capital punishment deters the criminals who are executed, saying "Dead men tell no tales ... and commit no crimes."

As Prison Legal News's representative at the event, I asked Ashcroft whether the emphasis on federal death penalty prosecutions against white defendants (citing the on-going capital trials of eight members of the Aryan Brotherhood prison gang), while similar capital charges are not brought against minority prison gangs that commit equally heinous crimes, was a perverse form of affirmative action designed to "correct" the racial imbalance on federal death row. At the end of 2001, the year Ashcroft was appointed Attorney General, federal death row prisoners were 84% minority. They were 74% minority at the end of 2002, 74% minority at the end of 2003, 64% minority at the end of 2004 and are presently 60% minority, largely due to an increase in the capital prosecution of white defendants.

Ashcroft flatly denied that the federal death penalty process was "designed to accomplish racial objectives." He stated capital cases are based solely on the merits of the case and must go before the Capital Case Review Committee, where the race of the defendants are "masked." However, Ashcroft failed to mention that the final decision whether to seek the death penalty was up to him as Attorney

General, regardless of the Committee's recommendation. In 2001, Ashcroft had testified before a House committee that despite there being a disproportionate percentage of minority prisoners on federal death row, research indicated there was "no evidence of racial bias."

The only time that Ashcroft stumbled during his carefully crafted presentation was during the question period, when an audience member challenged the theological basis for capital punishment and cited the example of Jesus saying that those without sin should cast the first stone. Although well known for his fundamentalist religious beliefs as a member of the As-

sembly of God, Ashcroft dissembled and did not adequately address the question.

Further, Ashcroft did not address the fact that more than 120 actually innocent, wrongfully convicted citizens have been released from death row since 1976 -- including 3 sentenced to death in Missouri when he was Governor -- due to prosecutorial misconduct, bad science, unreliable snitch testimony, botched investigations and mistaken witnesses. Instead, Ashcroft insisted that the death penalty was a necessary component in the fight against crime because "We believe in justice." Or perhaps he meant to say, "We believe, injustice." ■

Wackenhut Settles Pennsylvania Suicide Suit For \$125,000

On May 11, 2005, Wackenhut Corrections Corporation (now known as Geo Group) agreed to settle for \$125,000 a lawsuit arising from the suicide death of a prisoner in the Wackenhut-operated George W. Hill Correctional Facility, also known as the Delaware County prison.

John William Focht, Jr. was arrested in Delaware County, Pennsylvania, on February 3, 2002, and charged with possession of cocaine with intent to deliver. Upon intake at the county prison, Focht, a 43-year-old father of four, indicated that he had a history of depression and had attempted suicide; that he had been drinking at least 20 beers per day and using cocaine; and that he had been taking the antidepressant drug Paxil.

Focht was subsequently interviewed by Doctor Victoria Gessner, who started him on 100 milligrams of lithium per day. Because Gessner also placed Focht in a detoxification program, he was housed in isolation where guards were supposed to check on him every 15 minutes.

Two days after he was admitted to the prison, Focht was dead. Guards found him hanging in his cell on February 5, 2002 at approximately 7:30 p.m. He had fashioned a noose from his boot laces, which he attached to a wall grating.

Evidence suggests that Focht had been dead about an hour before his body was discovered. What's more, the intake

observation sheet--which was supposed to show Focht's condition at 15-minute intervals--was allegedly lost and never found.

Following his death, Focht's family sued Wackenhut, Delaware County, the county Board of Prison Inspectors, and guards Kelsey Saunders, Larry Simon, and Keisha Yeargin under state law and 42 U.S.C. § 1983. The family specifically claimed that withdrawal from cocaine and alcohol, discontinuation of Paxil, and doses of lithium above 100 mg are all known to increase the likelihood of suicide. Thus, the family argued, Focht should not have been permitted to keep his shoelaces and/or placed in a cell with an easily accessible grating.

The family also claimed, among other things, that the defendants were negligent in failing to observe Focht every 15 minutes and for not requiring video surveillance of cells housing prisoners known to be at risk for suicide. Wackenhut's failure to adopt or implement policies and procedures to protect suicidal prisoners contributed to Focht's death.

Wackenhut, which has since changed its name to the Geo Group [See *PLN*, June 2004], agreed to settle the lawsuit for \$125,000. The family was represented by attorney Jon J. Auritt of Media, Pennsylvania. See: *Focht v. Wackenhut Corrections Corporation*, Delaware County Court Of Common Pleas, Case No. 03-12274. ■

Appointment Of Counsel Ordered To Determine California Prisoner's Request For Post-Appeal DNA Testing

In a case of first impression, the California Court of Appeal strictly construed Penal Code § 1405 to require that the Superior Court appoint a prisoner counsel to determine the appropriateness of performing post-appeal DNA testing and filing of a writ of habeas corpus if then needed. In so doing, the appellate court criticized the Legislature for writing an unnecessarily overbroad statute.

Penal Code (PC) § 1405 provides that any indigent convicted person may request appointment of counsel to prepare a motion for DNA testing by sending a written request to the court, which only requires a statement that that

person was not the perpetrator of the crime and that DNA testing is relevant to their assertion of innocence. Accordingly, Todd Kinnamon, sentenced to 81 years-to-life under California's Three-Strikes law for attempted murder and other crimes, sought PC § 1405 relief to prove that his crime partner, not he, was the perpetrator, by having DNA testing done long after his conviction had become final.

The Superior Court had summarily denied his request. On appeal, a reluctant court construed the law to mean that any prisoner making the requisite declarations must be appointed counsel, no matter how

frivolous his claim. The appellate court opined that § 1405 appeared unnecessarily overbroad, in that persons included in its ambit were those for whom DNA evidence was plainly irrelevant, e.g., check forgers. A better law would tie the need for DNA testing to an evidence-based reality for it, and eliminate unnecessary appointments of counsel at public expense. In Kinnamon's case, the court felt that DNA testing would be of no aid, since both his blood and his crime partner's blood were present, and, under the facts of the case, reasonably so. See: *In re Kinnamon*, 133 Cal. App. 4th 316, 34 Cal. Rptr. 3d 802 (2005). ■

Washington Jail Pays Teenager \$400,000 for Rape While Imprisoned

Washington's Franklin County has paid \$400,000 to settle a lawsuit brought by a former pretrial detainee who was raped in the Franklin County Correctional Center (FCCC) by another detainee. The civil rights claim brought in a Washington federal court alleged failure to protect.

After he was arrested on a warrant for failure to pay a fine imposed by a criminal court, 17-year-old Russell Kassner was assigned on September 30, 2003, to a cell with another detainee, David Webster. Five days earlier, Webster had been convicted of solicitation to commit murder in the first degree and assault. Because of his history of multiple assault charges in the new convictions Webster, 36, faced a life sentence.

A January 6, 2003, report from the Washington Department of Social and Health Services found "Webster was a substantial danger to other persons and represented a substantial likelihood of committing criminal acts jeopardizing public safety." As a result of that report stating Webster was "aggressive, suspicious, intimidating, inclined to hold grudges, and that he was prone to sudden and unexpected brutality," the FCCC kept Webster in administrative segregation prior to September 30.

Shortly after being locked in the cell for the night, Webster began talking to Kassner about the violent crimes he had

committed in the past and that he would be sentenced to life imprisonment. Webster then showed Kassner a shank, which was a small blade with a black handle. He then threatened to kill him if he did not do what he told him to do or attempted to summon guards.

"Webster then raped R.K. by having forced anal intercourse with him. During the night, Mr. Webster repeatedly raped R.K. while threatening to kill him. Mr. Webster also forced R.K. to perform oral sex on him," the complaint charged.

Guards took no action to make Webster remove a cloth over the only light source in the room or to remove a piece of paper over the cell door window. The complaint asserted Webster was a known danger to others and the

FCCC failed to protect Kassner from the danger.

The FCCC agreed, on July 8, 2004, to pay R.K. \$400,000 to settle the suit. R.K. was represented by the able counsel of Richard D. Wall of Spokane. See: *R.K. v. Franklin County*, USDC, EDWA, Case No. CV-04-5050-LRS.

In September 2005, 1 guard resigned and another was suspended while an investigation in a lawsuit on claims one woman prisoner in the jail had forced sex with a guard and other female prisoners exposed himself to guards at FCCC. The guards' names were not released, no charges were filed, and the investigation continued. *PLN* will report future developments. ■

Additional Source: *The Seattle Times*

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New York Governor Illegally Halts the Release of 12 Sex Offenders

by Gary Hunter

New York Governor George Pataki illegally ordered twelve sex offenders, scheduled for release from prison, to be committed to New York's Manhattan Psychiatric Center (MPC), between September 23 and October 21, 2005. On November 2, 2005 New York Supreme Court Justice Jacqueline Silbermann granted the petitioner's unopposed motion to proceed anonymously in a habeas suit against the MPC.

Frustrated at his inability to persuade politicians to pass civil commitment legislation for sexual predators, Gov. Pataki contrived to take the law into his own hands. The twelve fell prey to Pataki's orders to "push the envelope" in interpreting Section 9.27(a) of New York's Mental Hygiene Law (MHL) which allows involuntary confinement of dangerous mentally ill persons.

Assistant Attorney General Edward J. Curtis defended Pataki's actions saying that prison superintendents properly applied for confinement orders and had each prisoner examined by two psychiatrists who recommended hospitalization. Upon arrival at a state hospital a third examination was conducted.

Steven Harkavy, deputy director of Mental Hygiene Legal Services (MHLS) and Does' counsel, argued that the law makes no provision for prison superintendents to initiate civil confinement.

"If the legislature would have wanted the prison superintendent as an applicant then it would have said so," he argued.

However, Justice Silbermann held that § 9.27(b)(4) allowed "an officer of any public...agency" to request review for civil confinement.

Still, serious flaws riddled Pataki's plan. The Court held that "the petitioners were deprived of the due process protections afforded to prisoners under the provisions of Section 402 of the Corrections Law, and were being illegally detained."

Sadie Ishee, attorney for MHLS pointed out that state law first requires court approval before examinations can be conducted. If approved, examinations are conducted by impartial, court-appointed psychiatrists who notify MHLS and a prisoner's attorney if it is decided that a prisoner should be committed.

Judge Silbermann also recognized that "The phrase in need of involuntary care

and treatment, is defined in MEL § 9.01 as meaning a 'person ...whose judgment is so impaired that he is unable to understand the need for such care and treatment.'" She went on to say, "that some of the petitioners may involuntarily have been placed in the mental health system by executive fiat is a possibility which this court cannot ignore."

"They clearly didn't follow procedures," agrees Harkavy.

Civil libertarians are calling Pataki's methods "official lawlessness" and accuse him of "political posturing and pandering." They accuse the governor of positioning himself for a bid at the 2008 presidential nomination.

"It is entirely appropriate for a court to require politicians, including the governor, to follow procedures set down in the law," said Donna Lieberman, executive director of the New York Civil Liberties Union.

On November 15, 2005 the Court ordered the release of the disgruntled dozen. That order was stayed pending an appeal by Pataki's possee. ■

Sources: *New York Post*, *New York Times*, *Associated Press*

BOP Enjoined from Terminating Boot Camp Program

A Massachusetts federal district court has entered a preliminary injunction against the Bureau of Prisons (BOP), enjoining it from terminating its "boot camp" incarceration program, pending compliance with the Administrative Procedures Act (APA), and requiring good faith consideration of the plaintiff for inclusion in the program.

The plaintiff, Richard Castellini, was convicted in July 2002 of money laundering and conspiracy to launder money. He was sentenced to twenty-one months imprisonment. After his conviction and sentence was affirmed on appeal, Castellini was allowed to report to the Intensive Confinement Center (ICC) at USP-Lewisberg on January 14, 2005. Eight days after his sentencing, the BOP sent a memorandum to federal judges dated January 14, 2005, stating that the boot camp program would be terminated "effective immediately" and that individuals enrolled in the program would be allowed to complete it, but that no new prisoners would be accepted into the program.

In 1990, Congress enabled the creation of the federal boot camp program, also known as the Shock Incarceration Program or ICC. Prisoners that successfully complete the rigorous demands of the boot camp may have their sentence reduced by up to six months and serve the remainder of the sentence in home confinement. Castellini filed his motion for a temporary restraining order or preliminary injunction, asserting the BOP did not have authority to terminate the boot camp and doing so violated the Ex Post Facto Clause.

The district court found that the BOP has discretion to operate a boot camp, but is not required to operate such a program. BOP's termination of the boot camp program, however, violates the APA's requirement of affording "interested persons an opportunity to participate...through submission of written data, views, or arguments." On at least forty prior occasions when the BOP made changes to the boot camp program, it filed the APA's notice-and-comment provisions – even when the

changes were largely ministerial.

The Court said, "the retroactive application of termination of the program to sentencing decisions made in reliance on the boot camp eligibility of a defendant underscores a key purpose of the notice requirement – ensuring fairness to the affected parties." Therefore, termination of the boot camp program violates the APA and is invalid, the Court held.

Additionally, the Court held termination of the boot camp program violates the Ex Post Facto Clause. Elimination of the program "can constitute an increase in punishment, because a 'prisoner's eligibility for reduced imprisonment is a significant factor in entering into both defendant's decision to a plea bargain and the judge's calculation of the sentence to be imposed.'"

Accordingly, the BOP was enjoined from terminating the boot camp program until it complied with the APA and to consider Castellini for the programs. See: *Castellini v. Lappin*, 365 F.Supp. 2d. 197 (D. Mass. 2005). ■

Sixth Circuit Upholds Michigan Ban On Prisoner Appeals of Discretionary Denials of Parole

The Sixth Circuit U.S. Court of Appeals upheld Michigan's lately revised statute that forecloses state prisoners from challenging discretionary denials of parole. Because the former availability of such a challenge had led to thousands of mostly unsuccessful suits, the Sixth Circuit accepted the state's argument that saving money from fighting those "frivolous" suits provided a rational basis for the preclusive amended statute.

Michigan state prisoner Paul Jackson filed a 28 U.S.C. § 2254 federal habeas corpus petition against Warden David Jamrog attacking the constitutionality of the 1999 revision to Michigan statute M.C.L.A. § 791.234(9), which permits an appeal to state court by prosecutors and crime victims of parole board decisions granting parole, but denies the equivalent right of appeal to state prisoners who are denied parole. Jackson claimed this process violated his Equal Protection rights.

As "a threshold matter, the court dealt with Jackson's failure to exhaust remedies in state court, per 28 U.S.C. § 2254(b)(3). However, the Michigan Court of Appeals held that no state court attack of discretionary parole denials is permissible. (*Morales v. Mich. Parole Bd.*, 676 N.W.2d 221, 225 (2003). Accordingly, failure to exhaust was excusable here because "there is an absence of available state corrective process." (28 U.S.C. § 2254(b)(1)(B)(i).) The court then agreed with the U.S. District Court below (E.D. Mich.) that because prisoners are not a suspect class, the rational basis test would control.

But the court's rational basis test was directed solely to the claim of financial pain to the state's defending against such prisoner suits during the years 1995 - 1999 when Michigan -- in a momentary lapse of compassion -- temporarily amended its statutes to permit prisoner appeals of discretionary parole denial. In those years, the state complained that of a total of 3,879 appeals, 3,800 were by prisoners and 79 by prosecutors. The prisoners won a scant 162 cases (4 %) for reconsideration, resulting in 24 releases (0.6%), while prosecutors won 26% of their appeals. The court found that upon this record, the state's 1999 statutory revision ending such appeals by prisoners was a rational protection of the public fisc.

Recognizing that by condoning the

1999 revision, the federal court was throwing the baby out with the bath water by foreclosing any review of abuse of parole board discretion, the court rationalized its harsh holding by theorizing that even if they did overturn Michigan's statute, they couldn't rewrite it. But Michigan could, reverting back to the no-appeal-whatsoever

version of the statute, which would not assist any aggrieved prisoner.

Accordingly, the Sixth Circuit affirmed the district court's denial of Jackson's petition, leaving the discretion of Michigan's parole board without any judicial review process. See: *Jackson v. Jamrog*, 411 F.3d 615 (6th Cir. 2005). ■

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Wrongfully Imprisoned D.C. Disabled Man Settles Suit For \$1.74 Million

by Michael Rigby

The District of Columbia and a private medical provider have agreed to pay \$1.74 million to Joseph Heard, a deaf, mute, and mentally disabled man who was wrongfully imprisoned in the D.C. jail for nearly two years.

Heard's ordeal [originally reported in *PLN*, April 2002] began in November 1998 when he was arrested on a misdemeanor charge of unlawful entry. Several months later Heard was committed to St. Elizabeth's Hospital and eventually declared mentally incompetent to stand trial. In October 1999, a Superior Court judge dismissed the charge and ordered him freed.

Instead, Heard was taken to the jail because computer records mistakenly indicated that he had an outstanding charge in a separate case. That charge too had been dismissed, a jail records officer later learned, but the paperwork authorizing his release was never received.

Heard, who had been diagnosed with paranoid schizophrenia, remained at the jail until August 13, 2001. The error came to light after jail staff were unable to locate his records. Those 670 days were tortuous for Heard. He received no visits from family, friends, or attorneys, and often scrawled the word "innocent" on scraps of paper. Heard tried to inform jail staff, through another prisoner, that his imprisonment was a big mistake, but guards and mental health workers ignored him.

After his release, Heard sued the District and the jail's private medical provider, the Center for Correctional Health and Policy Studies, alleging they violated his civil rights by failing to provide him a way to communicate with medical staff.

Under the terms of the settlement, which was approved by the U.S. District Court for the District of Columbia on August 4, 2005, the Center will pay \$640,000, with the District paying \$1,100,000.00. The District also agreed to pay reasonable attorney's fees and costs, but the exact amount is in dispute. (The settlement is on *PLN*'s website at www.prisonlegalnews.org).

Heard's attorneys asked for \$1,103,697.00 in legal fees plus \$71,013.36 in costs, which the District contested. The costs would have been much lower if the

District had not prolonged the case, said Heard's attorneys. It will be left up to the court to determine the appropriate amount. As we go to press the court has not ruled on the fee motion.

One of the attorneys, John Moustakas, said the District repeatedly refused to provide relevant records and stalled in discussing a settlement amount. "They locked him up illegally and unconstitutionally for two years," said Moustakas. "It's an obvious case of false imprisonment and violation of his civil rights. But

still, the District fought us and played around with us for two years."

Heard, now 45, lives with his sister, Sandy Hayes, in Orlando, Florida. Because of his ordeal, Heard has refused to return to Washington except for necessary meetings with his attorneys. "I'm glad they finally came to a settlement," said Hayes. "Hopefully, this will improve his life and he'll forget about those two years they took from him." See: *Heard v. Government of the District of Columbia*, USDC D DC, Case No. 1:02-CV-00296. ■

Former Riker's Island Head Goes to Prison

by Matthew T. Clarke

In March 2005, Anthony Serra, formerly the second-in-command of the New York City corrections department and top official at Rikers Island Jail, pleaded guilty to state and federal charges. He was subsequently sentenced to a year in prison. As previously reported in the August 2003 and January 2005 *PLNs*, Serra had been facing prosecution on a 144-count state indictment for charges stemming from his use of jail workers to renovate his kitchen and bathroom, plant trees and shrubs, mow the law, repair the driveway and other tasks at his house in Mahopac. The indictment also charged that Serra systematically stole city property and falsified state records to give the employees who worked on his home undeserved overtime.

The federal charges came from Serra's failure to report on his income tax form \$200,000 he made as a political consultant. The money was paid to Serra after he forced jail employees to work for free on Republican political campaigns. Serra's political employees included the New York Republican State Committee and the Friends of Pataki. The offenses occurred in 1998, 2001 and 2002.

Serra faced up to five years in federal prison. On August 1, 2005, he pleaded guilty to income tax evasion charges and received a sentence of eight months in federal prison and a \$80,000 fine. Additionally, Serra must serve two months of house arrest and two years of post-release supervision.

In March 2005, the day after he pleaded

guilty to the federal charges, Serra pleaded guilty to two of the 114 charges in the state indictment. On October 6, 2005, he was sentenced for the felony charge of grand larceny and misdemeanor conflict of interest, receiving a one year sentence for each crime and an order to pay an additional \$50,000 in restitution. Serra had already paid the city \$25,000 in restitution. The state and federal sentences are to run concurrent.

In sentencing him to less than the one-year plea-bargained sentence, Manhattan federal judge Barbara Jones told Serra that he had made "a foolish and tragic mistake," but she wasn't going to sentence him to term "so lengthy that it will have any permanent effect on your ability to get back to your family." The light sentence and sympathetic attitude has spawned criticism of preferential treatment.

Assistant New York City District Attorney Donald Levin disagrees.

"This is a guy who was way up there, who could have been the next commissioner, who fell from grace," Levin said. "And a felony conviction is a long way to fall."

Be that as it may, one year in prison is still a light sentence for years of conducting a continuing criminal enterprise and committing hundreds of felonies. Wealthy or politically-connected criminals get preferential treatment in the criminal justice system. It's the American way. ■

Sources: *The Empire Journal*, *New York Post*, www.thejournalnews.com.

\$3.6 Million Awarded in Rape and Murder by Erroneously Released NY Prisoner

The New York Court of Claims awarded \$3,621,632 to the estate of a woman who was raped and murdered by a prisoner who was mistakenly released early. The court also awarded \$1,950,000 to another woman who was raped and severely beaten by the offender. Fault was apportioned in both cases "as two-thirds (66 2/3%) on the part of the defendant State of New York and one-third (33 1/3%) to" the offender.

Franklin Scruggs was serving two concurrent sentences on 20 years to life within the custody of the New York Department of Corrections (DOC). When an appellate court vacated one of those sentences, leaving the other intact, the DOC mistakenly released Scruggs, apparently believing both sentences had been vacated.

Following Scruggs' erroneous release he met Stephanie Dillon, a 25-year-old, divorced mother of two daughters, ages six and two, on September 26, 1998. Later that night he brutally beat, choked and raped Dillon repeatedly over the course of several hours before she was finally able to escape.

A few days later, Scruggs met Michelle Brey, a 35 year-old single mother of 9, 7,

and 5-year old boys. Scruggs raped and murdered Brey. An autopsy revealed that she had been raped anally and vaginally, she sustained a number of blunt force traumas, a broken jaw and she was asphyxiated by a jacket being stuffed down her throat and wrapped around her neck. The examining pathologist likened Brey's "fight for air... to choking on food,... accompanied by fear of impending doom." He concluded that "the struggle until asphyxiation lasted from two to five minutes, 'maybe even beyond.'"

Dillon and Brey's estate sued Scruggs and the State. Both defendants were found liable. *Dillon v. State of New York*, 307 A.D. 2d 919, 762 N.Y.S. 2d 883 (2d Dept. 2003) and *Steel v. State of New York*, 11 A.D. 3d 673, 782 N.Y.S. 2d 924 (N.Y. App. Div. 2d Dept. 2004).

On the issue of damages, the court found "Dillon's past pain and suffering amount to \$1,300,000" and her "future pain and suffering amounts to \$650,000" for a total award of \$1,950,000.

The court then found that Brey's pain and suffering amounted to \$850,000. It "measured... the pecuniary loss suffered by the children in 'parental guidance...' nurture and "... physical, moral and intellectual train-

ing..." This is "distinguished from loss of companionship, mental anguish, sorrow or injury to feelings, which are not compensable in a wrongful death action..." Ultimately, the court awarded \$400,000 to each child for past losses. Future loss damages were awarded to the children in the amounts of \$300,000, \$400,000 and \$500,000 for the 9, 7 and 5-year-old, respectively. The court also awarded \$140,653 for past lost earnings and \$222,979 for future loss earnings for nine years. The total award to Brey's estate was \$2,198,000 in past damages and \$1,422,979 for future damages" or \$3,621,632.

Finally, the court apportioned two-thirds (66 2/3%) of fault to the State and one-third (33 1/3%) to Scruggs, finding that "what was striking about the decision-making process that led to the mistaken release ... was that it lacked oversight or any effective managerial controls—highlighted by the number of state employees involved in the many opportunities to catch the error." See: *Steel v. State of New York/Dillon v. New York*, 6 Misc.3d 1030(A), 800 N.Y.S.2d 357 (NY Ct. Cl. 2005). ■

BOP Awards Unisys Corp. Nationwide Prison Phone Contract

The U.S. Federal Bureau of Prisons (BOP) contracted with Unisys Corp. (Bluebell, Pennsylvania) to install new telephone systems in over 110 BOP prisons nationwide. The September 14, 2005 contract awards \$37 million for the first three years, expandable in three one-year options to a total of \$96 million.

Under the contract's terms, Unisys will install, maintain and program its Inmate Telephone System-3 (ITS-3). Unisys claims the new equipment requires only one-eighth of the current system's hardware space, and will make use of Unisys ES3120 servers programmed with a prisoner telephone software application provided by Value Added Communications of Plano, Texas.

Unique to ITS-3 is that prisoners will be able to pay for their calls in three ways. They may make a direct debit from their prison commissary accounts; they may call collect; or they may use pre-paid collect accounts. Unisys plans to offer similar

services to state and local prison markets.

Not announced was what, if any, "kickback" percentage Unisys returns to the BOP or how their billing compares with free market rates for non-prisoners. ■

Source: Unisys Corp. Press Release, September 14, 2005.

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Federal Government Bans Medicaid Impotence Drugs for Sex Offenders

The U.S. Government has ordered states to ensure convicted sex offenders do not receive reimbursement for erectile dysfunction drugs under Medicaid or Medicare.

A New York audit showed 198 sex offenders received such drugs through the state/federal health-care program for the poor and elderly since 2000. Shortly thereafter, President George Bush moved to close the loophole that lets sex offenders to receive drugs such as Viagra, Levitra, and Cialis through the program.

The federal action caused Florida's Attorney General to leap quickly onto the bandwagon. "Chain-gang Charlie" Crist's staff concluded that over the last four years 218 Florida sex offenders received Viagra, costing \$93,000. Crist said 77 percent of those had committed sex crimes involving minors.

Chain-gang Charlie, who announced his candidacy for Florida governor in May 2005, is a known prisoner basher. In the 1990s as a state senator, Crist was on the "get tough on crime" set and pushed legislation reinstituting chain-gangs, increased penalties and prison populations, and decreased recreational and educational programs in prisons. With a recent abduction and murder of three young Florida girls, Crist has been getting ample mainstream media mileage on the backs of released sex offenders.

Crist's drum beating called out Florida Gov. Jeb Bush, who called for a ban on Viagra for all poor people. "I don't think the Medicaid budget ought to be used for any of this, for anybody -- certainly not sex offenders," Bush said.

The decision to ban just sex offenders from receiving the pills was all but required by a May 23, 2005, letter from the head of the federal agency regulating Medicaid. The letter threatened states with sanctions if they provide sex offenders with the pills.

Other states quickly jumped into the fray, revealing 788 cases of sex offenders receiving Viagra and other impotence drugs. Among these are Florida, 218 cases; New York, 198; Texas, 191; New Jersey, 55; Virginia, 52; Missouri, 26; Kansas, 14; Ohio, 13; Michigan, 7; Maine, 5; Georgia and Montana, 3 each; Alabama 2; North Dakota, 1. The numbers surveyed varied among the states, from six months to five

years.

Some doctors disagree with the approach to ban such drugs to Medicaid/Medicare recipients, saying that to allow older people or the ill to maintain a sex life encourages them to lead a healthier lifestyle.

"States that have imposed a ban on coverage of erectile dysfunction are effectively lumping thousands of victims of crippling disease with criminals," said Dr. Richard Akins, chief executive officer of the National Prostate Cancer Coalition. "Viagra and similar medications are not a 'lifestyle' drug for these people."

In March, 2006, Florida law makers

introduced legislation that would make it a criminal offense for people convicted of sex offenses to possess or use impotence drugs such as Viagra or Cialis. State Senator Carey Baker likened it to laws that ban felons from voting or possessing firearms. None of these proposals however concede that people convicted of a sex crime can have, or are entitled to fulfilling sex lives that do not involve criminal acts. In the case of governor Bush, apparently poor people who have not been accused of a crime are not entitled to a sex life either. ■

Sources: *The Seattle Times*; *Palm Beach Post*; *The Miami Herald*.

BOP "Secret Squirrel Photo File" Suit Remanded

The U.S. Court of Appeals for the D.C. Circuit has reinstated a prisoner lawsuit under the federal Privacy Act (Act) at 5 U.S.C. § 552a, et seq. The District Court for the District of Columbia had dismissed the case for want of a genuine issue of material fact.

Federal prisoners Keith Maydak, George Smith and Paul Lee initiated the case pro se after learning that the federal Bureau of Prisons (BOP) was misusing the Inmate Photography Program. Under the photography program, prisoners pay \$1 to the Inmate Trust Fund and can then have their photos taken with family or friends. Film developers provided a second photo at no extra cost, which guards then confiscated and put in an "investigative file." Believing this practice to be unlawful, the prisoners sued various federal facilities (Beckley, Cumberland, Lewisburg, McKean and Ray Brook).

Guards at Beckley and McKean admitted paying for photo development with money from the Inmate Trust Fund in violation of 31 U.S.C. § 1321(b)(1). That statute prohibits guards from using fund monies to pay for security programs, as the fund is for the benefit of prisoners. Consequently, the plaintiffs also sued those guards for violating § 1321(b)(1).

The district court summarily dis-

missed the suit, claiming that it presented no genuine issue of material fact to be tried, and the prisoners appealed. On appeal, the D.C. Circuit appointed attorney Bruce V. Spiva to argue the prisoners' case. The appellate court found the so-called "secret squirrel photo file" to be a "record system" protected by the Act. It also found that the BOP's keeping of the extra photos may violate prisoners' association rights under the First Amendment. The appeals court also held that prisoners having their pictures taken with visitors was a right of association protected by the First Amendment, which precluded the district court's dismissal of the case on summary judgment.

The D.C. Circuit further found that using money from the Inmate Trust Fund to pay for photo development could violate 31 U.S.C. § 1321(b)(1), which declares the fund to be for prisoners' benefit only. On that basis, the appellate court found the existence of another genuine issue of fact which precluded summary dismissal.

Consequently, having found genuine factual issues which precluded the district court's grant of summary judgment to the BOP, the D.C. Circuit reversed the lower court's ruling and remanded the case to the district court with instructions to consider the above-discussed issues. See: *Maydak v. United States*, 363 F.3d 512 (D.C. Cir. 2004). ■

New York Jail Prisoner Injured In Assault Awarded \$750,000

On July 12, 2005, a New York court awarded \$750,000 to a prisoner who suffered ankle and face injuries when he was beaten by other prisoners.

While imprisoned at Rikers Island in Queens on February 12, 1995, Joshua Torres, 17, was confronted by another prisoner who demanded his sneakers. Torres refused. While locked in his cell an hour or two later, he claimed, the cell door suddenly opened and four prisoners entered. Torres says he was grabbed, thrown to the ground, and hit in the face with a blunt object, which he believed to be a toilet brush. One of the assailants was the prisoner who had confronted him earlier.

Torres sustained injuries to his ankle and face which required surgery. He underwent open reduction to internally fixate a trimalleolar ankle fracture; three

plates were inserted into his face; and his jaw was wired shut for 30 days. A subsequent surgery was performed to remove the plates, screws, and a tooth that had become infected.

Torres's mother filed the initial suit against the City of New York on her son's behalf but was removed when Torres reached the age of majority. Torres alleged the prison was negligent in its supervision of the prisoners and sought damages for past and future pain and suffering. He claimed residual injuries including headaches, blurred vision, a depression under his right eye, and a slight scar above and below his right eye.

At trial Torres asserted that the guards failed to intervene and that his cell door should have been locked. The City contended that because the incident was unforeseeable, it had no duty to prevent

it. Torres's criminology expert, Alvin W. Cohn of Rockville, Maryland, testified that the City still had a duty to intervene and that the guards should have been in sight or sound range of the assault. Donald R. Weisman, M.D. (otolaryngology), of New York, New York also testified for Torres.

After deliberating for 1 hour, the jury awarded Torres \$750,000 in damages. However, because 20% negligence was assigned to the assailants, Torres's net recovery was \$600,000. Torres was represented by Ernest N. Reece of the New York, New York, law firm Napoli, Kaiser & Fern. See: *Torres v. City of New York*, Bronx Supreme Court, Case No. 8453/96. ■

Source: *VerdictSearch New York Reporter*

Rebellion at CCA Prison in Texas

On August 27, 2005, a riot involving hundreds of prisoners broke out in a private prison run by Corrections Corporation of America (CCA) in Mineral Wells, Texas, injuring a dozen prisoners and two guards. The sixteen-year-old, 2,100-bed facility holds prisoners with less than a year to serve before their expected parole date.

Around 8:00 p.m. on Saturday, August 27, 2005, fights broke out among two dozen of the over 500 prisoners on the prison's recreation yard. Guards quelled the fights and returned the prisoners to their housing units.

At approximately 9:30 p.m., prisoners from one building began to battle those from another building. The fights spilled out onto the recreation yard and involved around 200 prisoners, some of whom had armed themselves with broom handles, sticks and boards. About 10:15 p.m., the Parker County Sheriff's Department, Palo Pinto County Sheriff's Department, Mineral Wells Police Department, Texas Department of Public Safety and Texas Rangers were notified of the riot and sent officers to secure the prison's perimeter. DPS also sent a searchlight-equipped helicopter.

A special operations team was deployed to quell the riot. They used tear gas, which quickly brought an end to the fighting. Two guards received scratches.

Twelve prisoners were injured, including Michael Cantu, 27, who was transported by helicopter ambulance to a hospital and Matias Gonzales, 63, who was also hospitalized. Several other prisoners were evacuated to the hospital via ground ambulance, but only Cantu and Gonzales remained at the hospital overnight. The injured guards were treated at the prison.

"It was pretty western out there for a while," according to Parker County Sheriff Larry Fowler. "You could follow it from the noise. It would be in one spot, then in another spot. When they deployed the gas it tapered off to nothing and they got control of it and shut it down."

It appears to have been race- or gang-related," said Fowler. "They generally trashed the place." ■

Sources: *Fort Worth Star-Telegram*, *Associated Press*, *WFAA-TV*, *Dallas Morning News*.

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Washington State Forensic Scientist Helps Convict the Innocent, FBI Assists

by Matthew T. Clarke

Washington State Patrol crime lab forensic scientist Charles Vaughan had no problem finding new employment after he helped convict two innocent Oregon State men of murder when he worked as a state forensic scientist in the Oregon State Police crime lab. Indeed, as it now turns out, the innocent men would not have been convicted without Vaughan's tainted testimony. Furthermore, since he was hired by Washington, Vaughan has botched more forensic work and made mistakes on forensic-science proficiency examinations.

Vaughan had been working for the Oregon State Police crime lab for about thirteen years when 19-year-old convenience store clerk Raymond Oliver was murdered in Springfield, Oregon, on June 7, 1983. The murder was an execution-style shooting from close range. On June 24, 1983, Chris Boots and Eric Proctor were arrested for the crime, but three days later were released without having been charged.

Vaughan analyzed alleged blood evidence--which he referred to as "high velocity blood splatter"--from Boots's and Proctor's clothing. He claimed to have found a fleck of gunpowder on Proctor's pants. In testing the fleck, Vaughan totally consumed it and only discovered that it contained nitrates, chemicals found in matches, fireworks, car paint, and other compounds, as well as gunpowder. In 1984, Vaughan testified about these findings to a Lane County grand jury, but no indictment was returned.

In March 1986, Vaughan sent a second "gunpowder flake" he allegedly found on the clothing to the FBI, requesting their assistance in identifying it. He sent a letter to the FBI crime lab, pressuring it for quick results because Boots had filed a lawsuit against the police department for false arrest. The FBI lab confirmed it was gunpowder. Proctor was indicted in May 1986. He was convicted of aggravated murder and sentenced to life in prison on October 31, 1986. Boots was convicted of the same charge and received a similar sentence on March 24, 1987. FBI lab supervisor Charles Calfee testified at both trials that the second "gunpowder flake" was indeed double-base gunpowder.

About ten years later, FBI chemist Fredric Whitehurst revealed the FBI crime lab's bias and incompetence in analyzing evidence. He was asked to review Calfee's findings and concluded that there was no proof that the second flake was gunpowder. However, the FBI refused to admit it had made a mistake.

Other scientists agreed with Whitehurst. One scientist, Kenneth Kosanke, examined a photograph and test results from the flake in March, 1997, and determined that it could not be gunpowder.

In 1994, a tip led investigators to the man who had killed Oliver. Richard "Ricky" Kuppens confessed to the crime before he committed suicide in October 1994. His fingerprint had been discovered on tape left at the crime scene. His accomplices admitted that Boots and Proctor had nothing to do with the crime. Boots and Proctor were freed in November 1994.

On May 17, 1995, Vaughan retired from the Oregon State Police crime lab. On July 17, 1995, the Washington State Patrol crime lab hired him. At that time, he didn't mention his part in convicting Boots and Proctor or that he was demoted from director to assistant director in 1993 for failing to discipline a crime lab employee who falsified test reports, according to Washington crime lab officials.

Boots and Proctor filed a federal civil rights lawsuit against Vaughan, the state of Oregon, Lane County, the city of Springfield, and two police officers in November 1995. However, the judge ruled that there was not enough evidence to prove that Vaughan "manufactured evidence or other-

wise acted with deliberate indifference," the high standard that must be met in federal civil rights lawsuits. Mere incompetence or negligence is not sufficient to win in this type of suit. Thus, Vaughan escaped any consequences for his responsibility for convicting the innocent men. Boots and Proctor settled their suit against the two police officers for \$2 million in May 1998.

University of California-Irvine criminology professor William Thompson worries about this lack of accountability and the ease at which Vaughan slipped out of Oregon when the heat was on and settled into Washington with no questions asked.

"It may well another Melnikoff case," said Thompson in reference to a Spokane crime lab chemist who was fired in March 2004 after it was discovered that his botched hair analysis while he worked as a forensic scientist in Montana put a Montana man in prison of a rape he didn't commit. "I think an audit of [Vaughan's] work would be in order."

Vaughan has also made errors in hair analysis. In September 1998, Thurston County prosecutors had to dismiss a burglary case after defense experts proved that Vaughan's analysis falsely linked the defendant to the crime. That same month, Vaughan failed his trace analysis proficiency examination. However, the crime lab didn't find out about his failing the examination for a year. When they did find out, what was the consequence for Vaughan? Nothing. He still works as a forensic scientist in Tacoma. ■

Source: *Seattle Post-Intelligencer*.

Arkansas Juvenile Prisons Cornell Kills a Prisoner, Hires Guard DOC Fired

by Matthew T. Clarke

Arkansas paid Cornell Corporations of Houston, Texas, \$9.5 million a year to manage the Alexander Youth Services Center in Pine Bluff, Arkansas. What they got for their money was a prison that killed by medical neglect a juvenile prisoner with a blood clot in her lungs whose requests for medical attention had been ignored for weeks. The prison also hired a guard the Arkansas

Department of Corrections (DOC) had fired for having sex with a prisoner. What Cornell's mismanagement earned them was a recommendation for extension of their contract from the state legislature.

John Berry, 40, was a 16-year veteran of the Arkansas Department of Correction and a sergeant when he was accused of having sex with a prisoner. An internal affairs investigation concluded that Berry

had sex with a prisoner at the Tucker maximum security prison. This finding, bolstered by his failing a lie detector test, led to his firing in October 2002.

No criminal charges were filed against Berry. Therefore, he passed a criminal history background check conducted by Cornell when they hired him. Berry also filed a federal civil rights suit against the DOC alleging the DOC violated his due process rights when it fired him. However, that suit was dismissed by U.S. District Judge Susan Webber Wright in May 2005. According to Berry's lawyer, he continues to maintain his innocence.

Michael Hurst, director of Alexander, said he only heard vague allegations against Berry which he failed to investigate when Berry was hired. Hurst said he wanted to talk to the Jefferson County attorney about what to do with Berry, but that office is currently vacant.

Meanwhile, state legislators were expressing outrage at the mishandling of prisoner medical services at Alexander. Seventeen-year-old LaKeisha Brown had been doing time at Alexander for two years and was due to be released in May 2005. Instead of being released in May, her body was released in April. She died of a blood clot in the lungs on April 9, 2005.

On the day of her death, Brown could hardly walk or leave her bed. She had been complaining of difficulty breathing and tiredness in the days before she died. She had also repeatedly complained of back pain, shortness of breath and chest pains in January and February. Her frequent complaints caused the private prison's doctor to order psychiatric care for her. Every indication is that the medical staff at Alexander simply did not believe Brown and ignored her pleas for medical attention.

At 6:00 a.m. on the day she died, a nurse observed Brown with blue lips and complaining of being cold and having a hard time breathing. The nurse asked that an ambulance be called. Her supervisor overruled her. No one even called the prison's doctor until she collapsed, unconscious and no ambulance was summoned until three and a half hours later. It was not the first time Brown had collapsed, she had done so several times in the previous days, it was just the last time she collapsed at Alexander.

State Public Defender Commission Juvenile-Services Ombudsman Scott Tanner helped Brown get an appointment

with a gynecologist after she complained about menstrual problems for months. He didn't understand why she didn't tell him of her other medical problems and the medical department's refusal to address them. Later he discovered that her therapist had told Brown that her frequent medical requests could endanger her planned May 1 release.

Unfortunately, Cornell is poised to get away with this criminally negligent homicide. An Arkansas State Police investigation found no criminal wrongdoing. Cornell hasn't fired anyone. This angered some legislators.

"Why hasn't someone been terminated?" asked state Senator Sue Madison, D-Fayetteville. "The nurse just turned a deaf ear to this because she was tired of her."

Madison also complained at Cornell's lack of cooperation in the legislative investigation, noting that neither Cornell nor Youth Services Division gave her any details of their investigations. Instead, she got them from the *Arkansas Democrat-Gazette*.

Meanwhile, Cornell issued an apology for Brown's death. However, the apology was generally worded and did not admit any fault on Cornell's part. Cornell promised to review policies and staff actions at Alexander.

State investigators already determined that Alexander employees violated their own policies repeatedly in the days leading up to Brown's death.

"On the day prior to and including LaKeisha's death, there was (sic) appropriate medical protocols in place," according to director of the Department of Health and Human Services Youth Services Division Kenneth Hales testifying before state legislators. "However, we did not find

documentation that could demonstrate to us that those protocols were adhered to. And that is our primary finding."

What did the angry state legislators do to punish Cornell for its callous disregard of Brown's life? Recommend extending Cornell's contract that was due to expire in 2008. After all, what is the life of a 17-year-old girl who was murdered by medical neglect when you have a juicy \$9.5 million contract to award? ■

Sources: *Associated Press*; *Arkansas Democrat-Gazette*; www.nwanews.com

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By Michael and Becky Pardue

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Civil Commitment of Massachusetts Sex Offenders Expanding

by Michael Rigby

Massachusetts prosecutors are using recent changes in state law to expand the number of sex offenders imprisoned through civil commitment, and it's costing taxpayers millions.

In 2004 and 2005, the Massachusetts legislature and Governor Mitt Romney greatly expanded the pool of sex offenders who could be committed to the state Treatment Center in Bridgewater. The old law was much narrower, focusing mainly on sex offenders who assaulted children. The new law includes such crimes as propositioning a minor, possession of child pornography, and "open and gross lewdness and lascivious behavior."

As a consequence, the number of petitions filed to commit sex offenders after their release from prison has risen sharply, from 75 in 2003 to 124 in 2004. In October 2005, 157 petitions were pending statewide, said Superior Court officials.

Under the law, individuals are committed if prosecutors can prove beyond a reasonable doubt that he or she is likely to commit another sex crime due to a "mental abnormality or personality disorder."

Committed sex offenders are entitled to have a judge review their cases annually to decide if they still pose a threat warranting continued confinement. Even so, release is unlikely. Since the law was enacted in 1999, not one person has been freed, according to the state's public defender agency, the Committee for Public Counsel Services.

The new law also provides for the commitment of convicted sex offenders even if they are not currently serving time for a sex offense.

From July 2003 through June 2004, 811 eligible sex offenders were referred to the district attorney's office. (Prison officials are required to notify the district attorney 6 months before a convicted sex offender is to be released.) Of those, prosecutors filed 77 commitment petitions, resulting in the commitment of 13 sex offenders, or 17%. During the same period the following year, prison officials referred 1,198 prisoners, resulting in 108 petitions and 21 commitments, or roughly 19%.

The flood of cases is clogging courts and wasting taxpayer money. Because most convicted sex offenders can't pay for their own defense, the state spends millions on court-appointed attorneys and

mental health experts. In fact, the state public defender agency recently created a separate division consisting of 4 lawyers who do nothing but defend sex offenders facing civil commitment. The cost: \$342,000 per year. In 2005 the state spent another \$541,000 for expert testimony.

What's more, civil commitment trials sometimes take longer--and cost more--than murder trials because they rely on complex testimony from dueling psychologists and psychiatrists and also because the stakes are so high. Sex offenders face commitment at the Treatment Center for "one day to life."

Critics of the increased commitments have argued that prosecutors label all sex offenders as dangerous to avoid any

potential political backlash should one of them commit a high-profile crime. As evidence, critics point to the fact that since 1999 judges have declined to pursue 80% of prosecutors' civil commitment petitions.

"Either they're doing it to impress their constituencies, or they're doing it out of fear of retaliation from their own constituencies if they don't do it," said John Swomley, a private Boston attorney who represents sex offenders referred to him by the state public defender agency. Consequently, Swomley contends, many of the petitions are baseless. But hey, the money is not coming out of prosecutors' pockets. ■

Source: *The Boston Globe*

Avalon Correctional Services Delisted From NASDAQ

On February 3, 2005, Avalon Correctional Services, Inc., announced that it had filed Form 15 with the Securities and Exchange Commission (SEC) to terminate the company's common stock pursuant to the Securities and Exchange Act of 1934 (SEA). This allows Avalon to cease filing SEC-required reports, including forms 8-K, 10-K and 10-Q.

Avalon complained that the costs of complying with Section 404 of the SEA, as required by the Sarbanes-Oxley Act of 2002, was making the business unprofitable. By terminating common stock, it will eliminate legal, auditing, accounting and printing expenses associated with compli-

ance. These costs might otherwise cause Avalon to default on its loan obligations and prevent it from accessing sufficient funds to continue daily operations.

Avalon will no longer be listed on the NASDAQ. It may be traded over the counter on the Pink Sheets, a centralized stock quotation service that operates through a web site. Avalon will still be required to report to its stockholders under Nevada state law. Avalon also announced its intention to post its press releases, quarterly reports and annual financial results on its website. ■

Source: Avalon Company Press Released.

California Lifer's Understanding of Plea Agreement Does Not Create Entitlement to Parole

In 1984, Peter Honesto committed a murder in the course of kidnapping and robbery, exposing him to California's death penalty or life without parole. He accepted a plea agreement for 17-life for second degree murder. When later repeatedly denied parole, he successfully petitioned the superior court to "enforce" the plea agreement by releasing him. The California Court of Appeal

reversed, holding that in the absence of a written record of plea terms that mandated parole, Honesto's subjective memory of his plea understanding did not ipso facto create a "right" to parole. Parole may be denied upon "some evidence" of the crime alone, when the parole board finds the prisoner "unsuitable." See: *In re Honesto*, 130 Cal. App. 4th 81; 29 Cal. Rptr. 3d 653 (2005). ■

Florida DOC's Copy Cost Assessment Rule Declared Invalid

by David M. Reutter

Florida's First District Court of Appeal has held the Florida Department of Corrections (FDOC) does not have legislative authority to support its rule regarding the amount prisoners are charged for photographic copying services, authorizing deductions from prisoners' accounts for copying services, and imposing liens on prisoner accounts to cover such costs.

Florida prisoners Glenn Smith and Thomas P. Wells, Jr. sought a declaratory judgment holding that Rule 33-501.302 of the Florida Administrative Code, which outlines costs charged to prisoners for photocopying services, exceeded the Legislature's grant of rule-making authority to the FDOC. The circuit court entered summary judgment upholding the validity of the challenged portions of the rule.

The First District Court of Appeals found that from the time the copying

service rule was originally promulgated, it mandated that all prisons provide prisoners copying services, it designated the type of materials that could be copied by prisoners, and it established a set fee to be paid by prisoners for copying services. The set fee charged is fifteen cents per page for standard sized papers, or more, if the copies require special equipment or paper.

While Florida agencies have rule-making authority, a proposed or existing rule is an invalid exercise of delegated legislative authority if "... the agency has exceeded its grant of rule-making authority, citation to which is required by S. 120.54(3)(a)1," Florida Statutes or "the rule enlarges, modifies, or contravenes the specific provisions of law implemented."

The Legislature provided standards to determine whether a particular rule constitutes an invalid exercise all delegated

legislative authority. Those standards hold that a grant of rule-making authority is necessary, but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or enact the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's classical powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rule-making authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties confessed by the same statute.

"Either the enabling statute authorizes the rule at issue or it does not," the Court said. The Court held that neither 20.315, 945.6037, or 944.09, which FDOC cited as authority authorizing the copying costs rate, authorizes FDOC to make monetary assessments against prisoners. Had they granted such authority, there would be no need for specific legislation authorizing the question from prisoners by FDOC of medical co-payments for emergency medical services.

The Court held the rule was an invalid exercise of delegated legislative authority in remanded for further proceedings. See: *Smith v. Florida Department of Corrections*, 920 So.2d 638 (Fla. 1st DCA 2005). ■

York County, Maine, Settles Class Action Strip-Search Suit for \$3,300,000

In April 2005, York County, Maine, agreed to settle for \$3,300,000 a class action lawsuit alleging the county maintained an unconstitutional policy of strip-searching all pre-arraignment detainees in the York County Jail regardless of the charge against them.

Plaintiffs Michele Nilsen and Michael Goodrich contended that upon being placed in the York County Jail for minor offenses, they were unconstitutionally strip-searched: Nilsen following a January 13, 1999, arrest for driving with a suspended license; Goodrich following a February 12, 2003, arrest for failing to report to his probation officer.

Nilsen and Goodrich specifically contended that the jail maintained an unconstitutional custom or policy of strip-searching all pre-arraignment detainees indiscriminately--whether arrested for unpaid parking tickets or a felony--and sought class action certification. A magistrate for the U.S. District Court for the District of Maine agreed and certified a class consisting of all persons strip-searched at the jail between October 14, 1996, and April 30, 2004, who were not individually evaluated for reasonable suspicion while awaiting a first court ap-

pearance or for bail to be set after being arrested on charges or a warrant that did not involve a weapon, drugs, or a violent felony.

Through mediation, the parties agreed to settle for \$3,300,000 and the county's promise to institute and maintain a new privacy policy for pre-arraignment detainees.

Under the settlement agreement, each of the approximately 7,000 persons in the class are entitled to a one time cash payment, no matter how many times they were placed in the jail are strip-searched. Women, who make up 17% of the class, will receive twice the amount paid to men. Attorney's fees were requested at 30% of the gross settlement amount.

The plaintiffs were represented by David C. Webbert of the Portland, Maine, law firm of Johnson & Webbert, and Howard Friedman of Boston. Plaintiffs had also retained correctional standards expert Thomas A. Rosazza of Colorado Springs, Colorado. See: *Nilsen v. York County*, USDC D ME, Case No. 02-212-P-H. ■

Source: *New England Jury Verdict Review & Analysis*

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Michigan Jail Settles Suicide Suit for \$280,000

On June 6, 2004, Wayne County, Michigan, agreed to pay \$280,000 to settle a lawsuit filed by the family of a county prisoner who committed suicide days after he was attacked by another prisoner.

Jose Perez was arrested on December 27, 2000, and placed in the Wayne County Jail in Detroit, Michigan. Three weeks after his initial cell assignment, Perez was moved to another section of the jail without the approval of the jail classification section.

While there, Perez was attacked by another prisoner who entered his cell at 9:45 p.m., pulled the sleeping Perez from his bunk, and viciously punched and kicked him while he was on the floor. Perez called to guards for help during the February 24, 2001, attack, but none responded. Another prisoner, Douglas Buchannon, ultimately intervened and pulled the attacker off of Perez.

At 10:00 p.m., guard Michael Brudzinski returned to the area from another section of the jail where he had been playing computer games. Perez called out that he needed a nurse, but Brudzinski took no action. Shortly thereafter, guard Kim Robinson noticed Perez's swollen and bleeding right eye and bloody nose while conducting a routine count. Perez told her that he had been attacked and that he was having difficulty breathing, but like Brudzinski, she did nothing. Neither Brudzinski nor Robinson informed the next shift of Perez's injuries.

When the midnight shift came on and saw the extent of Perez's injuries, he was taken to the hospital and treated for a closed head injury; right periorbital contusion; conjunctival hemorrhage on right eye; chest pain, rib fracture; and abrasions. After approximately 3 ½ hours at the hospital, Perez was returned to the jail at 4:25 a.m. on February 25, 2001, and placed in the Sixth Floor maximum security area.

Later that day, at approximately 6:21 p.m., guards discovered Perez hanging in his cell. Paramedics responded 5 minutes later and took Perez to the hospital, where he was pronounced dead at 7:19 p.m. Jail officials never notified Perez's family of his death. Perez's sister, Carmen Diaz, a Detroit Police Officer, ultimately learned of Perez's death at around midnight on February 27, 2005, when her commander

informed her that Perez had committed suicide.

Perez's family sued Wayne County, the sheriff, and several guards alleging, among other things, that jail officials should have known Perez had a history of depression and that his injuries, the delay in receiving medical attention, and teasing over his "ass kicking" by a John Doe guard caused him severe emotional distress and mental anguish that contrib-

uted to his suicide.

In a settlement approved by the U.S. District Court for the Eastern District of Michigan on June 10, 2004, Wayne County agreed to pay Perez's family \$280,000 for his wrongful death. Attorney's fees were approved in the amount of \$100,000. The family was represented by attorney Peter J. Parks of Troy, Michigan. See: *Diaz v. County of Wayne*, USDC ED MI, Case No. 02-71066. ■

New Jersey's Legal Mail Policy Enjoined; Qualified Immunity Granted

A New Jersey federal district court has held that a prison policy of opening legal mail outside of prisoners' presence is unconstitutional, but that prison officials are entitled to qualified immunity from damages. This civil rights action was brought by New Jersey prisoner's Jamaal W. Allah, Lennie Kirkland, and Kevin Jackson, alleging the Legal Mail Policy violates their fundamental rights to free speech and association under the First Amendment.

The Legal Mail Policy was amended by the New Jersey Department of Corrections (NJDOC) after the attacks of September 11, 2001. Citing a Governor's Executive Order that allowed state agencies to suspend or modify existing rules to the extent they jeopardize public policy, the NJDOC required that all incoming legal mail be opened outside prisoners' presence and checked for contraband and anthrax contamination. Prior to the September 11 attacks, NJDOC policy required that all legal mail be opened in a prisoners' presence.

The Court had before it the parties' cross-motions for judgment on the pleadings. It found that while the Supreme Court has upheld a policy of opening and inspecting, but not reading, clearly marked legal mail in a prisoner's presence. The Supreme Court, however, has not addressed whether the opening and inspecting legal mail outside a prisoner's presence is constitutional.

To Court found that there is no reasonable connection between the Legal Mail Policy in the defendant's a rusted interest in protecting staff and

prisoners from anthrax contamination. First, there was no evidence of attempts to expose prisons to anthrax. "A policy requiring that legal mail be opened in an enclosed area would be reasonable, and a policy providing that any suspicious letters marked legal mail be opened outside of the prisoner's presents might also be appropriate," the Court said. "However, a policy expressly directing that all the prisoners' legal mail be opened and inspected outside of their presence impermissibly 'outreaches' defendants' legitimate interest in maintaining prison safety and security."

The reading of prisoners' legal mail infringes the right of access even more than simply opening and inspecting it. The prisoners alleged they are under the impression their legal mail is being read. Whether true or not, the Court said "the only way to ensure that inmates' legal mail is not read is to require that it be opened in their presence. Accordingly, the Court ordered the defendants "immediately cease and desist the practice of opening inmates' legal mail outside of their presence."

The Court, however, held that the defendants were entitled to qualified immunity. The Legal Mail Policy was enacted at a certain time in our history, and was enacted with the legitimate goal of protecting prison inmates and staff. "Although the Court finds that the Legal Mail Policy is an overreaching response to the threat of anthrax contamination, it does not find that the law was so clearly established that it would be obvious to a reasonable official that the policy violated Plaintiffs' First Amendment rights." See: *Allah v. Brown*, 351 F.Supp.2d 278 (D.N.J. 2004). ■

Pre-Trial Defendant Released on Recognizance Is Not Subject to Warrantless Search Without Probable Cause

by John E. Dannenberg

In a case of national first impression, the Ninth Circuit U.S. Court of Appeals held that when a pre-trial (drug-offense) detainee accepted court release on his own recognizance ("OR") that was conditioned by his consent to random warrantless drug tests and warrantless searches of his home for drugs, he did not give up his Fourth Amendment right to the police to first establish probable cause for any such test or search. In so holding, the Court sharply distinguished the presumption of innocence and its full panoply of constitutional protections to a pre-trial detainee from those due a probationer or parolee, who is necessarily a convicted criminal with circumscribed constitutional freedoms.

Raymond Scott was arrested by Ne-

vada state authorities for drug possession and released on OR subject to the above conditions. Based upon an informant's tip, state officers went to Scott's house and took a urine sample. Importantly, the government respondents here admit that the tip, per se, did not establish probable cause. But before the urine test came back positive for methamphetamines, the officers arrested him on preliminary field results and searched his house. The search revealed an unregistered shotgun, for which Scott was indicted on federal charges of possessing it (26 U.S.C. § 5861(d).) At his federal trial, the district court granted Scott's motion to suppress the gun evidence for want of probable cause to search his house. The government took an interlocutory appeal from

the suppression motion.

In a spirited decision by Judge Alex Kozinski, the Ninth Circuit held that probable cause to search the house did not attach until the drug test came back positive from the laboratory. The court proceeded to thoroughly analyze relevant search and seizure law in its decision.

As to whether such a search was "reasonable," the court held that as a presumptively innocent pre-trial arrestee, the fact of his arrest could not be bootstrapped into a tautological excuse for permitting unreasonable searches, as might occur with (convicted) probationers or parolees. Nor would the "special needs" exception to "reasonableness" apply here because the government could not demonstrate any. Even the relaxed "totality of the circumstances" exception to the "reasonableness" doctrine to excuse lack of probable cause to search did not apply; not only was Scott presumptively innocent, he was under no government interest in "reintegrating" him into the community, since, being free on OR, he arguably had never left it.

The Ninth Circuit affirmed. Because the government was unable to establish probable cause to search Scott's house at the time it did, all fruits of that search "must be suppressed." See: *United States v. Scott*, 424 F.3d 888 (9th Cir. 2005).

Los Angeles County Pays Prisoner \$42,500 for Legal Malpractice by Public Defender

by John E. Dannenberg

The County of Los Angeles paid \$42,500 to settle a legal malpractice claim brought by a prisoner who suffered state prison plus felony disenfranchisement upon an unlawful conviction.

In October 1992, Jose Castro, represented by the Public Defender, pled guilty to statutory rape (California Penal Code § 261.5), a misdemeanor, for which he did one year in county jail plus three years probation. He was also ordered to register as a sex offender (Penal Code § 290), although the court failed to state on the record the necessary findings to support such a requirement.

In November 2001, Castro was charged with failing to so register, a felony. Again represented by the Public Defender, Castro pled guilty and received 16 months state prison time; he was released onto parole after eight months. Only then did he learn that his original conviction (§ 261.5) was not automatically a registrable offense, and that the original court had not made the requisite findings. Therefore, his conviction for failing to register was unlawfully obtained. He sued for severe emotional distress plus the loss of his opportunity to become a U.S. citizen (barred by his § 290 felony conviction).

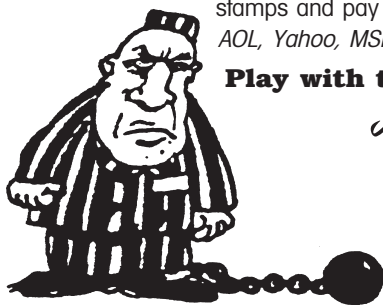
Estimating a liability exposure at trial of \$175,000, the County settled for a total of \$42,500. It is not known if Castro's wrongful felony conviction and bar to citizenship is being abated. See: *Castro v. County of Los Angeles*, Long Beach Superior Court, Case No. NC 034931.

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California Pays Innocent Prisoner \$328,000 for Nine Years in Prison

by John E. Dannenberg

For only the twelfth time since 1981, California paid a wrongfully imprisoned person for his troubles. After serving nine years of a 27-life 1995 sentence for rape, a 38 year-old man was recently awarded \$328,000 — \$100 for each day in prison.

Peter Rose was convicted in 1995 of kidnapping and raping a 13 year-old Lodi, California girl. However, using new DNA technology unavailable in 2004, his conviction was overturned. Rose filed an appeal with the Victim Compensation and Government Claims Board, where, under California Penal Code § 4903, his burden was to prove his innocence, show that he did nothing to lead to his arrest and that he suffered financially.

The claim then had to be approved by the Legislature.

Rose's pro bono San Francisco attorney, Ray Hasu, filed a 4-inch thick claim for his client, recalling the trial testimony of the victim who had identified Rose after her assault. At the time, the DNA technology did not exist to test the minute evidence of semen, but in June 2004, newer technology made it possible. The DNA now ruled out Rose. Rose used this to gain relief from the San Joaquin Superior Court and was released from Mule Creek State Prison in October, 2004. Rose's successful claim is the first for the Northern California Innocence Project, part of the national Innocence Network. The Network consists of groups of law

schools, journalism schools and public defenders' offices who help to free innocent prisoners.

Susan Rutberg, director of the Northern California Innocence Project at Golden Gate University in San Francisco, said that she and Hasu had also asked for compensation for the 318 days Rose spent in county jail, when he was unable to raise \$100,000 bail. But the Board denied the additional \$31,800 claim based on state law which limits compensation to \$100 per day from conviction. The attorneys are considering appealing to the state Legislature to broaden the law, even though Rose could not benefit from it. ■

Source: *Sacramento Bee*.

New Jersey Settles Prisoner's Freedom of Religion Suit

On November 14, 2005, the state of New Jersey settled a prisoner's civil rights lawsuit by paying him \$2,000 and allowing him to practice the Wicca religion and to receive related literature and artifacts.

Patrick Pantusco converted to the Wicca religion while imprisoned at the East Jersey State Prison. On January 26, 2002, Pantusco requested that his religion of record be changed to Wicca. Because Wicca was not recognized on the computer system, the classification department changed his religion to "other."

Over the next 15 months Pantusco attempted to order various books and religious artifacts, including a pentacle necklace, a prayer cloth, scented oils and herbs, a small bell and flute, and ritual powder, but his requests and delivery of the material was routinely denied. Officials noted, among other things, that Wicca was not a recognized religion.

After various attempts to resolve the issue through the prison's grievance procedures, Pantusco was informed on April 10, 2003, that he would be allowed to possess Wiccan literature but not religious artifacts.

Pantusco subsequently sued prison officials alleging claims under 42 U.S.C. § 1983, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and state law. Pantusco specifically claimed the prison policy violated his right to freedom of religion and denied him equal protection under the law. Pantusco noted that

some New Jersey prisons allowed prisoners to practice the Wicca religion and to possess Wiccan artifacts.

Following the commencement of his lawsuit in the U.S. District Court for the District of New Jersey, the state agreed to settle by allowing Pantusco to practice his religion and to receive Wiccan literature and artifacts pursuant to N.J.A.C. 10A:17-

5.1 and 5.12. The state also agreed to pay Pantusco \$2,000, inclusive of attorney fees and costs.

Pantusco was represented by attorney Stephen M. Latimer of the Hackensack, New Jersey, law firm Loughlin & Latimer on behalf of the American Civil Liberties Union of New Jersey. See: *Pantusco v. Moore*, USDC D NJ, Case No. 03-182 (KSH). ■

California DOC Watched Over by Toothless Bureau of Independent Review

While California's \$7.4 billion Department of Corrections and Rehabilitation (CDCR) continues to report solely to the Governor's Secretary of Corrections, the CDCR is also being overseen by the Bureau of Independent Review (BIR), reporting to the Governor. The good news is that some prison employees' misdeeds are now being scrutinized by other than their own peers; the bad news is that the BIR has no policing power to order any CDCR employee to do anything.

BIR was formed after frustrated federal judges voiced repeated allegations of mismanagement raised in prisoner lawsuits [see: *PLN*, Mar. 2005, p.1, *California Corrections System Officially Declared 'Dysfunctional' — Redemption Doubtful*]. The BIR monitors prison investigations, especially those involving prisoner injury to staff, guards' rules violations and prisoner deaths. Headed by former Kern County prosecutor Robert Barton, the

BIR is involved in every step of an investigation, from gathering information to suggesting resolutions.

The BIR gets good marks from Donald Specter, director of the non-profit Prison Law Office whose attorneys have spearheaded many successful court challenges to CDCR conditions. Specter calls BIR staff "professional, extremely thorough and neutral," particularly in assisting with allegations of staff misconduct. But University of Southern California professor Ruth Gilmore, an expert on CDCR problems, complains that because the BIR is toothless, it is rendered ineffectual.

The BIR has three geographic divisions around the state. While presently working on standards for guards arrested for DUI, a hopeful Barton plans to spend time on "bigger problems." It remains to be seen if the BIR can really inspire changes in CDCR. ■

Source: *Bakersfield Californian*.

COPS Program Fails To Arrest Crime, Funding Improprieties

by Michael Rigby

Police chiefs and politicians across the nation have hailed the Community Oriented Policing Services (COPS) program as largely responsible for the sharp drop in crime that began in the mid-1990s, *USA Today* recently reported. But now--10 years and \$10 billion later--a more accurate and far less flattering picture has emerged: Hundreds of millions of misspent dollars, tens of thousands of unfilled positions, and little evidence to suggest that COPS played any significant role in reducing crime.

In the 1990s, the COPS program was touted by the Clinton administration as a way to combat crime by putting 100,000 additional cops on the streets. Since then, the program has provided 12,000 police agencies with \$10 billion in grants to hire new officers and redeploy others. Much of the money, however, was apparently misused. Audits conducted by the Justice Department's inspector general of just 3% of all COPS grant recipients found \$277 million in questionable spending.

Many police departments simply used the money to cover routine expenses. In Albuquerque, New Mexico, for instance, federal auditors found that \$7.5 million of the city's \$12 million in COPS grants were used not to hire new cops but to offset cuts in the police department's budget.

Others saw the money as a personal windfall. In Novinger, Missouri, former police chief Charles Middleton used COPS money to pay his salary and treat himself to a \$6,000 a year raise. He was ultimately sentenced in 2002 to 2-years probation and ordered to pay \$53,000 in restitution.

Some of the worst abuses occurred on Indian reservations. The tiny Picuris Pueblo in New Mexico is one example. Between 1995 and 2000, its two-man tribal police department received \$728,125 in grants to hire 8 additional cops. Auditors were unable to determine where the money went or whether anyone was hired, however, because the department closed in 2002 due to financial difficulties and the pueblo has provided no relevant documentation. [Indian prisons are notoriously mismanaged. See *PLN*, February 2005, p. 1 for more.]

In other localities, the audits uncovered questionable spending on an even larger scale, including \$13 million

in Atlanta, \$7.4 million in El Paso, and \$6 million in Washington, D.C. In San Juan, Puerto Rico, a November 2003 audit identified \$7.1 million in suspicious spending and implied that much of the money was used to cover expenditures that should have been paid for by the local police budget. The audit further found that San Juan--which received \$39 million beginning in 1994 to add 813 cops to its 450-man police force--fell hundreds short of its hiring goal. (Specific numbers weren't provided.)

And San Juan is not alone. The Justice Department claims that COPS funded 118,000 new police jobs nationwide. However, a 2004 review of justice programs by the White House Office of Management and Budget found that "fewer than 90,000" police officers had been put on the street by COPS. A 2002 University of Pennsylvania study put the number even lower--around 82,000.

New York City, the largest recipient of COPS money, for example, received \$422 million to hire and reassign 4,808 officers. Even so, the department actually shrank by 321 cops between 1994 and 2004. The reductions came amid large budget cuts following the terror attacks of September 11, 2001.

In many cases, even when the grant money was used for its intended purpose--to hire more cops--departments couldn't afford to keep them once the grants ran out. The COPS program has been "like an open house, with all these officers coming and going at different times," says Christopher Koper, a University of Pennsylvania criminologist. "There's no one time at which all 100,000 are there."

What's more, few crime analysts think COPS contributed significantly to declining crime rates. A much bigger factor, they contend, is the robust economy, which has kept many young people working and away from crime.

Bolstering their argument is the fact that even cities choosing not to participate in the COPS program saw similar reductions in crime. A case in point is Oklahoma City.

Under the COPS program, police departments were given up to \$25,000 a year for three years to help pay the salary of each new cop along with additional funding to hire civilians or buy computers

and other technology so desk cops could be reassigned to the street. All this free money had a caveat, however: when the grants expired, recipients were obliged to keep the new cops employed on their own dime for at least a year. "A big part of our decision [not to participate] was that we knew some portion of the [federal] funding was gonna go away," said Oklahoma City Police Chief William Citty. Instead, Oklahoma City implemented community policing programs in high-crime areas without hiring many additional cops.

The Heritage Foundation, a conservative think tank, is not enamored with COPS program, either. The group says COPS was too expensive and gets more credit than it deserves for today's low crime rates. "Observing that crime rates dropped when COPS grants flowed to a community is not conclusive evidence that the grants helped to decrease crime," asserts David Muhlhausen, a crime analyst for the foundation.

Koper and another University of Pennsylvania criminologist, Jeffrey Roth, say the lack of definitive research on the impact of COPS is due in large part to politics. The Justice Department has avoided a comprehensive assessment, they argue, because adverse findings could reflect poorly on the program. The researchers say they asked the Justice Department three times for funding to conduct research on the COPS program, and each time they were rejected. "Neither administration (Clinton's nor George W. Bush's) has ever shown the slightest interest" in such research, says Roth. ■

Source: *USA Today*

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Florida Closes Scandal Ridden Girls Facility, Takes Over Control of Another Juvenile Facility

Only five years after it was opened, legislators have shut down the scandal ridden Florida Institute for Girls (FIG) built at a cost of \$7.9 million. FIG will remain empty until Florida's Department of Juvenile Justice (DJJ) decides if they can use it for another program. It will cost \$18,000 a month to maintain the empty building.

FIG was constructed to handle the toughest girls—those charged with crimes such as manslaughter, battery, carjacking, and rape. DJJ contracted with two private companies to run the facility. Both failed horribly to fulfill their contractual obligations.

Premier Behavioral Services lost its contract in 2004 when a Palm Beach County Grand Jury found it had scrimped on staff to save money, locking girls in the rooms, and forcing them to miss school, and activities because there weren't enough guards to watch them. While Premier operated FIG, four teens' arms were broken in violent restraints and three workers were arrested on charges of molesting or having sex with girls they were supposed to protect.

Lighthouse Care Centers made 83 of 84 improvements recommended by the grand jury. State monitors, however, found the company wasn't providing counseling and mental health programs required in his contract. Legislators ordered the program closed.

Closing FIG is the "right thing to do," said Cassandra Jenkins, juvenile-justice director at Children's Campaign, a nonprofit advocacy group in Tallahassee. "I think it... points to the fact that large, prison-like warehouses don't work with girls and, in my opinion any juveniles, and that staff have to be thoroughly trained and monitored to ensure the program and services are appropriately implemented."

In its final month of operation, scandal again hit FIG when William Lane, 44, was arrested on August 17, 2005, for having sex with a 15-year-old girl in her cell on their early morning shift July 27. On the night he had sex with the teen, Lane's hair was braided by the teen. She asked for money in exchange, and Lane agreed to buy her candy, soda, and food. After he returned with the food, they had sex in a cell. The teen told authorities she later

grew angry with Lane because he did not give her the \$50 she requested.

Of the 60 girls that remained at FIG on its August 31 closing, 25 were released for completing the program. The rest were transferred to four other high risk facilities for girls.

The juvenile justice business is proving to not only be problematic for companies, but also unprofitable. State lawmakers had to move \$2.41 million for 46 full-time workers to run the Southwest Juvenile

Detention Center because no companies submitted bids to run the facility, which had been run by Securicor New Century, a Virginia based firm, since 2003.

Securicor said it could not get enough money to attract money to ensure contract performance. Of the 46 full-time employees hired by the state, 34 are Securicor holdovers. ■

Sources: *Sun-Sentinel*; *Palm Beach Post*; *news.press.com*

Withholding Legal Mail States Legal Access Claim

by Bob Williams

The United States Court of Appeals for the Tenth Circuit has held that withholding legal mail while a prisoner is out to court states a colorable claim for denial of legal access because it impedes efforts to pursue litigation.

Kansas state prisoner Willie Simkins was transferred from the Hutchinson Correctional Facility (HCF) to a county jail in Boulder, Colorado in March 2000. After his return in March 2001, Simkins discovered that his legal mail had been held by HCF mailroom guards pending his return. The withheld mail included a summary judgment motion filed in April 2000 against Simkins in a federal conditions of confinement case stemming from conditions at the Saline County, Kansas jail. Since Simkins could not contest the motion without notification, his suit was dismissed in July 2000 on summary judgment and the defendants' factual allegations stood admitted. By the time of his 2001 return to HCF, Simkins could no longer appeal the loss.

Simkins then filed a 42 U.S.C. § 1983 complaint against HCF for interfering with his right of access to the courts. The district court dismissed the suit, ruling that Simkins had not shown an associated injury sufficient to give him standing to sue and, even if he had, HCF was entitled to qualified immunity.

On appeal the Tenth Circuit analyzed the standing issue under the controlling case, *Lewis v. Casey*, 116 S.Ct. 2174 (1996), and determined that Simkins must show that non-delivery

"frustrated, impeded, or hindered" his efforts to pursue a legal claim. Simkins met the "actual injury" requirement because his failure to receive the summary judgment motion and order resulted in (1) admission of the defendants' version of the facts; (2) inability to argue the legal issues, and (3) loss of opportunity to appeal. In so holding, the appellate court rejected the district court's finding that Simkins had failed to show "he would have filed a meritorious response" and thus hadn't proved the non-delivery caused the loss. "*Lewis* does not suggest the plaintiff must prove a case within a case" to show the claim would have prevailed, only that it was not frivolous. Instead, "cognizable harm arises ... when the plaintiff's efforts to pursue the claim are impeded" and the resulting loss is based on the impediment.

The district court had found qualified immunity applicable because the guards would have had to intentionally withhold the mail to violate a constitutional right, not merely act negligently as they claimed. The appeals court found mailroom supervisor Patricia Keen's affidavit quite compelling. Keen admitted withholding the mail until Simkins' return, claiming she was trained to do so. But her affidavit recited an HCF regulation mandating legal mail forwarding, and the Tenth Circuit thus found she acted "intentionally in contravention of prison regulations." Legal mail is, of course, a clearly established constitutional right. See: *Simkins v. Bruce*, 406 F.3d 1239 (10th Cir. 2005). ■

Nebraska Supreme Court Reverses Dismissal of Prisoners' Drug Testing § 1983 Claim

The Nebraska Supreme Court reversed a lower court's dismissal of a prisoner's 42 U.S.C. § 1983 action, finding that he stated a cognizable claim for relief and sufficiently pleaded exhaustion of administrative remedies as required by 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act (PLRA).

Luke Kellogg, a prisoner of the Nebraska Department of Correctional Services (DCS), suffered from several medical conditions which prevented him from providing "a urine sample within the given time period required [by] the DCS' drug testing program." Thus, "pursuant to Drug Offender Classification Policy Directive 00-013... he has been classified as a drug offender and disciplined several times," resulting in the loss of the time in suspension of telephone and visitation privileges.

Kellogg brought suit in state court, alleging that DCS discriminated against him by failing to provide reasonable accommodations for his disabilities, in violation of § 1983, the Americans with Disabilities Act of 1990 (ADA) and Neb. Rev.Stat § 20-148. Kellogg alleged that he exhausted available administrative remedies, and sought a temporary restraining order, injunctive and declaratory relief, restoration of good time and telephone and visitation privileges, and \$1.5 million in compensatory damages.

The trial court granted defendants'

motion to dismiss, concluding "that Kellogg had stated no claims for which he might be entitled to relief." The Nebraska Court of Appeals then granted defendants' motion for summary affirmance of the district court's order of dismissal, without opinion.

The Supreme Court reversed, holding "that Kellogg... alleged that he... pursued available administrative remedies and that his allegations are sufficient to withstand a motion to dismiss" on his § 1983 claim."

The Court declined to address Kellogg's claim under § 20-148, finding that he abandoned the claim on appeal by failing to raise the issue in the Court of Appeals. The Court then concluded that Kellogg's ADA claim "had been rendered moot" by post-dismissal accommodations for his condition that the Court was made aware of at oral arguments. See: *Kellogg v. Nebraska Department of Correctional Services*, 269 Neb. 40, 690 NW.2d 574 (Neb. 2005). ■

Theft of Prisoner's Book by Guards Valid Legal Basis for Texas Civil Suit

A Texas court of appeals has held that a claim that two Texas state prison guards removed a law book from a prisoner's cell and neither returned the book nor turned it over to the prison's inmate property officer was a valid claim under the Texas Theft Liability Act, Texas Civil Practice and Remedies Code, Chapter 134.

Paul Minix, a Texas state prisoner, filed suit in state court against two guards he claimed had taken a law book from his cell. The trial court dismissed the suit as frivolous for having no arguable basis in law. Minix appealed.

The court of appeals held that the Texas Theft Liability Act provides a legal basis for the claims against the guards who allegedly "entered his cell and removed a book that belonged to him without justi-

fication and subsequently failed to either return it to him or turn it in to the prison property officer." Therefore, the trial court erred in dismissing the suit.

To the extent that Minix sued the guards in their official capacities, they were entitled to sovereign immunity. However, the guards were potentially liable in their individual capacities. Therefore, the trial court's dismissal was affirmed with respect to official capacity and reversed with respect to individual capacity and the case was returned to the trial court for further proceedings. See: *Minix v. Gonzales*, 162 S.W.3d 635 (Tex.App. Houston [14th Dist.] 2005). ■

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Fourth Circuit Reverses \$35,934.66 Habeas Fee Award; Habeas Corpus Not “Civil Action” Under EAJA

The Fourth Circuit Court of Appeals reversed a district court’s award of \$35,934.66 in attorneys fees, costs, and expenses under the Equal Access to Justice Act (EAJA), in a federal habeas corpus proceeding.

Joseph O’Brien pled guilty in federal court to bank fraud and was sentenced to 24 months in prison. The court recommended that O’Brien be allowed to serve his sentence in a halfway house. “Instead of sending O’Brien to prison, the Federal Bureau of Prisons [(BOP)] designated O’Brien to serve his entire sentence” at a halfway house.

Eleven months later the Department of Justice (DOJ) issued an opinion, concluding that the BOP’s practice of placing certain offenders in halfway houses rather than a prison was unlawful under the U.S. Sentencing Guidelines and 18 U.S.C. §§ 3621 and 3622. Consistent with this opinion, the BOP redesignated O’Brien to serve the remainder of his sentence in a federal prison camp.

Just before his transfer, O’Brien commenced a federal habeas action under 28 U.S.C. § 2241, and the court issued a temporary restraining order precluding his transfer pending a hearing on his preliminary injunction motion. The court subsequently granted “O’Brien’s ‘motion for stay’ of any redesignation or transfer... and his motion for a preliminary injunction.”

The government then “mooted O’Brien’s habeas petition and agreed that he would not be redesignated to a federal prison camp, but will continue to serve the remainder of his sentence” in a halfway house. The district court entered an order confirming the government’s agreement.

O’Brien then “moved the district court for an award of attorney fees and costs pursuant to the EAJA, 28 U.S.C. §2412[.]” The court acknowledged the government’s success of its halfway house prohibition argument in other federal courts, but “awarded O’Brien attorney’s fees, costs, and expenses under the EAJA in the amount of \$35,934.66.”

The government sought reconsideration, arguing for the first time “that under the EAJA the United States, waived its sovereign immunity only with respect to attorney’s fees in ‘civil action’ for purposes of the EAJA.” The district court disagreed and the government appealed.

The Fourth Circuit observed that “[i]t is well settled that ‘[a]ttorneys’ fees may be assessed against the United States *only when it has waived its sovereign immunity by statute.’” *United States v. Dawkins*, 629 F.2d 972, 975 (4th Cir. 1980). Therefore, the court was required to “determine whether a statutory waiver of sovereign immunity for awards of attorneys fees in ‘civil actions’ *unambiguously* covers habeas corpus proceedings.”*

It then found that it did not. “Because the EAJA does not expressly authorize an award of attorney fees to a prevailing party in a habeas corpus proceeding and because the term ‘civil action’ does

not unambiguously encompass habeas actions,” the court concluded “that the EAJA does not contain the unequivocal expression of congressional intent necessary to amount to a waiver of sovereign immunity and thereby permit the assessment of attorneys fees against the United States in a habeas corpus proceeding.” The court acknowledged, however, that other courts have found habeas corpus to be a “civil action” for purposes of EAJA fee awards. *In re Hill*, 775 F.2d 1037, 1040-41 (9th Cir. 1985) and *Sotello-Aquije v. Slatery*, 62 F.3d 54, 56, 59 (2d Cir. 1995). See: *O’Brien v. Moore*, 395 F.3d 499 (4th Cir. 2005). ■

Court Orders Mob Boss Released from SHU

A New York federal district court has ordered a federal pretrial detainee released from administrative detention into general population because the government had other means of preventing him from communicating with the members of his crime family.

Vincent Basciano moved pursuant to 28 U.S.C. § 2241 and the Bail Reform Act, 18 U.S.C. § 3142, to be removed from solitary confinement into general population. Basciano is under indictment for murder in aid of racketeering of Randolph Pizzolo and an uncharged conspiracy to murder a federal prosecutor. Basciano is alleged to be the acting boss of the Bonnano family.

After his arrest on November 19 until December 3, 2004, Basciano was held in “reception” and prohibited visitors or contact with other detainees. He was then released into general population and until January 8, 2005, when he was placed in Special Housing Unit (SHU). On March 13, 2005, Basciano was transferred from MDC-Brooklyn to the MCC facility in Manhattan.

Besides strict movement, 23-hour lockdown, and limited property privileges, Basciano’s contacts with other human beings have been sharply curtailed. He received one social visit per week, was not permitted to speak to anyone in his cell, and his telephone privileges were “nonexistent.”

As a preliminary issue, the Court held that the government failed to present a non-exhaustion defense; thereby waiving

that defense. The Court said that even if that defense was raised, it would excuse Basciano from the requirement because it was the U.S. Attorney’s Office, rather than the Bureau of Prisons, that was the true source of Basciano’s confinement to SHU, making the administrative process futile.

The Court found there was no evidence that Basciano’s solitary confinement was imposed to punish him, and it is clearly related to a legitimate government objective.

The ultimate question, however, is whether the government’s chosen means is reasonably related to its goal of preventing Basciano from continuing to plan or approve violent criminal conduct while in prison. The Court held that it is not. “Indefinite detention in the SHU is an exceptionally harsh a method of preventing a detainee from communicating with his alleged criminal associates.”

The Court found that Basciano was unable to order Pizzolo’s death while incarcerated, for he was in “reception” until two days after that death. Thus, Basciano is no different than others who are accused of violent acts *before* they were detained. The government has other means to employ besides solitary confinement to prevent communication with criminal associates.

Accordingly, the Court ordered Basciano released to general population, but warned him to obey separation orders. See: *United States v. Basciano*, 369 F.Supp.2d 344 (E.D. N.Y. 2005). ■

New York Jail Detainee Awarded \$233,000 in Damages and Fees for Excessive Force Claim

by David M. Reutter

A New York federal district court reduced a jury's damage award in a prisoner's civil rights action alleging excessive force by guards. The total award came to \$165,000 and \$68,000 in attorney fees and costs.

This action was brought against New York's Nassau County Sheriff's Department and five guards (defendants) by Ennis Hightower, who alleged that while he was a pretrial detainee at the Nassau County Jail (NCJ) the guards used excessive force on him twice in one day. Hightower's complaint alleged that this Eighth Amendment violation occurred on October 20, 1998 at 10 a.m. for the first incident and at 12 noon for the other. Hightower also brought a state battery claim that occurred on October 30, 1998.

The matter proceeded to trial and the jury entered a verdict in Hightower's favor for the 10 a.m. and October 30 incidents. The jury found in the defendants' favor for the noon claim. The jury awarded Hightower \$150,000 for his physical injuries and pain and suffering; \$65,000 for emotional distress, and punitive damages of \$65,000 for a total of \$280,000.

After trial, the defendants moved to amend their answer to add the affirmative defense of failure to exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA), and for a new trial on damages.

The Court found that at the time Hightower filed his complaint the law in the Second Circuit was that the PLRA "governs only conditions affecting prisoners generally, not single incidents that immediately affect only particular prisoners, such as corrections officers' use of excessive force." In 2002, the Supreme Court clarified the PLRA applied to *all* prisoner suits about prison life. *Porter v. Nussle*, 534 U.S. at 532.

Because exhaustion under the PLRA is not jurisdictional, but is an affirmative defense that must be raised and proven at trial, the Court held the defendants' failure to raise that defense sooner was a waiver. Significantly, the defendants waited 23 months after the *Porter* decision to move to amend their answer. Moreover, the Court said amendment would be

prejudicial to Hightower because it would require discovery to determine if the action Hightower took to exhaust remedies would satisfy the PLRA. As such, the defendants' motion to amend the answer was denied.

The Court then turned to the motion for a new trial. While no two cases are alike, the Court examined several other excess of force and battery cases to determine if the jury's award was so high it "shocks the judicial conscience." The Court also considered Hightower's injuries. The record showed that he was released from the hospital the same day as admission. His injuries consisted of "an injury to the left side of his face" and that "his lip appears to be swollen and cut."

The Court said the jury's award, based on soft tissue injuries that comprise the bruises and contusions, shocked its conscience. The Court reduced the \$150,000 physical injury award to \$65,000. Also, the emotional distress award of \$65,000 was reduced to \$35,000. The total award came to \$100,000 in compensatory damages and \$65,000 in punitive damages.

The Court then addressed Hightower's motion for attorney fees and costs. The Court awarded a total of \$104,470 in attorney fees to the three plaintiffs' counsel: Anthony Ofodile, Chad Eze and William S. Robedee. Costs of \$2,934.31 were also awarded. See: *Hightower v. Nassau County Sheriff's Department*, 325 F.Supp.2d 199 (E.D.N.Y. 2004).

The defendants subsequently moved for the

Court to reconsider its award of attorney fees, for it failed to apply the PLRA. The Court agreed it made a "clear error of the law" in making the attorney fee award.

Specifically, the Court failed to use the hourly rate of 150% of the prevailing rate for appointed counsel in criminal cases in the Second Circuit. The prevailing rate is \$90 per hour, which computes to \$135 per hour. In its original order the Court computed Ofodile's award at \$250 an hour, Eze's at \$125 per hour, and Robedee's at \$150 per hour.

Using a rate of \$135 an hour, the total attorney fee computes to \$64,513.80. The Court also held the PLRA requires Hightower to pay 25% of that award out of his judgment, which amounts to \$16,124.95. Accordingly, the Court entered an order to reflect these adjusted fee totals. See: *Hightower v. Nassau County Sheriff Department*, 343 F.Supp.2d 191 (E.D.N.Y. 2004).

The advertisement for Prison Living Magazine (PLM) includes a cover image with the title "prison living MAGAZINE" and a sunset scene. A list of topics on the cover includes: prisoner profiles, sports, life after prison, crossword, dr. gary, jailhouse lawyer, and prisoner art. The cover also indicates it is Volume 1, Issue 1, from January to March 2006.

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Sixth Circuit PLRA Fee Set at \$169.50 Not \$135

The Sixth Circuit Court of Appeals joined the Ninth Circuit in holding “that the maximum allowable attorney fees under the [Prison Litigation Reform Act (PLRA)] should be based on the amounts authorized by the Judicial Conference, not the amount actually paid to the court-appointed council under the CJA.” That is \$169.50 (150% of \$113) rather than \$135 (150% of \$90).

In 1980, Michigan prisoners brought suit alleging various constitutional violations. “The parties entered into a consent decree, which was approved by and made an order of the federal district court....[T]o this day, 24 years after the suit was filed, the plaintiffs’ attorneys are still monitoring the defendants’ compliance with the decree and, by order of the district court, are still being paid attorney fees.”

Pursuant to 42 U.S.C. § 1997e(d)(3) of the PLRA, the plaintiffs’ attorney fees are capped at “150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed council.” ...Section 3006A, also known as the Criminal Justice Act (CJA) establishes the maximum allowable fees for court-appointed council representing indigent defendants in federal criminal cases and authorizes the Judicial Conference of the United States to increase these fees by taking into account such factors as inflation and prevailing hourly rates. 18 U.S.C. § 3006A(d)(1)[.]”

“In September 2000, the Judicial Conference’s Committee on Defender Services proposed to increase the hourly rate for court-appointed council from \$75-\$113 for fiscal year 2002.” The recommendation was approved in a budget request was submitted to Congress based on the new rate. “However, due to budget constraints, that hourly rate of \$113 was never implemented. Based on available funds, that hourly rate actually paid to appointed counsel was \$75 for work performed up to May 1, 2002, and \$90, thereafter.”

Plaintiffs moved “for attorney fees and costs incurred from January 1 to January 30, 2002[.]” seeking an hourly rate of \$169.50, “or 150 percent of \$113, which was the rate authorized... and requested of Congress in the 2000 budget proposal.” Defendants objected, arguing that the hourly rate should be the “amount actually paid to court-appointed counsel at the time. Specifically, the defendants claimed that the maximum allowable for work performed prior to May 1, 2002, was \$112.50, or 150 percent of \$75 and for work performed after May 1, 2002, the maximum allowable fee was \$135, or 150 percent of \$90.” The district court agreed with Defendants.

The Sixth Circuit reversed and finding no ambiguity in 42 U.S.C. § 1997e(d)(3) and 18 U.S.C. § 3006A(d)(1), holding “that attorney fees under the PLRA should be based on the hourly rate for court-appointed council that is authorized by the Judicial Conference, rather than the rate that is actually paid to such counsel.” The court found that “defendants’ interpretation of § 1997e(d) is at odds with the plain meaning of both § 1997e(d) and... § 3006A.” See: *Hadix v. Johnson*, 398 F.3d 863 (6th Cir. 2005). It should be noted that while the Sixth and Ninth Circuits apply the authorized hourly rate, the Third Circuit applies the rate actually paid, for of \$135 (150% of \$90). ■

Alabama Prisoners Lack Property Interest in PMOD Interest

The Eleventh Circuit Court of Appeals held that Alabama prisoners are not entitled to interest earned on work release wages because they don’t have a recognized property interest in that interest.

The Alabama Department of Corrections (ADOC) is authorized by statute “to adapt regulations and policies establishing a work-release program for” ADOC prisoners. All wages must be paid directly to ADOC, which is authorized to withhold up to 40 percent of the wages for incarceration costs. The remainder of the funds are deposited into the prisoner’s account and paid to the prisoner upon release. See: Ala. Code §14-8-6.

ADOC rules requires work release funds to be deposited into a Prisoner money or deposit (PMOD) account in the prisoner’s name. These “accounts are administered in accordance with the Department’s Manual of Accounting Procedures for Institutions and Community Based Facilities, which specifically states that ‘inmates are not entitled to receive interest on PMOD accounts.’” Rather, the interest accrued is used “to (1) offset the costs of administering the accounts, and (2) fund various recreational activities for” prisoners.

Former ADOC prisoner Joseph Givens brought suit in federal court, alleging that the ADOC’s refusal to pay him interest violates the Takings Clauses of the federal and Alabama constitutions. The district court dismissed, concluding that Givens failed to state cognizable Takings Clause claim because he did not have a

property interest in the interest earned on his PMOD account.

The Eleventh Circuit subsequently affirmed and observed that “to state a Takings claim...a plaintiff must first demonstrate that he possesses a ‘property interest’ that is constitutionally protected. “Whether ADOC prisoners “possess such a property interest [was] a question of first impression” for the Circuit.

The court noted that in *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194 (9th Cir. 1998), the Ninth Circuit held that prisoners have a protected property interest in the interest that accrues on their accounts, but the Fourth Circuit held in *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), that Virginia prisoners do not possess such an interest.

The court rejected Givens’ argument that he had a common law property right in the interest accrued on his account under “the interest-follows-principal maxim. The court followed the reasoning of *Washlefske* in rejecting this argument, finding that the *Schneider* – court “frame[d] the common-law inquiry too broadly.” Thus, it was “reluctant to construe *Schneider* as persuasive authority in [the] Circuit.”

The court then held that Alabama did not create a protected property interest in PMOD interest through the enactment of statutes, regulations or policies. Therefore, the court found that no recognized property interest was implicated and Givens failed to state a cognizable Takings Clause claim. See: *Givens v. Alabama Department of Corrections*, 381 F.3d 1064 (11th Cir. 2004). ■

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Qualified Immunity on FRCP 12(b)(6) Motion Faces “Formidable Hurdle” in Hepatitis Case

The Second Circuit Court of Appeals upheld a lower court's denial of a Fed.R.Civ.P. 12(b)(6) motion to dismiss, asserting a qualified immunity defense. The court held that “a qualified immunity defense can be presented in a Rule 12(b)(6) motion, but that the defendant faces a formidable hurdle when advanced on such a motion.”

New York Department of Correctional Services (NYDOCS) prisoner Edward McKenna suffers from the hepatitis C virus (HCV). In 1994, tests indicated some symptoms of HCV but he was not tested for the disease, despite several “risk behaviors.”

“In 1998, McKenna was transferred to Woodbourne Correctional Facility, but not tested for HCV, although it was NYDOCS policy to test all those entering a new facility... In 1999, McKenna was [finally] tested, and... told... that he had HCV.”

In September 1999, McKenna was denied HCV treatment “because another NYDOCS guideline that prohibited treatment for those who would not remain incarcerated or would be released twelve months after treatment began. Although McKenna had four more years to serve, he had a Parole Board appearance scheduled in just under one year, which might have resulted in his release from custody.”

McKenna was denied parole in 2000, and again requested HCV treatment. This time he was denied because he “was not enrolled in an Alcohol and Substance Abuse Treatment (ASAT) Program. NYDOCS had previously deemed McKenna ineligible for ASAT because of his medical condition.”

In 2001, McKenna was told that his infection had progressed to cirrhosis of the liver and he required treatment because his cirrhosis was decompensating. When McKenna requested a liver transplant, however, his request was denied “because the cirrhosis was probably compensated.” Compensated cirrhosis should be treated with medication, while decompensated cirrhosis requires a transplant.

In October 2002, McKenna was again denied HCV “treatment because he was not enrolled in ASAT. In December 2002, McKenna enrolled in the ASAT program, but still did not receive treatment.”

“McKenna was finally approved for [HCV] treatment in January 2003. However, because of the delay in receiving treatment, this disease was so advanced

that the side effects rendered him too weak to continue treatment.”

“After exhausting his administrative remedies, McKenna” brought suit against numerous prison officials alleging deliberate indifference to his serious medical needs. “The defendants moved to dismiss for failure to state a claim. Their Rule 12(b)(6) motion asserted lack of personal involvement as to some defendants, qualified immunity as to all defendants, and insufficiency of the constitutional claims. The District Court... upheld the sufficiency of the Eighth Amendment claim, and rejected the qualified immunity defense.” Defendants sought an interlocutory appeal of the qualified immunity ruling.

First, considering “the availability of the defense of qualified immunity on a Rule 12(b)(6) motion,” the Second Circuit saw “no reason why even a traditional qualified immunity defense may not be asserted on a Rule 12(b)(6) motion as that of a motion for summary judgment must except the more stringent standard applicable to this procedural route. Not only must the facts supporting the defense appear on the face of the complaint,... but, as with all Rule 12(b)(6) motions, the motion may be granted only where ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.’ *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1494 (2d Cir. 1992). Thus, the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense. The court described this as “a formidable hurdle.”

Turning to the merits of defendants’ qualified immunity defense, the court

agreed with the district court that defendants “cannot have the complaint dismissed at the pleading stage on the basis of qualified immunity. McKenna’s detailed 29 page amended complaint alleges a series of failures to test for his condition despite known danger signs of his disease, failure to initiate treatment when the need for treatment was apparent, failure to send at McKenna for follow-up visits ordered by doctors... and denial of treatment on the basis out inapplicable or flawed policies.” See: *McKenna v. Wright*, 386 F.3d 432 (2d Cir. 2004). ■

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Washington Settles Prisoner's Medical Indifference Suit for \$370,000

by Michael Rigby

In October 2005, the State of Washington settled for \$370,000 a prisoner's federal lawsuit in which he alleged that indifferent medical treatment proximately resulted in a stroke that left him permanently disabled. The settlement was reached after a district court denied summary judgment to all but one defendant.

Gerard Marcotte, a Washington state prisoner, reported to the infirmary of the Monroe Corrections Complex (MCC) on June 12, 2001, complaining of shaking, weak knees, sweating, numbness in his thighs, and black and silver spots in his field of vision. Marcotte reported to physician's assistant John Loranger that he had experienced similar but milder episodes in the past. Marcotte had also been diagnosed as having high blood pressure by prison medical personnel and was taking Atenolol, a anti-hypertension drug.

Loranger found that Marcotte's blood pressure was high, 154/94 (it had been 189/96 eight days earlier during an unrelated examination). Loranger also noted an abnormal noise in Marcotte's carotid artery (technically, a right side carotid bruit). After running lab tests, Loranger determined that Marcotte had

not suffered a stroke even though the tests showed high cholesterol and LDL (low-density lipoprotein) levels, and despite his medical history of hypertension, tobacco use, and diabetes. MCC medical personnel made no effort to follow up on Marcotte.

On September 11, 2001, Marcotte collapsed and was taken to the prison infirmary. Marcotte says he told Rosemary Fitzer, a registered nurse, that the entire left side of his body was numb. Fitzer took his blood pressure (160/90) and performed an electrocardiogram (EKG) which she interpreted as normal. After allegedly threatening Marcotte with "the hole" if he continued to fake his symptoms, Fitzer sent him back to his dorm with instructions to drink more water and reduce his smoking.

The next morning Marcotte's left side was paralyzed and he couldn't walk. He was taken to a local hospital where doctors determined he had suffered an acute stroke due to an occluded right-side carotid artery. The stroke left Marcotte permanently disabled, with impaired motor skills and functioning.

Marcotte sued the State of Washington, MCC, Loranger, Fitzer,

Superintendent Robert Moore, doctor John Kenney, and various John Does under 42 U.S.C. § 1983 and state tort law. He alleged the defendants' responses to his medical needs were inappropriate and proximately caused his stroke.

Defendants moved for summary judgment. After concluding the four personal defendants were being sued in their individual capacities, the U.S. District Court for the Western District of Washington held that fact issues as to whether the defendants acted with deliberate indifference prevented summary judgment to all but Loranger. Judge James Robart further held that a jury could reasonably find Moore and Kenney liable in their supervisory capacity and that disputed material facts prevented the court from making a determination regarding qualified immunity. See: *Marcotte v. Monroe Corrections Complex*, 394 F.Supp.2d 1289 (W.D.WA 2005).

Following Robart's ruling, the State settled for \$370,000. Marcotte was represented by Tacoma attorney Darrell Cochran, of Gordon, Thomas, Honeywell. See: *Marcotte v. Monroe Corrections Complex*, USDC WD WA, Case No. C04-1925JLR. ■

News in Brief:

Alabama: On March 2, 2005, Ellis Hudson, 40, was arrested on trespassing charges for breaking into the Bullock County jail in Union Springs. Hudson was apparently trying to smuggle tobacco to jail prisoners, which is banned.

Arizona: On March 8, 2006, an unidentified Maricopa county sheriff's deputy was stabbed by a prisoner in the county courthouse while escorting the prisoner to court. The deputy was not seriously injured.

Arkansas: On May 6, 2005, Xavier Livingston, a guard at the federal prison in Forrest City was arrested by FBI agents and charged with attempting to smuggle unspecified contraband into the prison and accepting bribes.

California: On February 10, 2005, Lloyd Wiatt, 61, a Los Angeles county superior court judge shot and killed himself at a park in Valencia after being questioned by police on allegations that

he had molested a child.

California: On July 10, 2005, Nicholas Rodriguez, 27, a prisoner awaiting execution on death row in San Quentin accidentally overdosed on heroin and died. Michael Camacho, the Los Angeles deputy prosecutor who prosecuted Rodriguez for three homicides said the overdose did not surprise him. "The accessibility of narcotics is rampant in the Department of Corrections, even though they would prefer not to admit it," he said.

Georgia: On August 30, 2005, the Georgia Board of Pardons and Paroles granted a full and unconditional pardon to Lena Baker, 44, a black maid who was executed in 1945 after being convicted of killing E.B. Knight, 67, a white man who had hired her to care for him and who held her against her will and threatened to shoot her if she tried to leave. The push for the pardon was organized by John

Cole Vodicka of the Georgia Prison and Jail Project.

Illinois: On March 2, 2006, Gerald Donaldson, 64, a prisoner convicted of rape and kidnapping, was killed by another prisoner, means unspecified in media reports, at Muddy River Correctional Center in Ina. Prison guard union leaders blamed a lack of staffing for the death and also the fact that the duty warden at the prison when Donaldson was killed, Julie Wilkerson, is a former music teacher with no prison or jail experience who apparently got the number three job at the prison after making campaign donations to governor Rod Blagojevich.

Massachusetts: On March 2, 2006, prisoners at the Massachusetts Corrections Institution in Shirley refused to return to their cells upon learning that their out of cell time was being cut in half. A week later an unidentified prison guard was suspended with pay for allegedly en-

couraging the prisoners to protest.

Mississippi: On October 29, 2004, Jessie Wilson, 22, a prisoner at the Mississippi State Penitentiary in Parchman, stabbed three unidentified guards who suffered minor injuries. The incident occurred while Wilson was being escorted from an exercise yard. He was later charged with aggravated assault and destroying state property.

Missouri: On March 6, 2006, an unidentified guard at the Pulaski county jail was arrested on misdemeanor charges of sexually assaulting a female prisoner.

New Hampshire: On January 26, 2005, judge Franklin Jones, 56, resigned from the bench, a day after the Judicial Conduct Committee recommended his removal from the bench. At a conference on sexual assault and domestic violence Jones groped five victim's advocates. He pleaded guilty to simple assault charges, reduced from sexual assault, and spent a week in alcohol treatment.

New York: On April 29, 2005, Alton Hutchinson, 36, was arraigned on charges that he beat and attempted to rape a female counselor at the Elmira Correctional Facility during a private counseling session. Hutchinson was already serving a 25-50 year sentence for attempted second degree murder, second degree assault, first degree rape and sodomy convictions. Hutchinson has already been convicted of the charges in a prison disciplinary hearing where he was sentenced to 16.5 years in disciplinary segregation and the loss of 30 months good time credits.

Ohio: On June 20, 2005, Tanya Serrell, 40, a guard at the Scioto Juvenile Correctional Facility in Delaware, pleaded guilty to assaulting a 13 year old prisoner at the facility.

Oklahoma: On May 5, 2005, Charles Wilson, 19, a guard at the then Corrections Corporation of America run Tulsa jail, was arrested on charges of stealing a woman's purse at gunpoint at a local mall. He was captured by police shortly afterwards.

Oregon: On April 21, 2005, Robert Stamper, 28, a former Bureau of Prisons guard employed at the Federal Correctional Institution in Sheridan was sentenced to 61 years in state prison after being convicted by a jury on 17 charges related to raping an 18 year old woman, kidnapping her at gunpoint, choking her into unconsciousness and leaving her for dead.

Pennsylvania: On February 23, 2005,

James Morgan, a sergeant at the State Correctional Institution in Camp Hill, was arrested at his prison work place and charged in Cumberland county court with raping two girls, now aged 17 and 21, when they were 7 and five years old, respectively.

Texas: On June 3, 2005, Joey Janice, 24, a former Tarrant county jail guard in Ft. Worth was sentenced to 30 days in jail and two years probation after pleading guilty to attempting to smuggle five grams of marijuana into the jail after taking money from a jail visitor. He also agreed to testify against another jail guard, Ollie King, who was also charged with drug smuggling at the jail.

Texas: On May 5, 2005, Francisco Marsical, 26, a guard at the Webb County jail in Laredo was arrested and charged with attempting to smuggle heroin, marijuana, syringes and lighters into the jail on behalf of the Mexican Mafia.

Vermont: On March 29, 2005, Lynn Forcier, 42, an employee at the Northern State Correctional Facility embezzled \$77,116 from prisoners' commissary accounts at the prison, according to prosecutors who have charged her with theft.

Washington: On January 14, 2005, Kenneth Ray, 46, resigned as director of the King County adult and juvenile jail systems. The resignation came a day after a report was issued that Ray was under investigation for unspecified "workplace concerns."

Washington: On October 2, 2004, Michael Tibbetts, 49, hanged himself in his cell at the McNeil Island Corrections Center. He was serving a 61 month sentence for drug possession.

Washington: On October 3, 2004, Clyde Hall, 51, a guard at the Washington State Penitentiary in Walla Walla was arrested on heroin possession charges and possessing a sawed off shotgun. Police claim Hall delivered drugs to prisoners. He had been employed as a guard since 1991.

Washington: Ralph Blakely, 69, the defendant whose case was used by the

U.S. supreme court to dramatically change sentencing procedures across the country and which invalidated Washington state's sentencing scheme for imposing exceptional sentences, was sentenced in Spokane county superior court on March 23, 2005, to 35 years in prison for soliciting the murder of his ex wife and daughter. Prisoner Robbie Juarez testified that Blakely had offered him \$40,000.00 to kill each of the women. The murder solicitation occurred while Blakely was serving the 7 1/2 year sentence for kidnapping the ex wife at knifepoint, which was vacated by the supreme court. The latest charges were filed after Juarez was released from prison and was facing burglary charges when he went to police with his claim and a detective assisted him in soliciting Blakely for the murder scheme. Juarez testified that in exchange for his testimony the burglary charges were reduced to trespassing charges. ■

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Ninth Circuit Reverses Dismissal of ADA Suit for Failure to Exhaust

The Ninth Circuit Court of Appeals held that a district court erred in dismissing a California prisoner's suit for failing to exhaust administrative remedies under 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act, (PLRA).

Earl Butler, a blind prisoner, was confined "at the California Substance Abuse Treatment Facility in State Prison in Corcoran California." While there, Butler received no assistance with or accommodation of his vision impairment. There was no a Braille program or railings

he could use. This resulted in Butler repeatedly injuring himself as he attempted to move throughout the prison.

On August 28, 2001, Butler completed "a form entitled "Reasonable Modification or Accommodation Request," seeking assistance "in performing all his "everyday functions, such as getting to and from the dining room, or library, reading correspondence or posted memorandums."

In September 2001, prison officials denied Butler's request, stating "that it was his responsibility 'to request assistance from staff.'" Butler then "appealed to the second level of review, stating, 'I am totally blind,' asserting that he was denied 'the benefits and services' of 42 U.S.C. § 12102; and repeating his request for reasonable accommodation." His request was again denied and Butler appealed to the third and final level of review, which was denied on January 14, 2002.

Butler then brought suit in federal court, alleging violations of the Americans with Disabilities Act of 1990 (ADA).

Defendants moved to dismiss for failure to exhaust administrative remedies under § 1997e(a).

The district court granted defendants' motion, finding that although "Butler had sufficiently grieved the 'statutory violation,'... the appeal does not appear to put defendants on notice of plaintiff's allegations..." The court concluded that Butler failed to exhaust his administrative remedies because "defendants lacked specific notice of plaintiff's statutory claims against them."

The Ninth Circuit reversed, concluding that by completing the form the State provided, "he availed himself on the administrative process the State gave him. The PLRA does not require more. Completion of the form, followed by Butler taking all the steps of the administrative appeals process, achieve the purposes of the PLRA's exhaustion requirement as authoritatively set out in *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). Compliance with the PLRA was complete." See: *Butler v. Adams*, 397 F.3d 1181 (9th Cir. 2005). ■

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Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news

about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the *Razor Wire*. Write: November Coalition, 282 West Astor, Colville, WA 99114.

Stop Prisoner Rape

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Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

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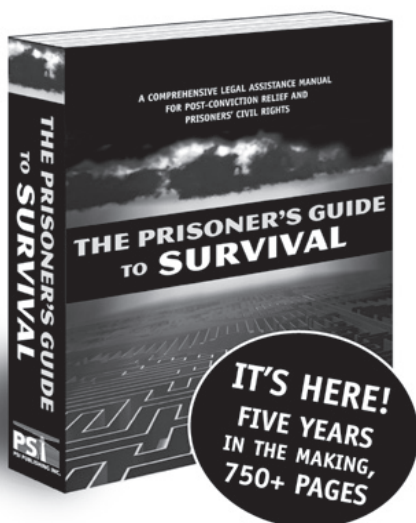
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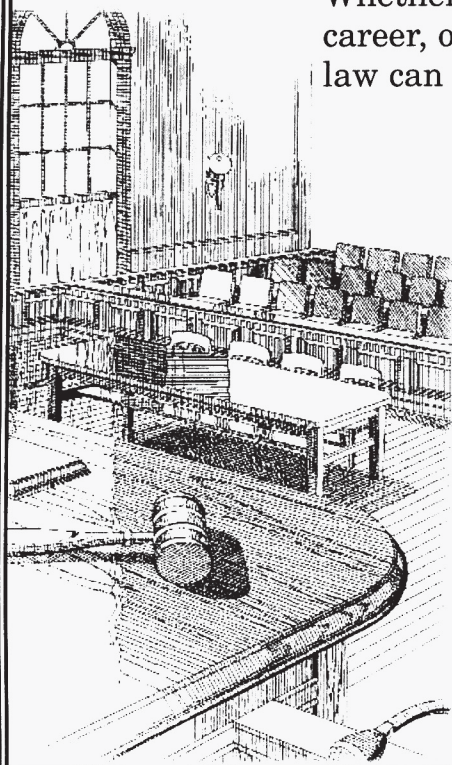
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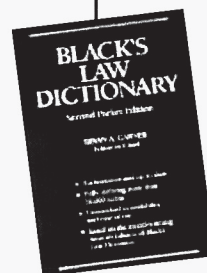
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Georgia Prisons: A Blight On The Peach State

by Michael Rigby

During the Civil War, General William Tecumseh Sherman's devastating march through the South was a blight on Georgia and all who lived there. Today, the safety of many Georgians – particularly the 50,000 confined in the state's 37 prisons – is just as precarious.

At one state prison guards are accused of routinely beating handcuffed prisoners. Nine guards have been fired and several officials, including the warden, have left their jobs. At another facility a prisoner died after guards forcefully removed him from his cell. One guard was fired and another resigned in that incident.

The Georgia Department of Corrections (GDOC) faces other problems as well. The prison commissioner is under fire for, among other things, soliciting funds from prison commissary vendors, and prison officials are struggling to determine how three prisoners on death row acquired escape supplies and tools that they used to saw through air vents in their cells. Prison officials have also been criticized for not reporting the murder of a prisoner until two days after his funeral, hobbling the criminal investigation.

Prisoners' Murder Unreported

Christopher Southerland was not a violent man, but he died a violent death in the mental health unit of Rutledge State Prison in Reidsville. Tragically, no one may ever be held responsible for his murder because prison officials waited nearly a month after he was horribly beaten to contact the police.

On December 12, 2004, guards at Rutledge found Southerland lying unconscious in his cell, his head resting in a pool of blood. His cellmate stood nearby with blood splattered across his pants legs. Southerland, 32, never regained consciousness after the attack and died from his head wounds nearly three weeks later, on January 1.

Yet no one at the prison contacted police until six days after his death – two days after his funeral, in fact. That delay, from December 12 until January 7, allowed Southerland to be buried without an autopsy or coroner's inquest, although state law requires both when a prisoner dies under unusual circumstances or when a murder is suspected. The delay also kept

police from examining the crime scene, gathering evidence, and interviewing witnesses while their memories were fresh.

Southerland had been imprisoned at Rutledge in March 2004 after he crashed a borrowed truck while intoxicated, violating his parole on a theft conviction. On December 12 he was one of 96 prisoners in the mental health unit, which was overseen by two guards.

Inga Morgan, the guard who found Southerland unconscious on the floor at 7:00 a.m., wrote in the incident report that Southerland's cellmate, 25-year-old Antwain Beasley, was acting "nervous and anxious" and had blood on his pant legs. At just under 6 feet tall and nearly 200 pounds, Beasley outweighed Southerland by almost 50 pounds. According to internal documents, Beasley, who was serving 15 years for aggravated assault and armed robbery, confessed to assaulting Southerland less than two hours later.

Southerland's grandmother said she is angry that guards did not protect him in the prison's mental health unit. When she visited her grandson at the hospital, Louise Southerland, 76, said shoe prints were embedded in his head. A hole in his ear bled for two days. "I wish I could have kept him out," she said. "But I couldn't. He just done little things. He didn't kill nobody. He didn't break into nothing. He didn't have a gun. None of those things. And now he's gone."

Ms. Southerland hopes that whoever is responsible for her grandson's death will be held accountable. She has retained attorney Sam Dennis of Valdosta, who stated, "We are in the process of investigating this suspicious set of circumstances,

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Georgia Prisons (cont.)

and if the facts merit it, we will file a lawsuit against the responsible party.”

The Georgia Bureau of Investigation (GBI) is investigating and stated it planned to exhume Southerland's body. “We are trying to work with authorities to accomplish a scientific exhumation, investigation, and autopsy,” said Dennis. No time has yet been set for the exhumation, and as of mid-2005, Antwain Beasley had not been charged in Southerland's death. Southerland was the twelfth Georgia prisoner to be murdered in the past four years.

Handcuffed Prisoners Routinely Beaten

Unfortunately, many guards and officials in Georgia prisons don't just passively allow violence to happen; instead, they actively engage in it. The GDOC has a long and inglorious history of prisoner abuse. From late 1995 to early 1999 the GDOC was the subject of many such claims under Commissioner Wayne Garner. In one incident, the prison system settled a federal lawsuit for \$285,000. Other incidents include the beating of prisoners at the Hayes State Prison in 1996 and dozens of sexual abuse allegations at the Women's Correctional Institution in 1992.

Commissioner James Donald, who took over in 2003, says the focus now is on rehabilitation and that abuse will not be tolerated. Apparently no one got that message at Rogers State Prison, a 1,200-bed medium-security prison in Reidsville.

In July and August 2005, nine guards at Rogers were fired for routinely beating handcuffed prisoners. Rogers warden Glenn Rich, deputy warden P.P. Collins and Alan Adams, who was in charge of state prisons and wardens, were all suspended pending the outcome of an investigation. Rich retired on August 7 before the investigation was completed, and Adams resigned.

The investigation began when one of the guards at Rogers reported the beatings to the GBI. Guard Tommy Cardell told GBI investigators that during his three years at Rogers he witnessed between 20 and 30 beatings of handcuffed prisoners.

Cardell, 51, said he routinely reported the abuse to prison officials and initially believed his allegations were being investigated. When he realized nothing was

being done he called GDOC headquarters in Atlanta. Cardell was then interviewed by a Reidsville-based investigator who, he said, only appeared interested in how many people knew about the beatings. As thanks for reporting the abuse, Cardell was fired on May 11, 2005 on trumped up charges of failing to cooperate with an investigation. Cordell says he had refused to answer questions he felt were hostile and irrelevant.

Cardell ultimately reported the abuse to a local newspaper, the *Atlanta Journal-Constitution*. After the paper questioned Assistant Commissioner Brian Owens about the abuse, the GDOC sent a team of investigators to Rogers. The next day, on May 19, 2005, the department announced that three supervisors – Lieutenant Reginald Langston, Lieutenant Rodney McCloud and Sergeant Jason Burns – had been suspended and that the GBI had been asked to investigate. It's unclear if the three supervisors were among the guards fired at Rogers.

Cardell said prisoners were often taken to a shower area and brutally punched and kicked in ways that wouldn't leave big bruises or cuts. He also claimed that prison officials in some instances encouraged the mistreatment. Once, according to Cardell, when a prisoner made a flippant remark to Warden Glenn Rich, Rich had the prisoner taken to the shower and beaten so badly that he later coughed up blood. In another instance Cardell stated he saw a guard drag a handcuffed prisoner through Rogers, using him as a “battering ram” to open metal gates. The guard repeatedly kicked the prisoner in the groin and leg, Cardell said. “They were doing two to three inmates a week then. You have no conscience if you can do that sort of thing,” said Cardell. Cardell was eventually rehired by the GDOC but was kept on paid administrative leave during the investigation.

In a federal lawsuit filed in Savannah on May 13, 2005, Sergeant Burns was accused of wearing a pair of black leather gloves to beat a handcuffed prisoner in the shower. The suit, filed by Rogers prisoner Lancaster Graham, also contends that Burns, who is white, used racial slurs while beating Graham and that a guard “spit in his face and rubbed the spit into his face with their boots.” Graham, who is now out of prison, said “life inside Rogers State Prison was like a man-made hell. The way they treat you in Rogers State Prison – there's no excuse for it except

Georgia Prisons (cont.)

ignorance or no heart.”

When questioned by CNN reporters about Graham’s allegations, GDOC employees, including Burns and then-Warden Glenn Rich, refused to comment. And when CNN tried to photograph the Rogers prison from a public road, at least half a dozen guards attempted to run them off. Eventually a state police dispatcher informed the guards that CNN was within its rights.

McNeil Stokes, the Atlanta attorney representing Graham, has filed four other federal lawsuits on behalf of Georgia prisoners alleging they were ruthlessly beaten by guards. The lawsuits describe in detail how GDOC prison guards berate, curse, humiliate and beat handcuffed prisoners. “I would say the beatings are usual and frequent and sadistic at certain prisons, including Rogers in particular,” Stokes said.

Regrettably, the abuse isn’t limited to Rogers. In December 2004, Lebert Francis, a prisoner at the Calhoun State Prison in Southwest Georgia, filed a lawsuit claiming he was “brutally choked, beaten, kicked, stripped naked, sexually brutalized and threatened with homosexual rape” by guards. The beating was “condoned and encouraged” by the warden and assistant warden, Stokes claimed in the suit.

Also in December, Brian N. Williams, a prisoner at the Phillips State Prison, filed a lawsuit alleging he was “brutally

beaten, kicked, and repeatedly clubbed in the face and about his head with heavy metal flashlights” by guards.

Following the allegations raised by Cardell about abuse by guards at Rogers State Prison, GDOC director Donald said he was considering establishing an ombudsman’s office as an advocate for prisoners who allege abuse or misconduct. “The centerpiece of the Department of Corrections is its people,” said Donald. “And we have some people out there who are clearly unsung heroes. And if there’s just one among us who doesn’t get the message, then we will deal with it.”

Guards Implicated In Prisoner Death, Escape

At the Georgia Diagnostic and Classification Prison, a beating by guards may have resulted in a prisoner’s death last year. Charles B. Clarke III died at the Diagnostic Prison on April 19, 2005 from what the GBI and prison officials termed “natural causes.” According to a GBI autopsy, Clarke, 27, suffered a cardiac arrest when a blood clot dislodged and blocked one of his arteries.

A month earlier, however, Clarke had been injured when guards forcefully removed him from his cell. Prison officials contend the degree of force used in the March 18 incident did not contribute to Clarke’s death. Even so, they initially refused to release Clarke’s medical records claiming he had not specified his next of kin in prison paperwork.

After the cell extraction Clarke com-

plained to medical personnel of pain and swelling in his head, torso and testicles. Additionally, the autopsy found bruises on his body, including a 10-by-4 inch bruise on his thigh. Several prisoners also wrote to Clarke’s family and lawyer saying they saw guards repeatedly punch and kick him.

Following a GBI investigation, GDOC Lieutenant Reginald Goodrum, 39, was fired for using excessive force against Clarke and for lying to investigators. Another supervisor, Captain Ricky Goodrum, retired on August 1 while the investigation was ongoing. A GDOC spokesperson said the two men were not related.

Prison officials refused to specify how Lieutenant Goodrum had lied to investigators. However, in his report of the incident, Goodrum said he sprayed Clarke with a one or two-second burst of pepper spray as they prepared for the cell extraction. He also wrote that Clarke was injured shortly afterward when he slipped on a wet staircase while handcuffed.

But a videotape of the incident, required whenever force is used, showed a guard reaching into Clarke’s cell with a can of pepper spray for at least 15 seconds. The videotape predictably ends before Clarke is injured, a common ploy used by prison guards who want to exact retribution during a “use of force” incident. Goodrum claimed the tape ended because the camera’s battery had died.

Clarke’s father, Charles B. Clarke, Jr., said Goodrum’s firing was not enough. “I think there’s more than one person involved,” he said. “But it’s a start. More than anything else, it’s an admission of guilt on their part that things were not done correctly.”

The Diagnostic and Classification Prison was the scene of another GBI investigation following the attempted escape of three death row prisoners in August 2004. Before their plan was foiled, Andrew Grant DeYoung, 31, Michael Wade Nance, 43, and David Scott Franks, 44 had amassed a stunning array of contraband, including hacksaw and reciprocating saw blades, \$280 in cash, knives, ski masks, duct tape, clothing, flashlights, “rope” made from bed sheets and even a map of Georgia. Two of the prisoners, Nance and Franks, worked for 14 months to saw through air vents in their cells, which allowed them to wriggle through the small openings into an enclosed area behind the cellblock.

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They were working to cut down a door leading to another hallway and on cutting through the vents in De Young's cell when their plan was discovered. A guard noticed a string attached to one of the vents and pulled it, causing the vent to collapse and expose the opening. The prisoners had fooled guards during routine counts by arranging pillows and blankets on their beds to make it appear they were sleeping.

At the time, prison officials were sure guards had aided the death row prisoners because some of the items, such as saw blades and cash, are not easily obtained inside the prison. Two guards were initially questioned, but as of June 2005 no one had been charged. DeYoung, Nance and Franks were placed in solitary confinement after their escape attempt was discovered.

The attempted escape did result in a number of policy changes. Guards and other employees are now required to pass through a metal detector upon entering the prison; a program that allowed condemned prisoners to crochet ski masks has been discontinued; and guards conducting counts on death row must now see a part of the prisoner's body from under the covers and pillows. The prison has also stepped up random shakedowns, which quickly resulted in the arrest of a guard for drug possession.

Prison Director Abuses Post

Investigations into abuse and corruption have not been limited to the lower echelon of Georgia prison employees. Those at the top have garnered their own share of unwelcome attention.

In May 2005, GDOC Commissioner James Donald, a retired two-star Army General with no previous experience in corrections, was investigated by the GBI for pressuring prison vendors to make financial contributions to his Excellence in Corrections Conference. Donald raised money for the conference, held October 18-20, 2004, through golf tournaments funded primarily by prison vendors and through direct contributions. The investigation was launched when Ed Lipscomb, owner of the MCCBC snack food company, reported that he felt compelled to contribute to the conference in order to keep doing business with the state.

In all, private sponsors donated more than \$100,000 to the conference – \$52,000 of which came from MCCBC and Stewart Candy Company, another

provider of prison commissary goods. At least two other commissary vendors also made donations. Donald courted the contributions as he considered switching from a multi-vendor system to awarding the state's entire commissary contract to a single company.

As expected, the state attorney general's office concluded that Donald had not committed a crime but cautioned him to avoid such practices. "This could give the perception that decisions about who would retain or receive future contracts with DOC could be influenced by monetary contributions to causes favored by the commissioner," wrote Assistant Attorney General Kim Schwartz in a 10-page report sent to Donald on August 29, 2005.

Donald has a history of using his office for personal gain. According to the report, Lipscomb said he felt pressured to hire Donald's son, Jeff Donald, for "\$15,000 a year, but there was no indication what duties Jeff would perform." The plan was abandoned after it went public.

And even though Donald has often lamented that prison overcrowding has reached "crisis" proportions – due in part to a shrinking budget – he seems to find money for himself and his pet projects.

For example, Donald ordered himself a new Ford Crown Victoria from Georgia Correctional Industries, the agency in charge of prison manufacturing, even though the governor's office had banned new car purchases due to budget concerns. Questions had also arisen as to whether he had authority to buy the car. Donald ordered it anyway, at a cost of \$25,734.

To further waste taxpayer money Donald hired a health and fitness coordinator for GDOC employees in March 2005. The part-time job pays up to \$31,668 per year – \$7,000 more than a new full-time prison guard earns.

The coordinator's duties included holding aerobics classes at the GDOC's central office in Atlanta, writing articles, and sending e-mail tips about healthy eating. On June 6 and 7, 2005, health and fitness coordinator Claire Fate sent out e-mails extolling "banana benefits" and providing "five reasons to eat an apple every day."

Donald's creation of a nutrition and fitness coordinator position came at a time when budget shortfalls were causing the GDOC to drastically scale back on prison counselors, chaplains and teachers. "The money would be better spent bringing

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Georgia Prisons (cont.)

back some of the programs and services that have been cut from the prisons, such as counselors and chaplains, instead of giving kindergarten advice to staff about eating fruit,” said Sara Totonchi, public policy coordinator for the Atlanta-based Southern Center for Human Rights.

In fact, as Donald frittered away taxpayer money, numerous GDOC staff positions were being eliminated. Governor Perdue’s budget request for 2006 calls for cutting 105 positions from GDOC’s payroll of 15,089. More than 600 jobs were cut in 2004, including numerous counselor positions. Also in 2004, Donald closed four regional corrections offices to save money. Following reports of abuses by GDOC guards, Donald stated that he doesn’t believe the closure of the regional offices resulted in decreased supervision of prison staff.

Further, the GDOC announced in February 2004 that it would soon be cutting the number of employees monitoring the state’s privately run prisons from 3 to 1 to reduce costs. Two companies operate the state’s three private prisons: Corrections Corporation of America (CCA) runs the Coffee Correctional Facility in Nicholls and the Wheeler Correctional Facility in Alamo, while Cornell Companies operates the D. Fay James Correctional Facility in Folkston. The three prisons house 4,567 prisoners.

Private prisons are notorious for cutting costs at the expense of prisoner safety. “The low wages and benefits paid by for-profit corrections firms can attract workers who would not be qualified to work in a public correctional setting,” notes a report from the Association of Federal, State, County and Municipal Employees.

Donald may simply be following in his predecessor’s footsteps. In December 2003, a Fulton County jury convicted former GDOC Commissioner Bobby Whitworth of taking a \$75,000 payoff while he was a member of the state parole board. Whitworth accepted the money to initiate and push through a bill that financially benefited a friend’s private probation company. Whitworth, 56, was sentenced to six months in prison, four years on probation, 100 hours of community service, and was fined \$50,000. It remains to be seen whether Whitworth will actually serve time in prison. He remained free on bond while his case is appealed.

[Whitworth’s appeal was recently denied – see this issue of *PLN* for details.]

Georgia Jails

It’s worth noting that Georgia jails are just as problematic as the state’s prisons. At the DeKalb County Jail, which a judge in 2001 called a dangerous breeding ground of disease, recent events include continuing court oversight of medical care and calls for investigations into two prisoner suicides in 2003 and the 2004 beating death of a 71-year-old prisoner – who was being held on a misdemeanor charge – by his 24-year-old cellmate in the jail’s mental health unit.

At the Henry County Jail officials are trying to determine how four prisoners escaped from the recreation yard in May 2005. Two other prisoners escaped from the jail in February and November 2004.

In Forsyth County, a 50-year-old woman employed by the Sheriff’s Department was arrested for stealing approximately \$53,000 from prisoner trust funds. Mary Lee Reynolds, who had sole control over the county jail’s Inmate Trust Fund, was charged with theft by taking on June 3, 2005 and released on \$54,000 bail.

And at the Fulton County Jail three prisoners died in a one-month period from April to May 2005, including William Tommy Goss, who committed suicide; 17-year-old detainee Antonio Merritt, who died due to medical causes; and another prisoner whose name and circumstances of his death were not initially released by jail officials. The deaths come one year after a class-action lawsuit was filed against the Fulton County jail by the Southern Center for Human Rights, which included claims of gross overcrowding, understaffing, breakdowns in plumbing and ventilation systems, and poor recordkeeping that resulted in prisoners being kept past their scheduled release dates. “There’s just no excuse for this,” said Southern Center for Human Rights Director Stephen Bright. [See: *PLN*, May 2005 for more on Georgia jails.]

State Counselors Murder Teenager

While violence and malfeasance abound in Georgia’s adult prisons and jails, it’s no picnic for the state’s juvenile prisoners, either.

On April 20, 2005, 13-year-old Travis Parker was killed by counselors at the state-run Appalachian Wilderness Camp in the North Georgia Mountains. The

counselors held the boy face down on the ground for at least 90 minutes, and denied him his asthma inhaler throughout the ordeal.

Travis was placed in a “full basket restraint” – a hold so unsafe it has been banned by the Juvenile Justice Department – after he angrily confronted a staff member for withholding food as punishment. Travis was restrained by at least three counselors at a time, said witnesses. He eventually stopped breathing.

Counselors Mathew Desing, Ryan Chapman, Paul Binford, Torbin Vining, Johnny Farris and Phillip Elliot were indicted on felony murder charges after a medical examiner ruled Travis’ death a homicide. “This is all based on the criminal negligence or reckless conduct of these individuals,” said White County District Attorney Stan Gunter. “It was due to the restraint, and how they applied it that has led to these charges.” Felony murder charges, which can bring sentences of up to life in prison, are brought in cases where deaths occur during the commission of a felony. The felony in this case was child cruelty.

The Appalachian Wilderness Camp, which accepts children age 6 to 17, is one of two operated by the state Department of Human Resources. The Juvenile Justice Department has about 20 children at the camp, which has a capacity of 50.

Parker had been sent to the camp for hitting his grandmother and threatening her with a knife. Even so, family attorney Thomas Cuffie said the boy and his grandmother had a loving relationship. Cuffie said that when the boy’s grandmother, Golden Griffin, saw him on life support in the hospital, she suspected he had been severely beaten. “He had considerable swelling, knots, and lacerations about his body,” said Cuffie. “They imposed a form of punishment that resulted in his death.”

Ironically, if convicted, the counselors who killed Travis may experience similar abuse firsthand if they are sentenced to time in the GDOC. ■

Sources: *Atlanta-Journal Constitution*, *MaconTelegraph.com*, *CNN.com*

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Texas Counties Set To Raid State Prisoners' Trust Fund Accounts

by Matthew T. Clarke

Partially in response to legislation making it mandatory by 2007 for Texas counties to establish programs to collect fines, costs, restitution and fees from Texas state prisoners and partially on their own, several Texas counties have begun recovering money for fines, court costs, court-appointed attorney fees and restitution from state prisoners' trust fund accounts.

In the past, frequent practice by district attorneys in Texas seeking lengthy felony sentences was for them to tell the jury to forget fining the defendant. This was primarily because it has always been assumed that indigent prisoners couldn't pay the fines anyway. Now, in a new wave of what some would call fiscal responsibility and others would label sheer meanness, Texas counties are moving to collect fines and other costs from Texas prisons' families and friends by attaching part of the money the families and friends send to the prisoners' trust fund accounts.

Except for a few privileged prisoners in a small experimental prison labor program involving private companies, Texas prisoners are not paid for their labor. Most frequently they come to prison indigent and remain that way until they leave. If they are lucky, a friend or family member will send the prisoner a little money every now and again that might cover the cost of buying hygienic supplies, snacks or even a fan. Seeing this pittance as a potential revenue source, some counties are eager to get a piece of the action.

Technically, the counties have had the legislative authority to tap into prisoners' trust fund accounts to recover child support, fines, costs, restitution and fees since 1996. Few counties did. That's why, when Karen Matkin was appointed District Clerk of McLennan County, she found that, despite having the authority to collect the money, the county had failed to develop a collection program. She quickly determined that about \$800,000 in uncollected costs, fees and fines were generated in 2004 alone.

When Matkin realized the magnitude of the uncollected funds, she requested an additional staff position, at an annual salary of \$26,000, to assist with the new program's paperwork load. She guaranteed the county commissioners court that the program would generate at least \$49,000 in the first year or the new

position could be eliminated. The first collection orders went out to 22 state jail felony cases in July 2005. The collection orders result in 20 percent of the preceding six months' worth of deposits being attached. Deposits made thereafter are attached at the rate of 10 percent.

Every felony case generates at least \$198 in court costs. If the county collects that amount, \$1.33 must be sent to the state. Other outstanding costs typically include at least \$500 in court-appointed attorney fees even if all that was done was the entry of a guilty plea.

Matkin says her goal is to collect 20% of the outstanding amount. She started with state jail felonies because their short term of incarceration made it imperative to attach their accounts quickly. However, prisoners with long sentences will also receive her attention.

"The longer somebody is in the penitentiary, the greater the likelihood that we will recover more of our funds," said Matkin. "If they are serving a life sentence, theoretically, somebody is going to be sending them money every month and we are going to be standing there with our hand out to collect our portion of those funds."

Criminal defense attorneys and former McLennan County prosecutors Ken Crow and Scott Peterson are not sold on the program. "This is just like all government programs," said Crow. "They all start out with good intentions and then they turn into crap. They will spend more to administer the program than they will ever collect from indigent defendants. That's why everybody's taxes go up--because of stupid ideas like this." Peterson is not even sure about the "honorable" intentions.

"I think it is a terrible idea because all you are doing is hurting the inmate's family because they are going to be the ones giving them the money," said Peterson. "Why would you want to do something like that?" George Allen, chief felony judge in McLennan County noted that the mandatory legislation could be viewed as another unfunded mandate. It requires the county to spend a lot of money setting up the program and collecting the outstanding amounts, then send the vast majority of the collected money to the state, even though the state paid nothing toward the collection program.

John Segrest, McLennan County District Attorney, questioned the concept of turning the collection of fees, fines and costs into a revenue stream for the state. He said that perhaps the whole idea should be rethought.

Kerr County District Clerk Linda Uecker said that the program in her county, which was established in 1997, has worked well. She noted that such good results might not carryover into a large-population county like McLennan County. Whatever the case, it is expected that by 2007 all Texas counties will have established collection programs.

Westmorland County, Pennsylvania, has also created a program to collect costs of incarceration from county prisoners. In 2002, the county prison board passed a policy to charge county prisoners \$10 per day of incarceration. The county attaches up to 50% of the money in the prisoners' trust fund to cover the fee. If they owe money upon release, prisoners are given a bill and instructions on how to set up a payment plan. Prisoners' sentences cannot be extended for failing to pay, therefore, the county is considering hiring a collection agency to handle the outstanding debts which amounted to \$2 million in September 2005.

The program generates \$60,000 to \$70,000 per year, most of which comes from work-release prisoners whose paychecks are partially garnished for the fee as a condition of being on work-release. The collected money goes into the county's general fund. ■

Sources: *Waco Tribune-Herald*, *Pittsburgh Tribune-Review*.

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From the Editor

by Paul Wright

Welcome to another issue of *PLN*. Readers may have noticed that we have kicked off *PLN*'s annual "subscription madness" campaign where we allow folks to purchase multiple gift subscriptions for people who are not current *PLN* subscribers. This is a great way to let people know about *PLN*. If you know someone who is interested in criminal justice issues, whether a prisoner, legislator, journalist, judge, concerned citizen or family member of a prisoner you should consider getting them a free gift subscription.

As I mentioned last month, we are undertaking a big campaign to boost our circulation. Our goals in building our circulation are several. One is to reach more non-prisoners to let them know what is happening in American prisons and jails. Second is to let activists, lawyers and prisoners know about the struggles and victories around the country to bet-

ter wage their own local struggles and building *PLN*'s circulation from our current 4,600 subscribers will help us keep subscription costs down as it lowers the per issue cost even as postage and printing costs continue to rise.

Current subscribers can help us keep costs down by letting us know immediately when they are moved. The post office does not forward copies of *PLN*, they are returned to us at a cost of 75 cents per issue. Informing us of address changes also ensures subscribers get their copies of *PLN*. Besides writing, our website has a special feature for subscribers to enter address changes. It is free and fast.

Speaking of free, *PLN*'s list serves offers daily prison and jail related news and information. Prisoners can ask friends or family outside prison to sign up for it by going to *PLN*'s website at www.prisonlegalnews.org.

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survey it is not too late to do so. We will tabulate the results and report them in an upcoming issue of *PLN*. It is also not too late to donate to *PLN*'s annual fundraiser. We are seeking to build our circulation and our impact.

Lastly, I would like to thank those readers who send us the information on the cases they win which allows us to report them in *PLN*. *PLN* is the only publication that regularly reports cases won by prisoners. The mainstream media and most court reporter services rarely cover the topic. If you win a case let us know about it so we can report it. We get a lot of mail from prisoner readers about cases they have filed. Due to space reasons we rarely report the filing of cases unless they are class actions or truly innovative. So save your postage and copies and wait until you win or settle the case at which time we will report it.

Enjoy this issue of *PLN* and encourage others to subscribe. ■

Colorado DOC's Medical Oversight Found Remiss

by G.A. Bowers

An independent auditor found the Colorado Department of Corrections (CDOC) to be lax in its oversight of medical care contractors.

In April 2005, Navigant Consulting, Inc., reported the results of its audit, commissioned by the Colorado State Auditor, of the CDOC external health care services provided to prisoners. The audit examined the rates paid to external care providers, administration of the utilization management program, and the CDOC's oversight of its external care contractor. It did not examine the quality of care provided to prisoners, the facilities, the credentials of the personnel providing the care, or the appropriateness of medical care provided to any prisoner. Navigant concerned itself only with fiduciary matters. If it had looked deeper, as did other auditors, it likely would have found more problems than it did.

Another state audit of the five private prisons in Colorado found "lax oversight," *The Denver Post* reported. None of the private prison medical clinics were licensed by the state. The CDOC had not inspected any of the clinics from May 2003 to December 2004. Two prisoner deaths may have been caused by medication

changes ordered by private prison doctors who had not even examined the prisoners. [See accompanying story.]

The CDOC's medical services are, at best, little better. *The Rocky Mountain News* reported that the CDOC's poor medical care turned two prisoner's prison terms into death sentences. Dan Smith, 44, complained of chronic back pain for eight months before receiving an MRI. It found a 10-inch tumor on his spine and another on his pancreas. Deric Barber, 31, complained for six to nine months before receiving a colonoscopy, which found colon cancer. Both prisoners are now housed in maximum security medical facilities where the CDOC refuses to allow reporters to interview them. Both men are considered terminal.

Navigant made nine recommendations. It recommended that the CDOC (1) improve its oversight of contractor's rate negotiations for external services, and (2) minimize the cost duplication for hospital security. Regarding utilization management, Navigant recommended that the CDOC (3) hold the contractor accountable for prior authorization, (4) improve concurrent reviews and discharge

planning, (5) ensure the contractor is conducting retrospective reviews, (6) review emergency visit claims, and (7) ensure that claims are accurate. In regards to oversight, Navigant recommended (8) that the CDOC improve its oversight of the external health care service's contractor by ensuring that it complies with the contract. Finally, the auditor recommended (9) that the CDOC consider using a capitation system rather than a fee-for-service payment system. The CDOC agreed or partly agreed with all nine recommendations.

The CDOC spent \$59 million in fiscal year (FY) 2004 to provide medical care to over 18,000 prisoners. Access Correctional Care contracts with the CDOC to provide all external services and was paid about \$1.4 million in FY 2004 for administering services totaling approximately \$24 million. These services include inpatient hospital admissions, outpatient care, specialist visits, and ancillary services, i.e. laboratory services and durable medical supplies (e.g. hearing aids).

Navigant found that the CDOC provided "minimal oversight" of Access' rate-setting methodologies. Although the contract allowed the CDOC to review rate

information, the CDOC did not request and Access did not volunteer this information. As a result, the CDOC occasionally sent prisoners to hospitals that charged twice the prevailing rate. Additionally, the auditor found that Access failed to negotiate cost-effective rate-setting agreements with hospitals, costing the CDOC as much as an additional \$2.5 million. The CDOC failed to establish guidelines and financial targets as contractually required nor had it reviewed the obsolete and inappropriate guidelines Access used. Navigant found that in nearly 80 percent of the hospital billings for providing security to intensive care patients, the CDOC actually provided the security. The CDOC agreed to improve its oversight of rate negotiations, inform its contractor when it provides security and require the contractor to negotiate an intensive care rate without security.

The auditor found that Access' external providers deny only two percent of specialist referrals while CDOC staff deny 29 percent of these referrals. The auditor recommended that the CDOC require the contractor to use more restrictive criteria and collaborate to modify the standard criteria, presumably to further reduce the number of referrals. The CDOC hopes to perform all pre-authorizations itself or to require the contractor to develop "financially-based performance measures." This should result in prisoners receiving even less health care.

Navigant examined only four percent of the State-owned hospital stays and found that the hospitals overcharged the CDOC for ten percent of the days. Extrapolating from these findings, the CDOC may have been overcharged by more than \$180,000. The auditor further found that Access failed to adequately review inpatient files and quickly discharge patients. The CDOC agreed to identify criteria for inpatient reviews and establish performance measures for future contracts.

The report pointed out that Access failed to require hospitals to submit documentation related to emergency visits and it failed to review those visits for appropriateness. Emergency visits arising from private prisons receive additional scrutiny as the private prisons are financially responsible for inappropriate visits. Access failed to provide the CDOC with this documentation and the CDOC failed to request it.

Navigant reviewed 184 emergency care claims submitted by the private prisons and found 17 questionable claims totaling \$14,600. It recommended that the

CDOC develop a process for such claims and apply it to these 17 and all such future claims. The CDOC argued that it would not be in their "best interest" to review the 17 claims. The CDOC stated that it does "not have a valid mechanism in place to recoup any potential inappropriate emergency visit claims." As the auditor pointed out, the CDOC's contract with the private prisons explicitly provides such a mechanism: "The CDOC shall retroactively bill the Contractor [private prison] for emergency care billed to the CDOC by the Third Party Administrator [Access] where fiscal responsibility is later determined to belong to the Contractor." Perhaps the CDOC was confused by the term "fiscal responsibility."

The auditor discovered that Access failed to validate the claims submitted by providers for services or to compare even a sample of submitted claims with medical records to verify the billed services were actually provided. The CDOC last reviewed Access' validation process in 1999. Navigant identified 1,710 questionable transactions valued at \$760,000. The CDOC confessed that it "does not have the resources or expertise to audit the actual claims," apparently in violation of Colorado Revised Statute f 24-50-503.5(1) which requires that personal services contracts be used only when the agency has "sufficient resources and expertise to monitor, measure, and enforce performance of the contract."


The CDOC's contract with Access requires the CDOC to annually evaluate service delivery and utilization management along with periodic reviews of the contractor's claims Processing. The CDOC has not performed any evaluation or audit since January 2001.

When the CDOC has found Access' performance deficient, its response has been to assign CDOC staff to perform the function or has taken minimal action to induce Access to correct its deficiencies. The CDOC has never used the remedial actions available in the contract--a contract existing since 1997.

Finally, the auditor noted that under the current arrangement, Access has no incentive to control costs. Access gets paid the same regardless of costs. Navigant recommended the CDOC perform cost/benefit analysis of a capitation arrangement where the CDOC pays a set rate for every prisoner. Twenty-three states use such an arrangement.

CDOC Director Joe Ortiz admitted

to *The Denver Post* that "we were lax in our supervision of medical staff." One state audit found "lax oversight of private prisons" while another found the CDOC provided "minimal oversight" wherever the auditor looked. Even when the CDOC stumbled upon a problem, it has taken, at most, minimal action to address the problem. The CDOC has been a sleeping, toothless watchdog. Sadly, the CDOC's failings may have cost the taxpayers millions of dollars and a few unfortunate prisoners their lives.

The full report is available at www.prisonlegalnews.org. 

Additional sources: *The Rocky Mountain News*, *The Denver Post*.

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Former Georgia Parole Chairman Loses Appeal of Corruption Conviction

by Gary Hunter

Former Georgia parole board chairman Bobby K. Whitworth launched a last-ditch attempt, in the Georgia Court of Appeals, to thwart his felony conviction for corruption. He failed.

Whitworth's tenure with the Georgia prison system is replete with scandal. His eventual prosecution stemmed from a \$75,000 payment he received from his close friend Lansome Newsome shortly after the Georgia legislature approved Senate Bill 474 which effectively transferred supervision of about 25,000 misdemeanor offenders to Detention Management Services, Inc. (DMS). Newsome, the owner of DMS, subsequently sold the company for a multi-million dollar profit to Sentinel Offender Services.

A jury found Whitworth guilty of abusing his office, an offense that carries from one to five years. Whitworth's appeal centered completely around trial error and avoided issues of his own culpability. The former chairman accused special prosecutor Tom Morgan of misconduct for failure to recuse himself for a conflict of interest; he maintained that Morgan should have been disqualified by the court for illegal contact with a former prosecutor.

Whitworth's illegal dealings first surfaced when Linda Thompson, a former parole board employee, learned of the transaction between her boss and Newsome. When she voiced her concerns about legal and ethical violations Whitworth had her fired.

Thompson hired Mike Bowers of Balch & Bingham law firm to represent her. At the time of Whitworth's trial special prosecutor Morgan had also accepted a position with Balch & Bingham to begin when the trial ended. Whitworth's appeal claimed that Bowers and Morgan shared information leading to his conviction. The Court found no evidence that this was true.

The Court also rejected Whitworth's claim that Morgan's commitment to Balch & Bingham gave him a personal interest in prosecuting the case. They held that Morgan fell within acceptable parameters of neutrality required of a prosecutor.

Whitworth also contended that Morgan illegally consulted with former prosecutors to build his case.

Following an investigation by the Georgia Bureau of Investigation Attorney

General Thurbert Baker recused himself and his office from prosecuting Whitworth because of questionable dealings between the two. Governor Roy Barnes (a personal friend of Linda Thompson) then appointed Peter Skandalakis to prosecute the case. Skandalakis eventually withdrew citing a lack of resources to litigate the matter. Governor Sonny Perdue, Barnes' replacement, eventually appointed Morgan as special prosecutor.

When Whitworth's attorney contacted Morgan to negotiate a deal Morgan called Mike Hobbs with the Attorney General's office. Hobbs advised Morgan that prior to the recusal, his office had anticipated successful prosecution of the case. Morgan rejected Whitworth's deal, prosecuted

the case and secured the conviction.

The Court held that, "Where there has been a recusal, even a voluntary one, there should ordinarily be no further involvement in the case by the recused persons.... And the giving of advice on the plea proposal would appear to be improper." But the Court affirmed the conviction stating that Whitworth could not show evidence of an "actual conflict of interest" or actual misconduct. See: *Whitworth v. State*, 275 Ga. App. 790, 622 S.E.2d 21 (Ga. App. 2005). The Georgia supreme court denied Whitworth's petition for review. Whitworth will now presumably serve his sentence of six months in jail, four and one half years conditional probation and pay the \$50,000.00 fine. ■

CSC Pays Public Defender Social Worker \$125,000 for Rape in Juvenile Facility

A former social worker with the Baltimore public defender's office in Maryland, who said she was raped by a 15-year-old boy she was a visiting at the Charles H. Hickley, Jr. School settled a civil lawsuit on March 28, 2005, against the corporations that ran the juvenile detention center.

Amy Bibighaus, 29, went to the Hickley School on February 12, 2002, to evaluate juvenile delinquents and make recommendations about punishment. One of the juveniles she saw was a 15-year-old boy who was being housed in isolation after being found delinquent in an armed robbery case. According to the lawsuit, the teenager "had proven to be an assaultive disturbance within the school and had demonstrated a propensity toward sexually aggressive behavior in the violence," including the sexual assault of a Hickley staff member.

After the teenager asked the attorney accompanying Bibighaus to leave the room so he could talk to the social worker, he propositioned Bibighaus. When she tried to leave the small office, a malfunctioning lock prevented her from being able to escape, and the absence of attentive Hickley staff members kept anyone from noticing the attack that turned into a rape.

Hickley staff members called state police after one staff member saw Bibighaus and the teenager in a "consensual sexual position" in the office. Bibighaus

was charged with statutory rape, which resulted in her acquittal at a trial by a County Judge. After the acquittal, the teenager was not charged because, according to prosecutors, "he didn't rape her."

Bibighaus' lawsuit sought \$20 million against the operators of Hickley: Youth Services International and its parent company, Correctional Services Corp. (CSC). [Editor's Note: CSC was later bought by Geo Corp. Apparently as a precondition to the purchase CSC settled all or most outstanding litigation pending against it at the time of the purchase.] She alleged negligence, liability, civil conspiracy, defamation, malicious prosecution, false imprisonment, and other counts. Her March 28 settlement for \$125,000 was characterized as a "complete vindication" by her attorney, Anton C. Iamele. "I feel very relieved that they've accepted responsibility for what occurred. By settling, it says that they failed to protect me, that they were negligent, and it feels good. It feels good to be vindicated," said Bibighaus.

After nearly 11 years of operating Hickley, the state decided not to renew its \$16 million a year contract with Youth Services. *PLN* has regularly reported on the travails of CSC and if negligent, and often dangerous, operation of adult and youth prisons. ■

Sources: *The Miami Herald*; *Baltimore Sun*

Weary California Prison Gang Members Increasingly Opt Out for Solace of "Sensitive Needs" Yards

Imprisoned California gang members are increasingly tiring of doing hard time to satisfy gang leaders' demands to enforce dogmatic, self-serving obeisance to the perpetuation of in-prison violence. Today, 13,000 California Department of Corrections and Rehabilitation (CDCR) prisoners (8%) are housed in protective custody (PC) "sensitive needs" yards (SNY), with a waiting list of 1,400 more.

Formerly the sole realm of child molesters, rapists and snitches, protective custody is being increasingly requested by members of prison gangs who wish to "drop out" of the life of stabbings, retribution and hit lists. Under the rules of many such gangs, "opting out" is an automatic death sentence. But with many such gangsters now doing life sentences for killings they only did "under orders," the specter of doing the rest of their lives under constant fear and pressure from gang leaders, and therefore enduring the harshest of prison conditions, is getting old.

Gang warfare has been legion in California prisons for almost 40 years, when an argument at Soledad State Prison began the rift amongst Latinos that today is manifested in the Norteño (Northerner) and Sureño (Southerner) schism that woodenly pits brother against brother solely based upon the region of the state they came from. Subcultures within these groups, based upon drug cartels extending to Cali, Colombia, have put a huge financial imprimatur on the current factions of

these gangs, including Nuestra Familia and the Mexican Mafia (EME).

Not to be outdone are parallel structures among blacks (Crips; Bloods; numerous gangs identified by their home telephone area codes), whites (Aryan Brotherhood; Nazi Low Riders), Asians and Pacific Islanders. Each gang has its own hierarchy, with killings ordered upon many hundreds of disobedient members over the years.

Whole prisons have been converted to SNY camps, as have separate yards in many other prisons. In fact, the SNY population in CDCR has grown from just 1,000 in 1999 to over 13,000 today. Former single-cell isolation in harsh SHU housing at supermax Pelican Bay State Prison (PBSP) has been traded for SNY double-cell living, even among former deadly enemies.

Prison officials hold out the carrot to gang members, offering to let them live a better quality of prison life in exchange for defecting their gang affiliation. Cost savings are obvious, just on the single-cell to double-cell housing change alone. Moreover, the revolution in protective custody is slowly breaking the stranglehold gang-imposed rules place on prison life. Officials literally asked members to opt out, when responding to unconstitutional gang/ethnicity based lockdowns at PBSP that the courts ordered CDCR to abate, according to former PBSP Warden Joe McGrath (who now heads all adult prisons within CDCR.)

Living in SNYs offers prisoners an-

other carrot, the hope of eventual parole. Gang affiliation is a guaranteed death-knell from California's parole board, which rarely grants parole to anyone, even non gang members.

Recently, CDCR took the ultimate step in "breaking" gang leaders, even at fabled PBSP, by farming them out to do hard time in distant federal lockups, where they have, in theory, no friends or connections. Governor Schwarzenegger recently conditionally commuted the life sentences of five such Nustra Familia leaders just to isolate them outside the state.

"You start seeing things, after doing so much time," said dropout Gerardo Fuentes, a lifer. "After watching people fight for power and backstabbing one another, you say, 'This is all B.S. [Gang leaders] are up in Pelican Bay. You're their pawn. This is their chessboard.'"

What goes unsaid is the tremendous power this gives prison officials who can then transfer SNY prisoners back to other prisons should they fall into disfavor with their keepers. The divide and conquer strategy successfully carried out by the CDC, using gangs, has ensured a docile and manageable prison population unable to unite on even the most basic of issues directly related to their own daily welfare. ■

Source: *Los Angeles Times*.

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Cell-Block Beatdown: Do Boston Prisoners Have Any Chance of Holding Abusive Prison Guards Responsible? Signs Are Not Promising

by David S. Bernstein

Stories about prison guards beating up prisoners aren't exactly the rage these days — people are more likely to get outraged over lax treatment of prisoners, like the flap about the Massachusetts Department of Correction allowing convicted murderers to hold a Christmas party.

But, no matter what one thinks incarceration should look like, it should not include sadistic beatings of subdued and shackled prisoners, or the deliberate withholding of needed medication or medical treatment. And that's what many prisoners say occurred, repeatedly, within the walls of the South Bay House of Correction in the late 1990s.

That is also the finding of a state commission report from 2002, which found "reported incidents of physical abuse and sexual misconduct, while not widespread, were egregious" at the "deeply troubled institution." And now, no fewer than 55 former prisoners are suing the Suffolk County Sheriff's Department, which runs South Bay, for these types of abuses.

South Bay, a sleek, modern, seven-building complex built in 1991 to replace the notoriously antiquated Deer Island facility, houses prisoners serving sentences of up to two and a half years. Criminals doing harder time go to state prisons, like MCI-Shirley. Many of the men at the House of Correction are serving time for drug possession, theft, or assault. Many are regular guys who screwed up. They just want to do their time and get back home. They are less Boston Strangler and more Mark Wahlberg — who has credited his 45 days at Deer Island for scaring him straight.

For the last few years, Sheriff Andrea Cabral has been stuck dealing with the problems left by her predecessor, Richard Rouse, who fled from office in 2002 amid allegations of gross mismanagement, patronage, and other sins — including multiple allegations of prisoner abuse at South Bay and the smaller Nashua Street Jail, used for temporary detainment.

Many of them have proven costly. Female prisoners won a \$10 million award to compensate them for illegal strip-searches. Another female prisoner who was coerced into having sex with South Bay guards

— and became pregnant by one of them — settled for \$657,000. A federal jury awarded half a million dollars to South Bay guard Bruce Baron for the psychological abuse he endured from his fellow jail guards after he reported one of them for misbehavior.

There were even criminal prosecutions. Federal authorities brought charges against jail guards at the Nashua Street Jail. Four department employees ultimately pleaded guilty to their roles in the vicious beating of Leonard Gibson, an 18-year-old with Tourette's syndrome, in October 1999 — guards said they would "beat the Tourette's out of him," because his outbursts were disturbing their attempt to watch baseball on television.

All of these incidents occurred between 1997 and 1999. The allegations of guards abusing male prisoners at South Bay, which happened during the same three-year period as all these other misdeeds, has had a longer, tougher, and less noticed struggle for attention, and for justice. A major step came last spring, when Cabral's office signed a 10-page settlement agreement in a class-action suit brought by 55 former South Bay prisoners. In it, the department made no concession about any individual action, but it agreed to a host of operation, policy, procedure, and practice changes at South Bay — many of which it was, by then, already implementing, such as placing video surveillance cameras in the elevators, where the worst beatings allegedly took place. It also paid \$175,000 to reimburse the prisoners' attorneys, and agreed to an external review next spring to measure its progress.

That's a huge step, but it leaves a lot left unanswered. Now, with the class-action suit settled, those 55 former prisoners are bringing their individual complaints to court. Their allegations name 86 different jail guards, sergeants, lieutenants, and captains, out of a total of around 500 employed at South Bay at the time, plus numerous "John Does" who prisoners could not identify — because they were allegedly hooded, or forced into a position from which they could not see their attackers. Most of those guards still work for the sheriff. Few have been disciplined. Several have been promoted.

Code Of Silence

The tales of abuse are frightening. There is Darryl Buchanan, beaten in an elevator until several teeth were dislodged; Carlton Buford, beaten and kicked with steel-toed boots; James Conrad, denied his daily medication for a week and then beaten so severely he ended up in the hospital for a month; Kenneth Edge, beaten until he couldn't stand and "there was blood everywhere," according to other prisoners; Edward Evans, with permanent hearing loss as a result of his beatings; Robert Gude, an epileptic, denied his medication and then beaten until he went into a seizure; Robert Hughes, beaten until he passed out, bleeding from his ear; Michael McGrath, beaten until he lost consciousness; Daniel Saliba, beaten and then thrown down a metal-and-cement stairwell while shackled; and Stephen St. James, kicked so hard he defecated blood for days.

Formal complaints — when prisoners dared make them — fell on deaf ears within Rouse's sheriff's department. Disciplining of guards was rare. The district attorney's office made no effort to bring criminal charges. Instead, prisoners were more likely to suffer more abuse in retaliation for lodging the complaint.

A state commission, led by former US Attorney Donald K. Stern, found that prisoner grievances were trapped in a system with a "lack of controls to prohibit retaliation," "no policy against harassment or retaliation against prisoners in response to a grievance," "a code of silence" among staff, and a grievance procedure that included no interview of the prisoner, no hearing, and no notification to the prisoner of a rejected complaint, from which he might file an appeal.

While prisoners at South Bay frequently used the official prisoner grievance process — 1,043 times in 2001, for instance — they almost never did so for serious allegations like use of force, leading the commission to speculate that there "could be reluctance or fear about filing grievances on certain topics."

"Complaining against the treatment of a particular guard seemed like it carried a certain risk," says Owen Todd, a member of the Stern Commission that produced the report. "The guards in the various

unions had the esprit de corps of one for all and all for one."

A year earlier, an audit by the American Correctional Association (ACA) — often accused of going easy on prison administrators — similarly blasted the grievance-investigation unit at the Nashua Street Jail. The ACA found no procedure to track complaints, poorly trained investigators, and other systemic problems — as well as a widespread belief among supervisors that administrators would reverse any discipline they handed out to guards.

Guards themselves kept their knowledge of abusive coworkers to themselves, locked behind a code of silence and threats of retaliation. "There's no question that that atmosphere existed at that time," says Francis DiMento Jr., an attorney who helped former South Bay guard Bruce Baron win his lawsuit against the county. Baron reported a supervisor for the infraction of playing cards with a prisoner; he then endured a year and a half of harassment from guards for being a rat.

Since quitting the department, Baron has also talked publicly about witnessing guards beating prisoners. One of the guards was nicknamed "Corporal Punish-

ment," DiMento says. "There are some sadistic guys in there."

The Most Egregious

It's tempting to be dismissive of these sorts of lawsuits — prisoners do, indeed, file many frivolous and baseless suits. But, as Leslie Walker, executive director of Massachusetts Correctional Legal Services (MCLS), points out, that is far more common at state facilities, where prisoners serve lengthy sentences and have little else to do. South Bay prisoners are serving, at most, two and a half years, and often much less. They will be long gone by the time any lawsuit reaches trial; they almost always prefer to just stick it out for the months until their release.

And these cases weren't even initiated by the prisoners. It all started in September, 1999, when prisoner Anthony Bova appeared for a scheduled court appearance covered with terrible bruises. The judge refused to send Bova back to South Bay. He ordered photographs taken of the injuries, and assigned attorney Theodore Goguen to represent Bova. "His face was mashed up, his chest was slashed," Goguen says of Bova. "I guess when the guards beat him up they forgot he had a court date."

According to Bova, guards had placed him on his knees, hands cuffed behind his back, and beaten him. Goguen asked Bova whether this was an isolated incident; Bova named three other prisoners he knew had been beaten. Goguen and his partner interviewed them, and that led to more, and more, and more.

They accepted only the most egregious cases, and those with supporting witnesses or documentation, Goguen says. "If it was just a few cuts on the face, we said no," Goguen says. The attorneys also rejected incidents that were arguably legitimate uses of force to restrain a prisoner.

Two months after meeting Bova, Goguen filed a suit with 28 plaintiffs. Three months later, he added 27 more names.

Most of the guards are named in just one or two incidents, but some names pop up over and over again.

Certain types of abuse also recur. Most striking are the "elevator rides," in which guards, often in groups, allegedly dragged prisoners into an elevator, where no surveillance cameras were installed at the time, to administer beatings. Another repeating theme: withholding a prisoner's medication until he acted out, and using that as provocation to assault him.



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Cell-Block Beatdown (cont.)

Several of the alleged incidents came in direct response to prisoners' attempts to complain about guards' misbehavior — the kind of retaliation that ensured that few prisoners would file grievances. One prisoner claims he was beaten in his cell after showing other prisoners how to properly fill out grievance forms.

A Bad Omen

Goguen finally got the first of the 55 cases to court several months ago, but was unable to convince a jury to find guard William Curtis guilty of violating prisoner William Fryar's civil rights.

On July 14, 1998, Curtis called an emergency-response team to Fryar's cell. Fryar's face was a bloody and bruised mess; one tooth was dislodged, another tooth was broken apart, and his lip was split. According to Fryar — who has muscular dystrophy and walks with a cane — Curtis had grabbed him by the hair and pounded his face into a wall several times.

According to Curtis, Fryar hurt himself falling.

These suits pose tremendous hurdles. The "code of silence" among jail guards has kept guards from talking about what they have witnessed. The witnesses, then, are the convicted criminals themselves. Not only are they inherently untrustworthy, but they are often poor speakers, due to lack of education, mental illness, or learning disability. "Winning these cases is an almost insurmountable task," says Walker of MCLS, which is not involved in these cases but often represents prisoners in similar suits. "The legal deck is stacked."

Fryar had another obstacle: he was not allowed to present the surrounding scandal of the sheriff's department under Sheriff Richard Rouse in the late 1990s. The remaining trials will bring in the broader context of the department, Goguen says.

There is plenty to use. Rouse, previously a state representative and county clerk, was appointed by William Weld to replace Robert Rufo as Suffolk County sheriff in 1996. He hired old friends with little or no law-enforcement experience for top posts, including John Haack as superintendent of South Bay. Rouse also hired his boyhood buddy Brian Byrnes as his second-in-command, despite his total lack of relevant experience. Byrnes staunchly resisted calls to upgrade South Bay's hor-

ribly inadequate video monitoring systems — which did not actually record, and which included no cameras in the elevators.

Rouse moved his own office out of South Bay and into the county courthouse downtown, and was seldom seen at the prisoner facilities. Under the lax oversight of Rouse and his top staff, "conditions were ripe for officers so inclined to abuse their authority," the 2002 Stern Commission report concluded.

And they did, as evidenced by the revelations of coerced sex, illegal strip-searches, prisoner abuse at the Nashua Street Jail, and harassment of Bruce Baron.

In most of those cases, the public learned the truth — and the victims received some compensation — only because of civil suits, like the ones being brought by the South Bay prisoners.

Sheriff Cabral's office has acknowledged, in general terms, problems of the past, and has done much to change its policies and procedures. But Cabral is doing everything she can to stand in the way of the civil suits. (Cabral would not speak to the *Phoenix* for this story.) Department attorneys have filed motions to get the suits dismissed, claiming that the prisoners can't sue until they exhaust the department's own grievance process. Goguen counters that those who tried to use that process were punished, and that the grievance process was so poorly managed that it was, effectively, no process at all.

Indeed, this very Catch-22 was noted by the Stern Commission. "The prisoner never formally exhausts administrative procedures," its report said, adding that this could, through no fault of the prisoner's, preclude the possibility of a civil lawsuit.

And if juries do start awarding cash settlements in those trials, the Commonwealth will most likely step in and settle the remaining cases. Those involved in the litigation believe that the state is using the first handful of trials to test the mood of the juries. If the juries side with the prisoners, expect the state to negotiate a group payment — without acknowledging any wrongdoing, or allowing the public to find out what really happened.

Have Things Changed?

Former prisoners tell a story, supposedly witnessed by a prisoner on kitchen duty, of Andrea Cabral's first day on the job, after Governor Paul Celluci picked her to clean up the department. At the start of each eight-hour shift that day, they

say, Cabral addressed all of the guards starting work. She told them that from now on, she wanted everything reported — no covering for other guards, no lies, no looking the other way.

True or apocryphal, the story spread quickly throughout the South Bay prisoner population. The department also rewrote its use-of-force policies and improved the grievance process. According to prisoners and other observers, the most blatant abuses have stopped.

But if there is no punishment for the misdeeds, what's to stop them from happening again? The Suffolk DA's office has had no interest in prosecuting guards, although in many cases they were simply unable — no state law forbade jail guards from having sex with prisoners, for instance.

After the scandals hit the press, the sheriff's department started handing down punishments, but has had trouble making them stick against union opposition. Cabral was quoted in 2003 complaining that, "You fire them, they sue you, and they say, 'You didn't tell me I couldn't trade peroxide for sex.'"

Of 23 guards fired or disciplined for serious misconduct between 1999 and 2002, seven had their punishments reversed in arbitration — reversed by the state's union-stacked Civil Service Commission. In fact, one of the four commissioners is Daniel J. O'Neil, former president of the statewide prison guard union.

And Cabral has sent mixed signals in her actions regarding Sheila Porter, the former South Bay nurse now suing the department. Porter claims that Cabral had her fired for cooperating with the FBI in its investigation of alleged prisoner abuse in 2003. Cabral denies the claim, but has hardly sounded like she welcomed the FBI inquiry.

She has also hardly acted like someone eager for the truth to come out in the 55 cases of alleged prisoner abuse. Certainly she wouldn't be thrilled at facing another multimillion-dollar settlement, for actions that preceded her. But if she's serious about ending the abuses, the truth has to come first. ■

David S. Bernstein can be reached at dbernstein@phx.com.

[This article originally appeared in the Boston Phoenix. Reprinted in PLN with permission. PLN has reported extensively on corruption and abuse in the Boston jail system and Massachusetts Department of Corrections.]

Continued Reliance on Commitment Offense to Deny California Lifer's Parole Denies Federal Due Process

by Marvin Mentor

The U.S.D.C. (E.D. Cal.) granted habeas relief to a California lifer whose parole had been repeatedly denied based upon the commitment offense, and ordered the California Board of Parole Hearings (BPH) to release him to parole. But because the decision issued five days before a contrary, controlling state-court interpretive decision on California's lifer parole statutes issued, the decision is subject to serious appellate challenges.

Carl Irons was convicted of second degree murder when he became angered at a roommate, shot him twelve times with a rifle, then stabbed him twice with a buck knife and kept the body in the apartment for ten days. Thereafter, he wrapped the body in a blanket, covered it with chicken wire, tied weights to it and drove it to the ocean where he threw it in the water.

Irons was denied parole at his fifth BPH hearing in 2001 principally because of the gravity of the offense. The Marin County Superior Court denied his habeas petition, finding that there was "some evidence" in the record to support the Board's conclusion. Higher state courts agreed without further reasoned opinions.

The U.S.D.C. found that reliance upon the unchanging factor of Irons' commitment offense, however, violated due process of law, relying on dicta in *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003). The court further relied upon *Biggs* to determine that California's parole statute (Penal Code § 3041) vested a liberty interest in parole. The BPH has appealed on numerous grounds.

First, the intervening California State Supreme Court interpretation of PC 3041 (*In re Dannenberg*, 34 Cal.4th 1061 (2005)); held that the Board's wide discretion permits it to continue to deny parole based upon the commitment offense alone, so long as it "barely exceeded the minimum elements of the offense." The BPH has argued that *Dannenberg* is now binding on the federal courts as a state court interpretation of state law.

Meanwhile, another federal district court has held that the real effect of *Dannenberg* was to reverse the California Supreme Court's prior ruling in *In re Rosenkrantz*, 29 Cal.4th 616 (2001) which

had held that lifers have a state-law-created liberty interest in parole. (See: *Sass v. Board of Prison Terms*, 376 F.Supp.2d 975 (U.S.D.C., E.D. Cal. 2005; 9th Cir. Case No. 0516455 (pending)).) But the *Sass* decision is being appealed because it chose to give deference to *Dannenberg* as being controlling rather than *Biggs*, a prior Ninth Circuit holding that there was a liberty interest in California's lifer parole statute.

The Ninth Circuit's interest was piqued by the *Irons* appeal on yet another point. The court asked the parties to brief on whether the Anti-Terrorist and Effective Death Penalty Act (AEDPA) unconstitutionally violates United States Constitution Article III federal court powers by limiting the reach of habeas corpus. Briefs are submitted. See: *Irons v. Carey*, 408 F.3d 1165 (9th Cir. 2005). *PLN* will report the decision when it is issued.

In the meanwhile, the Ninth Circuit granted en banc review of *Buckley v. Terhune*, 397 F.3d. 1154 (9th Cir. 2005), a California lifer case involving the "value" (if any) to a plea bargain to take a "lesser" life sentence rather than going to trial, as to its eventual impact on the granting of parole. Since the *Buckley* en banc case postdates *Dannenberg*, *Irons*, and *Sass*, it will likely resolve the tension among them. If the Ninth Circuit finds that the AEDPA is unconstitutional, the U.S. Supreme Court will probably grant certiorari.

Dannenberg, meanwhile, is pursuing federal remedies following his ruling in *Dannenberg* (which became final October 3, 2005 when the U.S. Supreme Court denied certiorari; *Dannenberg v. Brown*, No. 04-10299). Adding to the mix is that on September 16, 2005, the BPH found *Dannenberg* suitable and granted parole.

He would have been released in February 2006 but Governor Schwarzenegger overruled the BPH's decision. (Cal. Penal Code § 3041.2.) See: *Irons v. Warden*, 358 F.Supp.2d 936 (E.D. Cal. 2005). ■

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PHS Pays \$350,000 to Settle Claim for Over-Medication Death of Florida Jail Prisoner

Prison Health Services (PHS) has, once again, entered into a pretrial settlement to pay the family of a prisoner who died from the negligent care provided by PHS at Florida's Leon County Detention Center (LCOC).

The parents of a Ruth Hubbs brought this action in Leon County Circuit Court, but the action was removed to federal court by defendants PHS and Leon County's Sheriff. The suit, alleging Eighth Amendment and state law claims, was based upon the poor care provided to Hubbs while she was housed at LCDC from 2002-2003.

Hubbs had no history of mental health problems prior to her incarceration, but began experiencing depression in the fall of 2002, which was about six months after her arrest. She was prescribed Prozac, which prevented her from sleeping. A PHS psychiatrist prescribed Hubbs 150 mg daily of Doxepin on February 9, 2003. A month later, per dosage was upped to 250 mg. daily, along with Lithium and Depakone.

"Doxepin is one of the older types of anti-depression medication that is noted for a higher risk of overdosing. It is also one of the less expensive depression medications and it was the policy of Prison Health Services to rarely use newer, safer, but more expensive depression medications," charges that complaint. By the end of April 2003, Hubbs was taking the Doxepin, a diuretic, a bi-polar medication, and an anti-psychotic medication.

By early May 2003, Hubbs started objecting to taking the medication. Her attorney, a social worker, and guards made repeated complaints that Hubbs appeared to be over-medicated. PHS employees ignored those complaints. Her attorney, being concerned Hubbs was coming to court "stoned," sent a counselor from the Addiction Recovery Center, who found Hubbs unable to respond. The Counselor was told Hubbs was heavily medicated "to keep her quiet."

Hubbs showed all the classic signs of Doxepin overdose: agitation, loss of physical coordination, stupor, confusion, hallucinations, and incoherence. Hubbs was so heavily medicated guards sent her to the infirmary because she could not be housed with other prisoners. The infirmary sent her back to her cell. Even-

tually she was moved to confinement where she received little or no attention or treatment.

Hubbs was found a lying on the floor of her cell on May 15, 2003. She was unable to rise, to eat, or to speak in coherent sentences. Guards appealed to infirmary staff to help lift her from the floor to a bed.

PHS' doctor, William Pirmus, ordered staff to leave her there. Later that afternoon, a nurse found Hubbs sitting in

the middle of the floor with her pants off, confused, and non-communicative. The next morning, Hubbs was found dead. The medical examiner found Hubbs death was caused by Doxepin intoxication.

The case was settled for \$350,000 on August 29, 2005. Hubbs' parents were represented by Tallahassee lawyers Steven P. Glazer and James V. Cook. See: *Travison v. Prison Health Services*, USDC, ND FL, Case No: 4:04-CV-00409-RH-WCS. ■

Petty Stone Cold Kickbacks KO Government Employees Nationwide

by Mark Wilson

Stone Cold Chemicals, (SCC), sells cleaning products to government agencies, and it is really cleaning up.

Company founder Thomas Stone admits to training his sales force to offer "premiums" (i.e., bribes and kickbacks) to government purchasing agents to induce them to buy SCC products at grossly inflated prices of up to twelve times their actual value. SCC then recorded the corrupt public workers and each premium paid on a "catch report"; and catch them it did when SCC officials agreed to testify against the public officials who refused to plead guilty to criminal wrongdoing.

SCC induced 21 year Maryland Department of Corrections employee Vivian Odom into making approximately \$6,000 in purchases, including drain opener at \$26 a bottle and de-icer at \$20.97 per can. Odom also ordered paper towels called Wipeouts at \$477 plus shipping while a Wipeouts company official "was prepared to testify that sells the towels for one-ninth that price." SCC officials acknowledge routinely doubling "the cost of shipping and using the money to fund the Company's health and dental plan."

"Invoices show multiple purchases of the same product at about the same time." Between June 20 and 30, 2003, SCC billed the state for four shipments of Skidew Mildew Stain Remover at \$2,636.

"Odom bypassed 'preferred vendors' of similar products who have a contract to provide the items at lower prices without

free charges." She also broke up "orders that would have totaled more than \$1,000 into two lots to avoid a requirement for competitive bidding."

In return, SCC sent three Bass Pro-Shop rod and reel sets worth about \$100 total, fishing knives, a fishing toolkit, a scale, and other equipment, to Odom's residence. She also received a gift certificate from Victoria's Secret, Outback Steakhouse, and Toys R Us.

"It's sad to think that 20-and 25-year career people would succumb to such a petty bribe solicitation," said Maryland Attorney General J. Joseph Curran, Jr., whose office prosecuted Odom. The bribe's Odom accepted amounted to just a few hundred dollars worth of goods, according to Curran, but they cost her dearly. She lost her \$41,641 per year job of 21 years and was sentenced to two years in prison, with all but 30 days suspended, two years of probation and a \$500 fine.

SCC's activities have also snared Maryland Highway Administration employees, Georgia State and local government employees, Oregon Department of Transportation employees, a former Baker County, Oregon corrections deputy and Pennsylvania government employees. Meanwhile SCC officials have pled guilty to criminal charges in Florida, Georgia and other states, resulting in prison terms and probation. ■

Sources: *The Baltimore Sun*; *The Oregonian*

Georgia Legislature Awards Wrongly Convicted Man \$1 Million

In its 2005 session, the Georgia Legislature awarded Clarence Harrison \$1 million for “loss of liberty, personal injury, lost wages, injury to reputation, emotional distress, and other damages as a result of his nearly 18 years of incarceration and expenses and trying to prove his innocence.”

Harrison was convicted on June 26, 1987, and sentenced to life in prison for rape and 20 years each for kidnapping and robbery to run consecutive to the life sentence. His conviction stemmed from the October 25, 1986, attack of a woman walking to a bus stop in Decatur, Georgia. The woman was grabbed from behind, struck on the head, and dragged to an unknown location where she was sexually assaulted. She was dragged to two other unknown locations, again sexually assaulted, and her wristwatch was stolen.

After his November 5, 1986, arrest, Harrison maintained his innocence. At trial, the victim identified Harrison from a photograph lineup and a witness who lived in the neighborhood where the attack occurred identified Harrison, as a man who had come to her door on the evening of the attack and circumstances suggested to her he was the assailant.

In September 1998, Harrison sought DNA testing. The laboratory conducting the analysis was unable to produce results due to previous testing of the evidence. Despite being told all evidence in his case had been destroyed, Harrison continued to try

to prove his innocence. In 2004, testing that was not available in 1998 concluded with 100 percent certainty that Harrison DNA did not match the DNA from the victims of rape kit. Based on this new evidence, the charges were dropped on August 31, 2004.

During his imprisonment, Harrison was divorced by his wife and virtually prevented from seeing his two children throughout his incarceration; he missed the birth of his first grandchild; his mother and one sister died; he suffered from medical conditions

including a worsened back problem that causes him now to have to walk with a cane, migraine headaches for three years for which he received no treatment, and due to a delayed diagnosis of kidney cancer, he had to have a kidney removed.

The General Assembly of Georgia ordered the Department of Corrections to pay (from funds appropriated to it,) \$1 million to Harrison as a fitting and proper compensation for his loss. See: Georgia General Assembly House Resolution 108. ■

Minnesota County Settles Suit over Untreated Appendicitis for \$225,000

On August 25, 2005, the U.S. District Court for the District of Minnesota approved a \$225,000 settlement to a Minnesota prisoner whose appendicitis went untreated at the Douglas County Jail.

Jeremiah Bratsch, 21, suffered stabbing pains in his lower right abdomen for four days while at the jail in July 2003. When he was finally sent to a local hospital, surgeons there were forced to remove 18 inches of intestine.

In his lawsuit, filed in May 2004, Bratsch sought \$200,000 to \$300,000 in damages. A trial date had been set for August 22, 2005, but the county's insurer, Minnesota Counties Insurance Trust, thought it safer to settle.

Bratsch had been imprisoned at the jail for violating a bail condition relating to his arrest for allegedly stealing guns from a shed. He served his time on the burglary charge and was released in mid-June 2005.

Frederick Goetz, Bratsch's Minneapolis attorney with the law firm Goetz & Eckland, said the settlement shows that “people in jail are completely helpless when it comes to medical care. . .when people are helpless like that, you have to meet the minimum standards.” See: *Bratsch v. Norman*, USDC D MN, Case No. 04-2772 DSD/SRN. ■

Additional Sources: *Star Tribune*, *Echo Press*

Dismissal of Medical and Retaliation Claims Reversed

by Bob Williams

The United States Court of Appeals for the Fourth Circuit, in an unpublished opinion, has reversed a lower court's dismissal of deliberate indifference claims in a prisoner's denial of medical treatment for hepatitis C plus pancreatic and gout disorders. The Court further reversed the dismissal of a retaliation claim for contacting a fellow prisoner's mother.

Michael Moore, a North Carolina state prisoner, filed a 42 U.S.C. § 1983 complaint alleging deliberate indifference in his medical care for a host of problems including hepatitis C, a pancreatic condition, gout in his hand, and others. Moore also claimed he was retaliated against for contacting the mother of another prisoner who was severely beaten by guards. Moore's complaint also included claims

of cruel and unusual punishment in conditions of confinement and lack of due process in classification.

The United States District Court for the Eastern District of North Carolina dismissed the complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2).

On appeal, the Fourth Circuit, accepting Moore's allegations as true and drawing all reasonable factual inferences in his favor, reviewed his complaint de novo. Finding Moore alleged medical harm sufficient to establish deliberate indifference to his serious medical needs under *Estelle v. Gamble*, 97 S.Ct. 285 (1976), the Court reversed only the dismissal of Moore's hepatitis C, pancreatic and gout claims. The Court found the rest were meritless.

Although the Court did not state specifically how Moore was exercising constitutionally protected conduct or how he was retaliated against, the Court held his complaint sufficiently stated a claim for retaliatory action taken by guards with regard to the protected conduct.

Affirming the dismissal of the condition of confinement claims, the Court found Moore failed to establish a serious deprivation to a basic human need and guard's deliberate indifference to that need. Moreover, Moore failed to demonstrate a serious physical or emotional injury resulting from the conditions. The dismissal of Moore's due process in classification claim was also affirmed. See: *Moore v. Bennette*, 97 Fed. Appx. 405(4th Cir. 2004). ■

State Auditor Blasts Colorado DOC's Private Prison Oversight Failures

by Matthew T. Clarke

In June 2005, the Colorado State Auditor released its April 2005 report of the performance audit of private prisons contracted by the Colorado Department of Corrections. The report strongly criticized the private prisons' performance and the lack of oversight by the DOC's monitors.

The DOC uses six private prisons. Three medium-security private prisons in Colorado are operated by Corrections Corporation of America (CCA) as is one maximum-security prison in Tallahatchie County, Mississippi. The CCA prisons all house male prisoners. One medium-security private prison for female prisoners, in Brush, Colorado, is owned and operated by Tennessee-based GRW Corporation. It was the site of recent sexual assault and drug scandals that caused Hawaii and Wyoming to withdraw their prisoners from the facility. One of the CCA prisons, Crowley County Correctional Facility (CCCF), recently experienced a riot that the DOC blamed on the lack of experience and poor training of CCA guards. [*PLN*, Jan. 2005, pp. 26, 31]. The auditors found the lowest staffing ratio at CCCF. The monitors failed to conduct a security or emergency activation audit at CCCF prior to the riot.

The method by which the private prisons are contracted is odd. The DOC contracts with the county government where the prison is located. The county government keeps a cut of the contract and passes the rest on to the private prison company. Prisoners from other states are also incarcerated in the private prisons.

Around 2,800 of Colorado's 18,000 state prisoners were in private prisons in fiscal year 2004. This cost the taxpayers of Colorado \$53 million in private prison contracts and another \$1.1 million to pay for the 15-member private prison monitoring board whose duties include oversight of the contract compliance of the private prisons. However, the taxpayers didn't get a good value for their money when it came to the monitoring board. The report painted a picture of too few employees for the load and heavily criticized the fact that only 10 of the 15 allocated employee slots were actually being used for private prison oversight.

The report was critical of many aspects of private prison operations: (1)

none of the five Colorado private prisons had medical clinics licensed by the state Department of Public Health and Environment as required by state law; (2) prisoners with serious mental illness were not being timely seen by mental health staff; (3) staffing levels were too low, often only 80% of typical DOC staffing levels; (4) the private prisons were not following the DOC menu plan and often substituting less nutritious food for food required by the plan; (5) the private prisons often failed to deduct and transmit restitution and child support payments from prisoners' accounts; and (6) the private prisons often fail to deduct the three days of earned time a month from sex offenders who refuse to participate in, or are terminated from, treatment programs required by law, resulting in the unlawful early release of some sex offenders.

The medical and mental health failings were especially worrying. The State Auditor identified nine deaths of prisoners in private prisons that should have been, but were not, reported to the Colorado Department of Health. They concluded that seven of the deaths were from natural causes, but two may have been caused by medical personnel at the unlicensed clinic at the Bent County Correctional Facility changing prisoners' medication without ever having seen the prisoners. This enraged Sen. Deanna Hanna, D-Lakewood.

"Obviously, they have been having a free-for-all in practicing medicine the way they want to for a long time," Hanna said. "We are paying a lot of money to these private prisons for health care, and we need to get a better product than we are getting."

In 2004, CCA settled a suit brought by the mother of Jeffery Buller, 26, who died shortly after his release from Kit Carson Correctional Facility in 2001. Buller had an inherited disease that caused his breathing passages to swell. CCA had refused to spend \$35 for medication Buller needed during his final ten days of incarceration, switching him to another medication instead. Evidently, CCA learned nothing from Buller's death.

There were also criticisms of the DOC's handling of its part in the operation of private prisons: (1) there was no process to identify out-of-state prisoners in private prisons whose classification

was higher than medium security (under Colorado state law, such prisoners may not be incarcerated in private prisons); (2) some Colorado prisoners classified higher than medium security were incarcerated in Colorado private prisons in violation of state law; (3) about 100 high-security Colorado prisoners were incarcerated in a private prison outside of Colorado, possibly in violation of the intent of state law; (4) the DOC did not properly oversee staffing levels in the private prisons; (5) the DOC and private prisons did not adequately screen potential private prison employees for criminal backgrounds resulting in the hiring of employees with criminal backgrounds and unscreened employees; (6) the DOC did not screen visitors to private prisons for criminal backgrounds as frequently as they did visitors to state prisons; (7) the DOC's audit process was ineffective in finding and documenting noncompliance in private prisons; (8) the DOC was using four employees appropriated to the private prison Monitoring Unit for other tasks and left the position of head of the monitoring unit open for three years so that only four of the fifteen allocated employees are actually visiting the private prisons; (9) the DOC failed to take any enforcement action on documented instances of contract noncompliance by private prisons; (10) the DOC failed to use a competitive bidding process to award the private prison contracts; (11) the DOC had not discovered many of these inadequacies using its own monitoring and auditing procedures.

The overall picture that emerged is one of overworked private prison monitoring Unit staff with far too many duties to perform for the staffing level. Even if the full fifteen full-time equivalent positions were available, the work load would be onerous. The monitoring unit is responsible not only for monitoring contract compliance, but for classifying out-of-state prisoners incarcerated in Colorado private prisons and performing background checks on visitors to private prisons. Monitors are supposed to spend twenty hours a week on site in the Colorado private prisons. They are also supposed to audit security and monitor emergency activation drills. With six prisons to monitor, one of which is out-of-state, the task is impossibly large for ten people to do. It is little wonder that the monitors fell far short of their targets

in monitoring the prisons. State auditors discovered reports by the monitors that were obvious redated copies of previous reports. Often the monitors' reports were so vaguely worded as to be useless. The DOC admitted that it does not even review the monitors' reports, so it was unaware of the problem.

The DOC's response was positive. It accepted all of the recommendations and said it was taking steps to correct the problems discovered by the auditors.

"It's clear that the for-profit prison industry has no desire to follow their contracts, and it is costing taxpayers money every day," declared Rep. Liane "Buffy" McFadyen, D-Pueblo West. That said, Colorado is poised to award thousands of new prison beds to the private prison industry.

Questions have also been raised about the political contributions by CCA and whether it influenced the lax oversight of private prisons. CCA and its executives gave a minimum of \$43,000 to Colorado state political parties and candidates for the legislature and governor's office. Recipients of CCA's largess include Governor Bill Owens, former Senate Minority Leader and current Interim State Treasur-

er Mark Hillman; two former presidents of the Senate, two legislative budget committee members and the Speaker pro tem of the House. Owens was the largest beneficiary in Colorado.

"They give large contributions both to win contracts in the state, and, one would also presume, to have as much free reign as possible," said Pete Maysmith of Colorado Common Cause, a campaign-finance limits advocacy group. Therefore, Maysmith sees a direct link between campaign donations and lax oversight. "Let's not pretend otherwise," said Maysmith.

Whether there is a link or not, it should be clear from all of the misfortunes of CCA and its charges that private prisons are a bad idea and a poor investment of public funds. But this bad idea seems to be gathering steam as Colorado prepares to house up to 3,000 more prisoners in private prisons rather than enact sentencing reform. ■

Sources: Report of the State Auditor-Private Prisons/Department of Corrections-Performance Audit April 2005, *Rocky Mountain News*, *Pueblo Chieftain*, *Denver Post*, *Casper Star-Tribune*.



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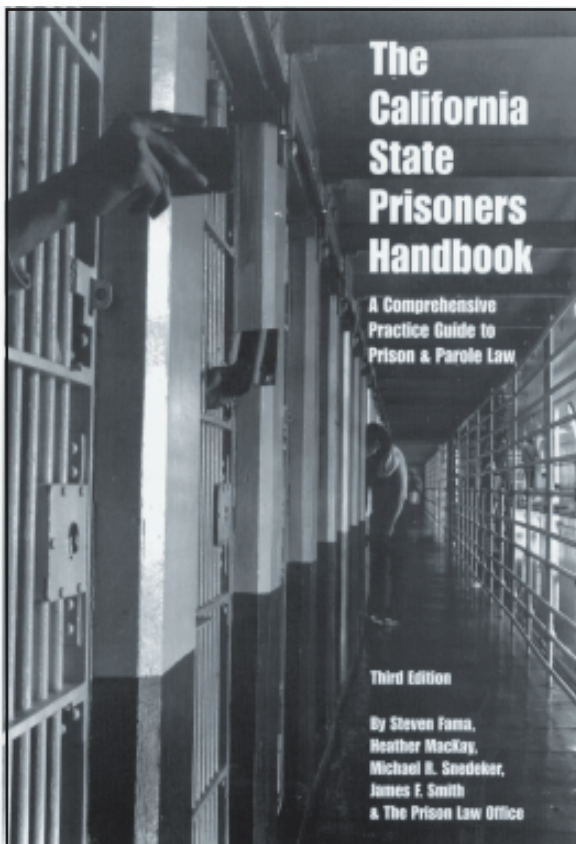
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California DOC Settles Racially Determinative Housing Suit

by John E. Dannenberg

Upon remand from the U.S. Supreme Court (*Johnson v. California*, 125 S.Ct. 1141 (2005)), the California Department of Corrections and Rehabilitation (CDCR) entered into a settlement agreement with plaintiff prisoner Garrison Johnson wherein CDCR agreed to end using race as the sole determinative criterion in double-celling newly arrived prisoners.

Johnson had sued CDCR for injunctive relief prohibiting automatic double-celling based upon race for prisoners newly received at a prison. Johnson, who is Black, was frequently transferred among California's 34 prisons, and objected to always being initially double-celled with only another Black upon his arrival. Although the Ninth Circuit had sided with CDCR's legitimate penological interest argument alleging safety concerns (*Johnson v. California*, 321 F.3d 791 (9th Cir. 2003); *PLN*, Apr. 2004, p.40), the U.S. Supreme Court reversed, holding that it is unconstitutional to use race as the determinative predicate for deciding whom to put in double cells. The high court remanded the case to the Ninth Circuit to determine what combination of selection factors might remedy the constitutional violation. Under the Ninth Circuit's tutelage, the parties settled in November 2005.

The agreement declares CDCR's goal to treat all prisoners without subjection to any form of racial segregation. To this end, CDCR will create a housing protocol for assigning cellmates in reception centers using multiple criteria. Any decision shall be based on prior data bases, including the court abstract of judgment, probation or pre-sentencing report, prior incarceration records or any other documents. CDCR will develop a violence tracking system within reception centers with a special eye for violence that is racially motivated, as part its Confidential Draft Organizational Plan.

CDCR further agreed to endeavor to eventually assign cells in general population housing, using a protocol that minimizes the impact on prisoner and staff safety, modeled on the lessons learned in the reception center precedent.

Further details are found in CDCR's October 25, 2005 draft "In-Cell Racial Integration Plan" (ICRIP). CDCR will update its data base system (DDPS) to record housing eligibility/restrictions

coded as follows: RR (racially restricted to own race); RE (racially eligible to live with any race); RW (restricted white); RB (restricted Black); RH (restricted Hispanic); RO (restricted Other) -- all of the last four only for "rational and objective reasons." Determination of these needs will be done in a visually and aurally confidential interview area.

The ICRIP contemplates three phases. Phase I (March 2006) projects completion of the DDPS modifications, Reception Center incoming offender coding, and pilot Behavioral Management Units (BMU) (for individuals failing integration). Phase I will begin at Deuel Vocational Institution (DVI), with all reception centers expected to be in compliance by March 2007.

Importantly, Phase I only involves coding; housing protocols will remain unchanged. Phase II, which begins tentatively in March 2007, projects imple-

mentation of the program in protective custody and minimum security facilities. Phase III anticipates integrated housing in all facilities through attrition and new arrivals. It is anticipated to begin in March 2008.

The ICRIP also goes into definitions of "racial motivation" as applied to disputes in housing. When discipline is required, Form 115 Rules Violation Reports will be issued, and offenders may be relegated to a BMU for an as yet unspecified program.

Additionally, the agreement provides a payment of \$12,000 to Johnson, in exchange for a dismissal of this action with prejudice. Attorney fees were remanded to the U.S. District Court (C.D. Cal.) for determination. See: *Johnson v. California*, No. 01-56436 (9th Cir. 2005), Settlement And Release Agreement. The settlement is available on *PLN's* website. ■

Phoenix, Arizona, Settles Krone Wrongful Imprisonment Suit for \$3 Million

The city of Phoenix, Arizona, will pay \$3 million to settle a lawsuit brought by a man who spent more than a decade in prison for a murder he did not commit. The settlement, approved by the city council in September 2005, is the second Ray Krone has received. In April 2005, Maricopa County agreed to pay Krone \$1.4 million [see *PLN*, July 2005].

"I'm just glad for it to be over," said Krone, who contracted hepatitis C, had his arm broken and was stabbed while in Arizona prisons.

Krone, now 48, was arrested in 1991 and charged with killing a bartender who worked at a Phoenix lounge where he played darts. In 1992 Krone was convicted and sentenced to death; his conviction was based largely on expert testimony that purportedly matched his teeth with bite marks found on the victim.

In 1994 Krone's conviction was overturned on procedural grounds and a new trial was ordered. He was convicted a second time in 1996. During the second sentencing the judge commented that he wasn't convinced Krone was the killer and sentenced him to life in prison rather than death.

Krone was freed in 2002 after new DNA testing exonerated him. An FBI

database subsequently linked DNA from the crime scene to a man who was already in prison.

In his lawsuit, Krone alleged the county used "altered and manufactured evidence" and that an expert on bite marks "gave false testimony which he knew to be untrue." Krone also claimed that Phoenix police did a poor job of investigating the murder and failed to look at other suspects.

Krone will not keep all \$3 million from his most recent settlement. His lawyers will receive more than half, with \$773,028.00 going to attorney Alan M. Simpson and \$729,552 to Barham & Ostrow.

Krone currently lives in Dover Township, Pennsylvania, near his family. He serves on the Commission on Safety and Abuse in America's Prisons and has spent the last few years traveling, advocating for DNA testing and speaking out against the death penalty.

In 2005 Krone was featured on ABC's *Extreme Makeover* reality program. Once ridiculed as the "snaggleteeth killer" for his crooked teeth, Krone now sports a winning smile. See: *Krone v. County of Maricopa*, U.S.D.C., District of Arizona, Case No. 03-0734. ■

Sources: *azcentral.com*, *Associated Press*

Michigan Jail's Strip Policy Unconstitutional; Guards and Get Qualified Immunity, County Liable

by David M. Reutter

A Michigan federal district court has held that the practice of removing the clothing of unruly pretrial detainees and keeping them naked in the "hole", violated the Fourth and Fourteenth Amendments, but held the defendants were entitled to qualified or absolute immunity in their individual capacity.

This action was brought by 22 former detainees of the Saginaw County Jail, suing Sheriff Charles Brown, various individual guards, and Saginaw County. The suit challenged the Jail's "practice of holding uncooperative and disruptive detainees in administrative segregation cells; and jail personnel would take all of the clothing from such detainees so that they were naked for the time they spent in administrative segregation."

The policy of removing clothes was applied without regard to the nature of the offense for which the detainees were held and in the absence of any individualized suspicion of drugs, weapons, contraband, or threat of suicide. Here, each of the plaintiffs were held on misdemeanor charges.

If a detainee failed to comply with orders to remove his or her clothing prior to placement in the administrative segregation cell, force was administered to remove the clothes. The force often included a physical blow to the body, the use of a chemical spray, and even removing the clothing with scissors. Additionally, cross-gender personnel also took part in the disrobing, at times violently, and the subsequent video monitoring and live cell checks.

The County implemented the policy in reaction to the suicide death of a detainee in 1996, who hanged himself with his jail issue jumpsuit in an administrative segregation cell. The Court held that if the policy is unconstitutional, the plaintiffs have established a case of municipal liability. The Court turned to that question.

The Court found there is a rational connection between the interests of jail security and confining unruly prisoners in segregation, but that alone does not justify removing all their clothes. Prisoners, after all, had a liberty and privacy interest in shielding their naked bodies from view by others, especially members of the opposite gender.

The Court found the detainees had no alternative for exercising their right to

privacy once their clothes were removed. That removal exposed them to all who could view them in the segregation cell by video monitoring devices or through the slot in their door. The alternative to naked confinement include allowing detainees to wear underwear, providing paper suicide gowns, and restricting access by jail personnel of the other gender. Moreover, guards also could use the jail's suicide observation cell.

For these reasons, the Court held the County's "policy of taking all the clothing from detainees confined in administrative segregation violates the Fourth and Fourteenth Amendments to the Constitution." The Court found the individual defendants, however, were entitled to immunity.

Sheriff Brown, under Michigan law, was entitled to absolute immunity because he is the highest elected official in local government. Because the Court found the contours of the right to reasonable seizures pertaining to pretrial detainees was not sufficiently clear to impose liability during that time, the individual defendants are entitled to qualified immunity.

Accordingly, summary judgment was granted for the individual defendants, but denied as to Saginaw County, who faces a damages claim. See: *Rose v. Saginaw County*, 353 F.Supp.2d 900 (N.D. Mich. 2005) ■

Additional source: ACLU of Michigan.

Severely Beaten L.A. County Jail Prisoner Wins Only \$5,000

A Los Angeles (L.A.) County, California jail prisoner who was severely beaten by three other prisoners on three occasions sued for deliberate indifference in failing to protect him. On August 3, 2005, after a five day trial and seven hours of deliberations, a federal civil jury found against jail staff but awarded the prisoner only \$5,000.

Guillermo Astudillo, 28, was housed in the Men's Central Jail in L.A., where the guards heard him being beaten, but did not respond. Astudillo sued seven guards and the County under 42 U.S.C. § 1983, demanding \$500,000, claiming the County was negligent in its guard training. But before trial, the court dismissed the County as well as all of the charged deputies who were not present at the time of the beatings.

However, guard Joseph Manfree was present, and failed to perform hourly safety checks to determine if anyone was being assaulted. Because Manfree had not done so, thereby permitting the repeated beatings, he was found guilty of cruel and unusual punishment. Police procedures expert Roger Clark testified that anyone performing this required task would have discovered the beatings earlier. He further testified that Manfree regularly allowed drug use and drinking to go on in the jail, contributing to his deliberate indifference. [The L.A. County Jail's failure to protect its wards due to security lapses,

resulting in five murders and 25 deputies being disciplined, is widely acknowledged. See: *PLN*, Apr. 2005, p.16.]

In argument to the jury, Los Alamitos attorney William C. Saacke asked the jury that if \$12.5 million was awarded for the death of Ron Goldman [O.J. Simpson case victim], what award should be made for someone nearly beaten to death? For his wrist fracture, face and arm lacerations, blunt force trauma to his head and fractured nose and six days in the hospital, the jury thought that only \$5,000 was appropriate, even though they found that Manfree was deliberately indifferent to Astudillo's protection rights. See: *Astudillo v. County of Los Angeles*, U.S.D.C., C.D. Cal., Case No. 2:03-CV-04719. ■

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California's 2005 Prison Suicide Rate Doubles Over 2004

by John E. Dannenberg

By the time 2005 ended, 44 California state prisoners had committed suicide. A significant increase over the 26 suicides that occurred in 2004. The California Department of Corrections and Rehabilitation (CDCR) suicide rate is currently running at 27 deaths per 100,000 prisoners, compared with 14 per 100,000 nationally. The general community suicide rate is 11 per 100,000. CDCR spokesperson Terry Thornton commented that the rate in 2004 was only 16 per 100,000 and that the number of suicides fluctuates widely. But lawyers representing the estimated 26,000 seriously mentally ill California prisoners say that this is a problem that has been building for years.

Aggravating problems they cite include a security classification system that counts mental illness as a security danger, which automatically routes the mentally ill to tougher prisons where they are housed with more violent cellmates and receive reduced privileges and amenities plus lots of lockdown time. Attorney Tom Nolan said, "You're pretty isolated, and for people who are suicidal you want as much human interaction as possible."

Two years ago, CDCR terminated its policy of stationing a guard in front of each suicide-risk cell, in favor of video monitoring. Nolan complained that this lacks the one-on-one interaction that might be suddenly needed to thwart a suicide. The attorneys and court special master asked CDCR to install vent covers on ceiling vents in SHU and administrative segregation cells to prevent prisoners from stringing up cords, after noting that in 2003, nine of CDCR's suicides occurred this way. This is particularly a problem at the mental wards at California Men's Colony state prison and at Atascadero State Hospital. Moreover, U.S. District Judge Lawrence Kariton ordered that prison guards provide the first line of immediate life support action to apparent suicide victims, instead of waiting for medical workers to arrive. Such delays contributed to ten deaths in 2003, according to the court's special master.

Indeed, court monitor Dr. Raymond Patterson, in his April 2005 report, concluded that 74% of the 2003 suicides

were "probably foreseeable or preventable." There are more than 400 suicide attempts in CDCR annually, according to prison officials. Then Corrections Secretary Roderick Hickman was "concerned," adding that California recently hired suicide prevention consultant Thomas White, a formal federal prison official.

But another crosscurrent may be facing CDCR. With cell space at a premium, single cells are reserved for psychiatrically dangerous prisoners and condemned prisoners. Robert Glenn, 33, after serving 2 ½ months of his 22 year voluntary manslaughter sentence at Pleasant Valley State Prison, was upset at the specter of doing the balance of his term in a double cell. Glenn's previous requests to be moved elsewhere had been denied. So,

he took matters into his own hands when on August 5, 2005 he calmly strangled his cellmate with a shoelace so that, upon the resulting murder conviction, he would get the death penalty and gain a "coveted" single cell on San Quentin State Prison's Death Row.

Glenn has been charged with murder, but the prosecutor has not announced if he will seek the optional death penalty. It is entirely possible that Glenn simply represents a novel expression of mental illness in prison, "suicide-by-murder." If he doesn't get the death penalty, maybe at least he will score single-cell status based upon CDCR psychological dangerousness determinants. ■

Sources: *Fresno Bee*, *Associated Press*, *Los Angeles Times*.

Utah Jail Policy Banning Subscriptions to Magazines and Newspapers Enjoined; Fees Awarded

by John E. Dannenberg

On June 2, 2004, the United States District Court (D. Utah) ruled that the Salt Lake County Jail's (SLCJ) policy prohibiting prisoners' receipt of any magazine or newspaper was unconstitutional. Brian Barnard, the persistent attorney, who fought the case for eleven years, was granted \$28,374.89 in fees and costs, although the prisoner-plaintiffs were awarded only nominal damages (\$1).

Former SLCJ prisoners Charles Farnsworth and thirteen others sued Salt Lake County for injunctive relief and damages in 1994, seeking to overturn SLCJ's prohibition on media subscriptions. After eleven years and two judges, the court found in plaintiffs' favor, ordered the ban abated, and awarded substantial fees but only nominal damages.

The court ruled that "nominal damages" meant \$1 total, not \$1/day, because the latter would amount to compensatory rather than symbolic damages. But the court recognized that resolution of the case served "an important public purpose," and held that "significant" fees should be awarded. Accordingly, it granted half of the attorney's request for \$56,750 in fees. *PLN* readers should note

that because both injunctive relief and damages were sought and won, the PLRA fee cap of 150% of the damage award did not restrict total fees. (See, e.g., *Dannenberg v. Valadez*, 338 F.3d 1070 (9th Cir. 2003). See: *Farnsworth v. Kennard*, U.S.D.C. (D. Utah), No. 94 CV 65 (May 2005).

Salt Lake City attorney Brian Barnard is not taking this as the end of the matter. He is appealing the dismissal of other claims. Mr. Barnard also represents Prison Legal News in censorship litigation against the Utah Department of Corrections and jails in Utah. *PLN*, represented by Mr. Barnard, is challenging similar reading matter restrictions at the Cache County Jail, where prisoners are supplied two daily newspapers, but given only four minutes each to read them. Another lawsuit challenges Cache County's policy of limiting which magazines are permitted, on grounds that this violates the free speech and due process rights of both prisoners and publishers. ■

Additional Sources: *Rocky Mountain Verdicts and Settlements*; *Deseret Morning News*.

Alabama Work Release Prisoners Reclassified Following Escapes

In late September 2005, 275 minimum-security Alabama prisoners were moved from work camps to maximum-security prisons pursuant to an order by Governor Bob Riley. The prisoners had done nothing wrong. The move was purely reactionary following the escape of 3 prisoners in 4 months.

The escaped prisoners had all been convicted of murder. Carl Brad Ward was captured on September 29, 2005. As of October 4, 2005, two of the escapees—Herman Adkinson and Frank Buchanan Jr.—were still at large.

Ward's escape drew the most criticism. He had been denied parole in April due to victim protests and wasn't to be reviewed again for 5 years. Prison policy dictates that Ward should have been housed inside the prison fence, but a special approval process allowed him to keep working at a state-owned warehouse outside the Elmore Correctional facility.

Following the public outcry, Riley ordered all prisoners convicted of murder, manslaughter, or criminally negligent homicide back inside the prison fences. Jason Dudley, a 29-year-old prisoner who has spent most of his 10 years in prison at minimum-security work camps, was one of those affected by Riley's decision. A decade earlier Dudley had been drinking and driving recklessly when his friend was killed in a one car accident. He was convicted of manslaughter

and sentenced to 17 years in prison.

After Riley's order Dudley was transferred first to the Bibb Correctional Facility—which houses 1,893 prisoners in space for 900 and then assigned to the Kilby Correctional Facility several days later.

"He's been in these honor camps now for 6, 7 years and they take him out in shackles and chains and take him to the high-security prison," said Dudley's sister, Kim Lake. "He said [Bibb] is terrible. . . . It's a lot of the young gang-type people. Here you are on good behavior, and they're going to put you in there with hard criminals."

Lake's brother had been transferred from the Farquhar Cattle Ranch, where, over the previous year, there were only six cases of prisoner discipline. By contrast, at Bibb there have been 1,143 disciplinary actions and 69 assaults.

Some experts question the wisdom of Riley's order. "Generally what I know about classification is the nature of the offense is not the best way to tell you who's going to be a dangerous inmate or not," said Dr. Rick Kern, director of the Virginia Sentencing Commission. Better indicators are age, gang affiliation, and a history of committing assaults he said.

As Alabama struggles with prison overcrowding and under-funding, this move will only worsen those problems. ■

Source: *The Birmingham News*

NYDOCS Abandons ADA DOJ Exhaustion Defense

Upon the request of prison officials, the Second Circuit Court Of Appeals vacated a district court's dismissal of an action brought by New York prisoners, for failure to exhaust administrative remedies.

Several of New York State Department of Correctional Services (DOCS) prisoners brought suit in federal court, alleging violations of the Americans with Disabilities Act (ADA) and the federal Rehabilitation Act, (RA).

The district court dismissed the action pursuant to 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act for failure to exhaust available administrative remedies. The court reasoned that dismissal was proper because while plaintiffs "exhausted internal prison grievance procedures, they had not lodged

a complaint with the Department of Justice ('DOJ')[,]" as authorized by 42 U.S.C. § 12134(a) and 28 C.F.R. 35.170-178.

In an apparent attempt to avoid a published opinion on the issue, prison officials moved on appeal to vacate the District Courts order "asserting" that they wished to withdraw the DOJ exhaustion defense "in any and all" pending litigation in which liability against DOCS and its agents is asserted under the ADA[.]" DOCS represented that it did "not... intend to assert the defense in any... future litigation." Plaintiffs consented to the motion, agreeing that the district court's dismissal order should be vacated and the Second Circuit found "this disposition appropriate." See: *Rosario v. Goord*, 400 F.3d 108 (2d Cir. 2005). ■

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Exhaustion Not Required in Pennsylvania Parole Denial Challenges

The Third Circuit Court Of Appeals held that “a Pennsylvania state prisoner challenging the denial of parole need not file a petition for a writ of mandamus in order to satisfy the dictates of exhaustion” before seeking federal habeas review.

Pennsylvania prisoner Robert DeFoy was convicted of armed robbery and served 10 years before being released. He was subsequently recommitted on a technical parole violation and served an additional 18 months before being re-paroled.

“While on parole... the second time, DeFoy was arrested for involuntary deviate sexual intercourse, statutory rape and corruption of a minor.” Despite protesting his innocence, he was convicted and sentenced to 78-156 months in prison. The court also “revoked his parole on the armed robbery sentence and ordered him to serve an additional forty months imprisonment for that offense.” The judge then “recommended that DeFoy participate in Pennsylvania’s Sexual Offender Treatment Program.”

“Because DeFoy was unwilling to admit he committed the sex offenses,... he was precluded from participating in a Program. In turn, he was twice denied parole while serving the armed robbery sentence because he had not participated in the Program.”

DeFoy attempted to challenge the parole denials on direct appeal in state court but those actions were denied because “denials of parole are not appealable” on direct appeal, DeFoy then sought federal habeas relief without first filing a writ of mandamus or a writ of habeas corpus in state court.

The district court dismissed DeFoy’s federal habeas petition as unexhausted, concluding that he should have sought mandamus relief in state court before proceeding to federal habeas. DeFoy appealed.

Beginning with the threshold issue of whether DeFoy’s petition was moot because he was “no longer serving his sentence for armed robbery” the Third Circuit relied upon *Garlotte v. Fordice*, 515 U.S. 39 (1995) and *Foster v. Booher*, 296 F.3d 947 (10th Cir. 2002) for its conclusion that the petition was not moot. Additionally, “the doctrine of collateral consequences” is a “narrow exception to the general mootness rule” which would have “rescue[d] DeFoy’s petition from being moot.”

The court explained that the district court’s conclusion that DeFoy failed to exhaust state court remedies was made “in the midst of considerable jurisprudential confusion on the issue[.]” In *Burkett v. Love*, 89 F.3d 135, 142 (3d Cir. 1996), the court “predicted that Pennsylvania courts would permit three methods of attacking the denial of parole in Pennsylvania courts: direct appeal, mandamus, and state habeas corpus.” However, the state court disagreed and “declined to adopt the reasoning in *Burkett* and held [those] suggested remedies to be unavailable.” *Weaver v. Pennsylvania Board of Probation & Parole*, 688 A.2d 766 (Pa. Commw. Ct. 1997). In light of *Weaver* several district courts in the Circuit excused exhaustion of state remedies, finding that no Pennsylvania state court remedies existed. However, the Pennsylvania courts then created a conflict, suggesting that state remedies *may* exist for parole denial challenges. *Myers v. Ridge*, 712 A.2d 791 (Pa. Commw. Ct. 1998) and *Rogers v. Pennsylvania Board of Probation and Parole*, 724 A.2d 319 (Pa. 1999).

“Inasmuch as *Weaver* has never been overruled,” the court concluded, “it is the best indication of how the Pennsylvania

Supreme Court would resolve the issues raised by DeFoy.” Therefore, the court held that “a Pennsylvania state prisoner challenging the denial of parole need not file a petition for a writ of mandamus in order to satisfy the dictates of exhaustion.”

The court did not reach the merits of DeFoy’s claim that the practice of making “parole for any sex offender contingent on participation in the Sexual Offender Treatment Program, and the Program in turn requires that he admit guilt” violated his Fifth Amendment rights. It suggested, however, that “he was presented with an unenviable choice: refuse to admit guilt and be ineligible to participate in the Program, thereby losing eligibility for parole, or admit guilt and incriminate himself providing evidence that would most certainly be used against him in any post-conviction efforts to demonstrate his innocence.” In a concurring opinion, one judge noted the importance of the issues raised by DeFoy and suggested that “[c]onsideration of alternatives to admissions of guilt as a prerequisite to participation in a program or eligibility for parole may be crucial.” See: *DeFoy v. McCullough*, 393 F.3d 439 (3rd Cir. 2005). ■

Eight Circuit Upholds Denial of Compensatory/Punitive Damages; Physical Injury Required in First Amendment Cases

In a 2-1 decision, the Eighth Circuit of Appeals held that the Prison Litigation Reform Act’s (PLRA) emotional injury bar on compensatory damages of 42 USC § 1997e(e) applies to First Amendment cases. The court upheld a lower court’s denial of compensatory and punitive damages, and an award of \$1.50 in attorney’s fees – 150 percent of the \$1.00 nominal damages award – pursuant to the PLRA’s attorney fee limitation of 42 USC § 1997e(d)(2).

“Jeff Royal was convicted of ‘cattle rustling’ and sentenced on August 10, 1998, to a term of five years in the Iowa Department of Corrections...Prior to his conviction, Royal fell through a haymow and suffered a spinal cord injury requiring him to use a wheelchair.”

On September 10, 1998, Royal sued prison officials in federal court, alleging various claims of inadequate medical

care and accommodation of his handicap. Prison officials responded by confiscating his wheelchair in October, 1998.

“Royal complained that the crutches he was expected to use caused him pain and tingling in his hands...between November 1998 and January 1999, Royal submitted seventeen grievances in an attempt to regain his wheelchair.”

“On December 24, 1998, Royal filed a preliminary injunction motion to get his wheelchair back.” He asserted in his supporting affidavit that “without his wheelchair, he had to crawl on the floor” but prison security director Tom Reid “issued a memorandum stating that any inmate seen crawling on the floor would be subject to discipline.”

Prior to the preliminary injunction hearing, Royal was seen by a neurosurgeon who “recommended that Royal’s wheelchair be returned to him. The prison

authorities returned his wheelchair and the...hearing was cancelled.”

On January 28, 1999, Royal was ‘written up’ after a confrontation with a nurse.” Reid had Royal placed in segregation “until March 25, 1999, when he was transferred to another facility.”

Royal then brought suit in federal court “alleging that he was retaliated against for exercising his right to access to the courts when he was placed in segregation for almost two months.” He apparently dismissed his initial medical care suit.

Ultimately, “the district court found Reid had unconstitutionally retaliated against Royal by placing him in segregation because Royal filed numerous grievances.” The court concluded, however, that Royal was ineligible for compensatory damages, pursuant to § 1997e(e) because there was no evidence that he suffered any physical injury because of Reid’s conduct. The court also declined to award punitive damages “finding Reid did not act with evil motive or reckless indifference, but out of frustration and a desire to protect his staff from Royal’s abuse. Because Reid had retired, the district court also found punitive damages would not deter future conduct.” It then awarded nominal damages of \$1.00 and attorney’s fees of \$1.50 pursuant to § 1997e(d)(2).

On appeal, the majority first considered whether the PLRA’s emotional injury bar on compensatory damages applies to First Amendment violations. Observing that “[t]he majority of courts hold section 1997e(e)’s limitation on damages applies to all” prisoner actions, including First Amendment claims, the majority joined those courts, “concluding Congress did not intend section 1997e(e) to limit recovery only to a select group of federal actions brought by prisoners.” Therefore, the majority found that the district court properly declined to award Royal compensatory damages.

The dissent disagreed, explaining that “[a] review of the case law, however, reveals that courts in a majority of the circuits have either affirmatively held that § 1997e(e) does not apply to First Amendment claims, or have declined to apply the physical injury requirement to such claims. The dissent also noted that one of the cases the majority relied upon wasn’t even a First Amendment case, but rather an Eighth Amendment case.

The dissent concluded that Royal’s compensatory damages request is not

barred, “[b]ased on the language of § 1997e(e), the ‘purpose, subject matter and the condition of affairs which led to its enactment,’ and the other significant provisions of the PLRA which serve to put a stop to frivolous prisoner litigation[.]”

The majority also refused to second-guess the lower court’s denial of punitive damages, concluding that “the district court applied the correct legal standard” and “did not abuse its discretion in not awarding punitive damages to Royal.”

Finally, the majority upheld the district court’s award of \$1.50 in attorney’s

fees. In doing so, the court rejected Royal’s challenge to the constitutionality of § 1997e(d)(2), finding that the Circuit previously upheld § 1997e(d)(2) in *Foulk v. Charrier*, 262 F. 3d 687 (8th Cir. 2001) and that *Foulk* was controlling.

The majority acknowledged that “Royal wished to...seek en banc review to overrule *Foulk*. “However, en banc review was subsequently denied in *Royal v. Brandt*, 2004 U.S. App. LEXIS 19304 (8th Cir. Sept. 14, 2004); and *Royal v. Brandt*, 2004 U.S. App. LEXIS 21573 (8th Cir. Oct. 15, 2004). See: *Royal v. Kautzky*, 375 F. 3d 720 (8th Cir. 2004). █

New York Prisoner Awarded \$2,250 For Wrong Medication

On February 22, 2005, a court of claims in Rochester, New York, awarded \$2,250 to a state prisoner who was given the wrong medication for nearly two years while imprisoned at the Collins Correctional Facility.

On October 14, 1999, prisoner Nathan Baxter went to the prison pharmacy to have his medication refilled. Instead of receiving the correct medication to treat his recurrent migraine headaches, however, Baxter was given another prisoner’s medication: Imdur, a drug used to treat hypertension and angina. Baxter’s headaches persisted but he kept taking the medication, which the pharmacy continued to refill. The error was ultimately discovered by his family doctor on June 6, 2001.

Baxter sued the state of New York, pro se, for medical malpractice claiming the medication caused him to experience anxiety, depression, headaches, and high blood pressure. The state admitted he had been given the wrong medication. A prison doctor also testified that Baxter’s migraines were likely exacerbated by the Imdur, which dilates the arteries and can cause headaches.

Yet without expert testimony causally linking Imdur to Baxter’s claims of anxiety, depression, and high blood pressure, the judge held that she could not rule on those claims, nor could she decide to what degree Imdur contributed to his headaches. Despite this, the judge further found that Baxter had erroneously been given Imdur for nearly two years even though the prison’s Health Services Policy Manual required a physician to review prisoners’ angina medication every 90 days.

Based on these findings, the judge concluded the state was negligent in administering Baxter’s medication and that this negligence aggravated his migraines. Accordingly, Baxter was awarded \$2,250 for past pain and suffering. See: *Baxter v. State of New York*, Rochester Court of Claims, Case No. 104638. █

Source: *VerdictSearch New York*

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Repercussions from Georgia Courthouse Escape, Shootings Continue

Inadequate security, which had existed for years at Georgia's Fulton County courthouse, as well as lapses by Sheriff's deputies, are being blamed for the deadly March 11, 2005 escape of Brian Nichols. *PLN* has previously reported on the many problems afflicting the Fulton county jail. Nichols' violent breakout that left a judge, court stenographer, Sheriff's deputy and federal agent dead is merely the latest in a long story of mismanagement, corruption, brutality and incompetence.

Several weeks prior to Nichols' escape, his mother had warned that he might grab a gun if he thought he would be found guilty in his trial on rape and other felony charges. And just two days before his deadly rampage, Nichols had smuggled homemade shanks into the courthouse, only to be caught on his way back to jail. As a result, Lt. Gary Reid agreed to provide extra security in Superior Court Judge Rowland Barnes' courtroom. On the morning of March 11, however, Reid called in sick so he could visit his son's school, and Deputy Cynthia Hall, who had 17 years experience with the Sheriff's office, took Nichols from the courthouse basement to an eighth floor holding cell. Once there she removed Nichols' handcuffs to allow him to change into street clothes for his court appearance. Nichols attacked Hall, striking her on the head and knocking her unconscious. He then used Hall's key to obtain her gun from a lockbox.

Despite the cell door not having an opening for prisoners to stick their hands through to remove handcuffs, Fulton County Sheriff's policy was to remove handcuffs in the open. It was also the Sheriff's policy to send a single deputy to escort a prisoner to court. Hall, 51 years old and standing 5'4", was no match for Nichols, 33, a former college football linebacker who had studied martial arts. Hall's only backup, two employees assigned to monitor surveillance cameras from a central control room, didn't see the attack. Capt. Chelsea Lee had sent one of them to fetch her breakfast at the time.

After disabling Deputy Hall, Nichols proceeded to Judge Barnes' chambers. Once there he disarmed and handcuffed Barnes' bailiff, Sgt. Grantley White, and held others at gunpoint. Upon entering the courtroom, Nichols fatally shot Judge Barnes; while people fled, he then shot

court reporter Julie Ann Brandau in the head, killing her.

As he escaped the courthouse Nichols was confronted by Sgt. Hoyt Teasley, whom he shot multiple times and mortally wounded. Nichols next carjacked several vehicles, including one belonging to a local reporter, left the area, and eventually killed David Wilhelm, an off-duty Special Agent for the U.S. Immigration and Customs Enforcement Agency. A construction worker found Wilhelm's body the next day; Nichols had fled with Wilhelm's badge, gun and blue Chevrolet truck.

Early the next morning Nichols forced his way into an apartment occupied by Ashley Smith, a widowed single mother. Over the next seven hours Smith talked to Nichols about God and gained his trust. After being allowed to leave the apartment to check on her daughter, Smith called 911. Nichols surrendered without resistance.

As a side note to Nichols' headline-grabbing escape, a great deal of media attention was focused on Smith, who reportedly read to Nichols from the bestselling evangelical self-help book, *The Purpose-Driven Life*, by Pastor Rick Warren. She was lauded as a heroine for bringing a peaceful end to Nichols' deadly rampage. Not so much attention was focused on the reward money that Smith received for assisting in Nichols' capture – some \$70,000 – nor on her later admission that she provided Nichols with crystal meth, though she denied using any of the drug herself.

Much finger-pointing has occurred in the aftermath of Nichols' killing spree. A group of Fulton County deputies has called for Sheriff Myron Freeman to resign or that he be recalled. Freeman did not take office until January 2005, just two months before Nichols' escape; it appears, however, that an entrenched courthouse culture did not always take safety issues seriously long before Freeman took office. *PLN* has previously reported on the extensive problems at the Fulton County Sheriff's Department and jail [see: *PLN*, March 2005].

In August 2005, following a report by the Fulton County Courthouse Security Commission, eight Sheriff's employees were fired, two were suspended without pay and three others received written reprimands or counseling. Although Sheriff Freeman initially refused to identify them

by name, he said they included two majors, a captain, a lieutenant, a sergeant, two deputies and a jail guard. Several were accused of lying during the investigation into the escape regarding their actions and whereabouts. The employees fired for lying "slowed us down considerably. If we had just had the truth in the beginning, we could have cut a good 3½ weeks off our investigative time," said Dekalb Sheriff Thomas Brown, who led an independent investigation into Nichols' escape.

The investigators who questioned the deputies, however, appeared to help them with their answers. In March, Joel Middlebrooks, a deputy who split his time between the control room and courtroom, told investigators he "started making [his] way" toward the courtroom elevators after he heard a radio call for help. An investigator, however, asked the deputy, "You sprinted, is that what your testimony was?"

One of the fired Sheriff's employees, Sgt. Jerome Dowdell, was cited for having a personal relationship with Brian Nichols and his mother, Claritha Nichols. All three were members of the same church.

Sgt. Charles Rambo, a union official with the International Brotherhood of Police Officers, which represents employees at the Sheriff's office, contends that individual staff members shouldn't take the blame. Instead, "it was the irresponsible and incompetent way this department was run for years that caused a lot of the problems," he said. Rambo, who had previously vied with Freeman for the Sheriff's position, stated that the employees subjected to discipline were "being shafted." Indeed, security lapses at the Fulton County courthouse had been evident for years.

In 2003 the U.S. Marshal's office had conducted an audit and recommended that emergency exits be fitted with special "panic" bars, which would keep the doors locked for 15 seconds and sound an alarm to help deputies capture escaping prisoners. The Marshals also recommended building new holding cells for some courtrooms, discontinuing the practice of escorting prisoners through public areas, and increasing safety and security training. None of these suggestions were implemented.

"Things have been going on in that courthouse this way for years and everybody just took it for granted," said the

U.S. Marshal in Atlanta, Richard Mecum, chairman of a task force investigating the shootings and courthouse security.

Absenteeism was also a major problem, with deputies taking sick days to run personal errands or take three-day weekends. Several days following Nichols' escape, Sheriff Freeman transferred 40 deputies to the court complex, ordered that deputies be armed while escorting prisoners, and required at least two deputies to bring prisoners to court. He also reduced the number of prisoners taken to court from 400 to 225 per day, although that quota is still regularly exceeded.

Further, a policy change implemented in January 2005 may have contributed to Nichols' successful escape. Deputies at the courthouse who issued security alerts were instructed to verify the alert before requesting assistance, rather than seek an immediate response. During Nichols' escape the deputy in the courthouse control room tried four times to obtain verification before requesting help. Ironically, it was Sgt. Hoyt Teasley, who was shot and killed by Nichols, who had ordered the policy change over the protests of one of his subordinates, Paul Tamer. Tamer, the deputy in the control room at the time of Nichols' escape, dutifully followed Teasley's orders and delayed issuing an alert. The Sheriff's office has since reverted to requiring an immediate response to security alerts at the courthouse.

The escape and its aftermath have put a scare into courthouse staff. By May 24, 2005, seventeen prosecutors and investigators had decided to leave the District Attorney's office, with at least three citing the shootings as a factor. Meanwhile, judges at the Fulton County Courthouse are frustrated that little has changed in the way of security. Judge T. Jackson Bedford, Jr., walked an *Atlanta Journal-Constitution* reporter from a first-floor public hallway into the restricted judge's chambers area. After passing a desk where an unarmed civilian security officer sat, Bedford approached Courtroom 1C from the back. The door was unsecured.

"Look at the first floor," the frustrated judge said as he opened the door and looked over his shoulders to the area he had just passed through. "It's wide open"

Sheriff's officials say progress to tighten security is being made. However, two years before Nichols' deadly escape, Dennis Scheib, a former Sheriff's deputy

working as a defense attorney, had sharply criticized security at the courthouse, noting lapses almost identical to those that Nichols exploited when making his escape.

The widow of Judge Rowland Barnes, who was presiding over Nichols' rape trial and was Nichols' first murder victim, has filed a lawsuit that singles out the Sheriff's employees who failed to protect her husband, but does not name the county as a defendant. "Our claims are against individuals—not the government," said Barnes' attorney, Tommy Malone. "There were policies in place for preventing this type of tragedy from happening and they were not followed, and that's why this tragedy occurred." Additional lawsuits have been filed by the survivors of the three other victims killed by Nichols, and by two case managers for Judge Barnes, Susan Christy and Gina Clarke, who are seeking damages for mental anguish from the ordeal.

In November 2005, Nichols was found to be planning another breakout. This time a routine shakedown revealed a letter to a prisoner in an adjoining cell that "made reference to an escape plan," including overpowering deputies and releasing other prisoners.

The prisoner to whom Nichols was writing was identified as Stephen Marshall, 34, who is awaiting trial on charges in the 2004 fatal shooting of a 3-year-old. Since finding the letters, which the Sheriff's office has refused to release to the press, SWAT members were assigned to guard Nichols at the Fulton County Jail. Nichols is facing the death penalty in a 54-count indictment resulting from his March 2005 escape. ■

Sources: *Atlanta-Journal Constitution*; *New York Times*; *Los Angeles Times*; *Austin American-Statesman*; *Seattle Times*; *Law.com*.

L.A. County Jail Gets \$20,000 from State for Pruno-Sniffing Dogs; Inmate Welfare Funds Tapped to Maintain Program

On September 30, 2005, the Los Angeles (L.A.) County Board of Supervisors approved a Sheriff's funding request for \$20,000 to purchase and train two "pruno" sniffing puppies and to pair them with Sheriff's deputies. The Board's action accepts initial funding from the State of California Department of Alcoholic Beverage Control (ABC) for the stated purpose of deterring the illegal production and consumption of alcohol in the jails.

Citing an "unacceptable level of risk to inmates ... contributing ... to violence in the jails," the Sheriff pled his case to get state funds to use dogs to find the pruno. The dogs are trained to sit down next to a "find." But there is a kicker in the plan. Sheriff Leroy Baca stated in his October 18, 2005 funding request memorandum to the Board that "the Department and Inmate Welfare Commission will fund all ongoing and additional costs associated

with operating this program." Thus, it appears that funds collected from profits on prisoners' purchases of canteen, which are designated for books, basketballs and the like, will be permanently diverted to cover the ongoing costs of tracking down pruno. This has all the earmarks of an improper utilization of Inmate Welfare funds at the County jails. ■

Sources: Sheriff's October 18, 2005 letter to the Board of Supervisors; Sheriff's Budget Appropriation No. A01-SH-15685- 8831. A copy of the memo is on PLN's website.

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See Page 45 for more information

\$1.1 Million FTCA Emotional Distress Award In BOP “Suicide” Death Upheld, Even Though Murder By Guards Suspected

by John E. Dannenberg

The Tenth Circuit U.S. Court of Appeals upheld a \$1.1 million award under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80 for intentional infliction of emotional distress on the surviving family of a prisoner who allegedly committed suicide in BOP custody. The distress derived from an unauthorized and unannounced autopsy, alleged BOP cover-up of the death scene (which the surviving family believed pointed to murder, not suicide) and misinformation about facts surrounding the death that aggravated the suffering of the family. (*PLN* has reported extensively on this case since 1995.)

Kenneth Trentadue, on federal parole in 1995 after doing a term for bank robbery, was arrested in California on a DUI charge and returned to custody at the Federal Transfer Center in Oklahoma City. There, after two days, he requested and received protective custody housing. At 2:38 a.m. the following morning, he was observed asleep during a routine cell check. Twenty-three minutes later, on another sweep, he was found hanging from sheets tied to an air vent, with considerable blood on his body and the floor. Although he was cut down minutes later, no resuscitation was performed and he was pronounced dead. All staff called it a suicide, but extensive trauma and lacerations to his head and body suggested otherwise. The next day, after the scene had been photographed, the cell was cleaned, including a note scrawled on the wall.

The coroner initially listed the cause of death as “unknown.” To conduct an autopsy, however, BOP needed the written approval of Trentadue’s wife. When they were unable to quickly get this, they proceeded anyway. In the meanwhile, they were called by Trentadue’s brother Jesse (a Salt Lake City attorney who represents police misconduct defendants) who authorized an autopsy, even though he was not Kenneth’s legal representative. From the autopsy and subsequent internal BOP investigative reports, the coroner changed the cause of death to “suicide.”

However, the family never was told of the autopsy. They discovered it, to their horror, in an open casket ceremony at a

funeral home. This led Jesse on a decade-long crusade to unearth who killed his brother. The physical injuries to Kenneth belied a “suicide.” He suffered severe head battering, a gouged throat, and “deep, ugly wounds” that covered his arms, legs, hands and wrists even the bottoms of his feet. BOP personnel “helpfully” opined that in the 23 minute period, “he quietly rose, ripped his sheets and fashioned a noose, running one end ... through the ceiling vent grate and looping the other end around his neck. Then he leaped from the sink, but the sheets did not hold. He fell, striking his head and other parts of his body on the sink, a desk and a stool. Next, he took a plastic knife or toothpaste tube and gouged his throat. Then he reknotted the sheets, wrapped the rope around his neck, and jumped again. This time, the sheets held,” when he was “spotted ... swinging from the ceiling.” The warden and the Justice Department’s inspector general assured the family this was a suicide.

But Kenneth had not been despondent. Upon his arrival days earlier, he wrote his wife happily, “Big, big hug.” He phoned Jesse and told him he did not expect a lengthy parole violation term. “It looks pretty good,” he said in a prison recorded phone conversation. Nonetheless, prison officials reported that Kenneth had asked to be placed in protective custody, saying “things were not quite right.”

And indeed they were not. Four months earlier, the federal building in Oklahoma City had been bombed. Although Timothy McVeigh had been identified, there was rumored to be a John Doe # 2 who, it turns out, matched Kenneth Trentadue’s appearance down to the square jaw and dragon tattoo on the shoulder. Jesse thinks it is possible that a guard, angry over the bombing, had it in for him, and murdered him. A nearby prisoner, Alden Baker, told Jesse in a deposition that he heard the commotion, “a lot of scuffling going on, a lot of beating going on, a lot of clashing going on” between guards and Kenneth. Baker saw guards in blood-spattered uniforms and heard moaning in the corridor. When the moaning stopped, he heard sheets being ripped.

The inspector general’s report noted that at least 41 pieces of evidence had

disappeared from Kenneth’s FBI case files. But in 2001, the FBI admitted it found 4,400 pages of documents from the Oklahoma City bombing investigation which were never turned over to defense attorneys for Timothy McVeigh because they were only on secret computer “I-files” in the local field office. These included witness interviews saying they saw McVeigh with the unidentified John Doe # 2. Then, in a remarkable coincidental sequence, relevant prison logs turned up missing, Kenneth’s clothes were destroyed before they could be analyzed, and a videotape of the crime scene was erased. Moreover, Jesse learned that there had been bloodstains near the panic button in Kenneth’s cell, A-709, but the cell was repainted before the coroner’s investigation could be completed.

Dr. Fred Jordan, the medical examiner, reportedly was threatened by federal authorities with a tax audit if he did not stick to his diagnosis of “suicide.” But Jordan later told an Oklahoma television reporter that “it’s very likely he was murdered.” Jordan has flipped his story over the years between whether Kenneth’s injuries were “received in an altercation,” or “there is no evidence to substantiate beating or torture.” Even assistant Oklahoma attorney general Patrick Crawley said he thought Jordan had been pressured by the federal government and had been prevented from conducting a thorough investigation. Crawley, who represented Jordan, wrote of the Trentadue experience, “all Americans should be very frightened of [federal agents] and the DOJ.” To this day, Mike Hubbard, a veteran police detective who reviewed the case for Senator Orrin Hatch said skeptically, “I know a homicide when I see one.” Joel Hillman, chief of the DOJ’s Public Integrity Section, did not respond to requests for interviews. He is now reviewing the case “as time allows,” he wrote Jesse in late 2004. But the Congressional hearings promised by Senator Hatch never materialized. Still, Jesse senses he’s closer than ever to getting to the truth of Kenneth’s brutal death.

Coupled with their distress (and nonacceptance) over “suicide” as being the cause of death, the family sued BOP

for “intentional infliction of emotional distress.” The suit was bifurcated into *Bivens* (civil rights) claims [that guards were responsible for Trentadue’s death] and FTCA claims [emotional distress on family]. The *Bivens* action was tried to a jury on a theory of deliberate indifference to Trentadue’s medical needs, for which the jury awarded \$20,000 in compensatory damages. The jury rejected all other *Bivens* claims.

The FTCA action proved more promising, but also legally contentious. After a bench trial awarding \$1.1 million for emotional distress, the BOP appealed. First, they claimed lack of proper (administrative) notice of suit. BOP argued that plaintiffs had only generally advised on the theory of their complaint, which was insufficient to satisfy 28 U.S.C. § 2675(a)’s requirement to “sufficiently describe the injury.” The Tenth Circuit rejected this jurisdictional defense, ruling that notice is satisfied if one informs the agency of the facts of the incident; they need not elaborate on all possible causes of action or theories of liability.

As to plaintiff’s “misrepresentation” claim, the court held that the statutory exception for this type of claim would not apply in the instant case because the term “misrepresentation” as used in 28 U.S.C. § 2680(h)(4) applies only to financial misrepresentation.

The question of whether the facts supported a legal basis for “emotional distress” was also decided in plaintiffs’ favor. Oklahoma law (controlling here) provides that there must be reckless action that was “extreme” or “outrageous,” and that the resulting distress was “severe.” Upon reviewing the district court record, the Tenth Circuit could not find that the lower court had erred in toto. But the Tenth Circuit did agree that the district court did not make explicit findings for each of the plaintiffs for whom awards had been granted (Trentadue’s wife [\$250,000], mother and three siblings [\$200,000 each] and deceased father’s estate [\$50,000]) to verify that each plaintiff individually met the requisite tests. Accordingly, a remand was ordered for that purpose.

Defendant Lee also complained on appeal that an award against him under the FTCA acted as a judgment bar to concurrent *Bivens* liability. The court agreed, and vacated the *Bivens* judgment against him.

In sum, the Tenth Circuit vacated the FTCA action and remanded it to deter-

mine whether, under Oklahoma law, each plaintiff suffered the requisite emotional distress. It further reversed (barred) the *Bivens* judgment against Lee because he had also suffered FTCA liability. Finally, Trentadue’s twenty-one cross-appeal issues were denied. See: *Trentadue v. Lee*, 397 F.3d 840 (10th Cir. 2005).

District Court Reinstates Trentadue Judgments On Remand

On September 19, 2005, on remand from the Tenth Circuit, the U.S.D.C. (W.D. OK) made the requisite findings of fact and reinstated the \$1.1 million in judgments against defendant United States of America. The court dismissed the \$20,000 *Bivens* judgment against defendant Stuart Lee.

Explicitly following the Tenth Circuit’s instructions, the district court reviewed the record to determine if each plaintiff suffered the requisite severe emotional distress required by controlling Oklahoma law. The court evaluated each for the “fourth element” of the tort of intentional infliction of emotional distress, which requires proof that “the plaintiff’s emotional distress was so severe that no reasonable person could be expected to endure it.” In making its findings, the court relied upon trial record evidence of the “extreme and outrageous character of the defendant’s conduct.” The court so found separately for each of the plaintiffs, and awarded Carmen Trentadue (Trentadue’s

widow) \$250,000; Wilma Trentadue (Trentadue’s mother), \$200,000; [estate of] James Trentadue (Trentadue’s father), \$50,000; Donna Sweeney (Trentadue’s sister), \$200,000; Lee Trentadue (Trentadue’s brother), \$200,000; and Jesse Trentadue (Trentadue’s brother), \$200,000. Following the Tenth Circuit’s ruling that judgment against defendant Lee is barred by § 2676 of the FTCA, that judgment (\$20,000) was dismissed.

Finally, the district court denied Trentadue’s lately filed motion to dismiss without prejudice “Jesse Trentadue’s Severed Claim of Emotional Distress Based Upon the United States’ Efforts to Indict Him.” The court noted the limited purview of the instant case for damages as to the emotional distress attending the horrific open-casket revelation, which did not include any related claim regarding the smokescreen attempt to divert attention from the death by indicting him. In particular, because this claim went to the conduct of the government’s counsel at trial and not to the misconduct of federal officials investigating Trentadue’s death, it fell outside the scope of the issues for litigation defined in the remand order.

Although pleased with the court’s new ruling, Jesse Trentadue said he has no doubt the government will appeal it. “When I won the first time they said they would never pay us.” See: *Estate of Trentadue v. United States of America*, U.S.D.C.(W.D. OK), Case No. CIV-97-849-L. ■

Alabama Diabetic Prisoner Stomped On and Retaliated Against by Guard Awarded \$20,000

by John E. Dannenberg

A diabetic Alabama prisoner lying on the floor of his cell due to suffering from his diabetes condition had his leg stomped on by a guard. When the prisoner grieved the abuse, another guard filed a phony disciplinary report against him. Proceeding pro se, the prisoner sued both, winning \$5,000 in compensatory damages and \$150,000 in punitive damages. The latter was reduced to \$15,000.

On August 8, 2002, Cornelius Jackson, an insulin-dependent prisoner at the Donaldson Correctional Facility in Bessemer, was having reactions from his poorly treated and monitored diabetes condition. Jackson alleged that Lt. Kenneth Clark came into his cell and stomped on his foot while he lay prone on the floor, and then

roughly handled him.

Jackson complained in writing to the warden, adding that guard Nathan Cash filed the phony disciplinary report in retaliation for Jackson’s having had the temerity to complain about the foot stomping. Jackson sued both in U.S. District Court and he was granted a jury trial where he prevailed against both guards on June 2, 2005.

In a post-trial motion, the defendants challenged the jury’s punitive damages award as excessive relative to the small compensatory award, here a 29-1 ratio. The court agreed, and fixed the punitive damages at three times the compensatory damages, or \$15,000. See: *Jackson v. Clark*, U.S.D.C. ND AL, Case No. 2:02-2327. ■

Ohio Man Awarded \$618,000 for Nearly 16 Years Wrongful Imprisonment

On August 15, 2005, the Ohio Court of Claims awarded \$618,683.33 to a man who spent nearly 16 years in prison for a rape he did not commit.

Donte L. Booker was arrested for a carjacking outside a Beachwood, Ohio bar in February 1987. During the crime Booker used a toy handgun which Cuyahoga County Prosecutor Bill Mason said was stolen from a rape victim's car four months earlier. Booker claimed he purchased the gun at a local store and that it was never positively identified as belonging to the victim. Nonetheless, police asserted Booker was the rapist, and the victim picked him out of a lineup.

Booker was tried and convicted for the rape and the carjacking at the same time. He received consecutive sentences of 10 to 25 years for rape, kidnapping and robbery, and 3 to 15 years for the carjacking.

Booker was imprisoned following the 1987 trial until he was paroled in December 2002. He was returned to prison for 9 months in March 2004 on a parole violation. It was during this time that he used a 2003 law to request a DNA test. The law, which was subsequently extended until October 2005, allowed persons who had not pled guilty to request DNA testing if they believed it could exonerate them. In January 2005, the DNA test results proved Booker was innocent of the rape.

The award was less than the \$40,330 for each year of wrongful imprisonment, plus attorney fees and lost wages, that Booker should have been entitled to under state guidelines. "It was an adjusting down of the \$40,000 to take into consideration other factors [i.e., Booker's arrest record]," said Assistant Attorney General Paula Paoletti.

But it's still more than state officials wanted to pay. While not contesting Booker's innocence claim, Mason argued that regardless of the rape, Booker would have served a substantial amount of time for the carjacking alone. "There is one year, and my guess is probably as many as six years" that Booker was wrongfully imprisoned, Mason stated.

W. Scott Ramsey, Booker's attorney, disagreed. If not for the rape conviction, he contended, Booker may have received probation and never have set foot inside

a prison. "It's possible he should not have gone at all and if he did go, he wouldn't have had to serve nearly a quarter of what he served," said Ramsey, who had asked for \$1.4 million.

Booker, now 38, says restoring his reputation was more important than any financial gain. "The money, of course, I do

need it," said Booker, who admitted only to the carjacking. "But my main concern was getting this off my record because it is so humiliating being labeled a rapist." See: *Booker v. State of Ohio*, Ohio Court of Claims, Case No. C2005-03393. ■

Source: *Cleveland Plain Dealer*

PLRA Doesn't Bar FRCP 15(a) Amendment of Complaint - No HIV/Hepatitis Treatment = "Imminent Danger of Serious Physical Injury"

In a case of first impression, the Eleventh Circuit Court of Appeals held that the Present Litigation Reform Act (PLRA) does not bar a prisoner, proceeding *in forma pauperis*, from amending his complaint under Fed.R.Civ.P. 15(a).

John Ruddin Brown entered the Georgia State Prison (GSP), in 2001. He suffers from human immunodeficiency virus (HIV) and hepatitis. Due to a decline in his health, on September 5, 2002, Dr. Walton prescribed medication for HIV and hepatitis. However, on October 30, 2002, Dr. Presnell discontinued the medications.

Brown brought suit against Presnell and GSP Medical Administrator Lisa Johnson, alleging that the withdrawal of prescribed medications constituted deliberate indifference to his serious medical needs. He sought preliminary and permanent injunctions mandating "adequate medical care for his serious medical needs."

Brown sought to proceed *in forma pauperis*. However, he had previously incurred three strikes under 28 U.S.C. § 1915(g) of the PLRA. Under § 1915(g) a prisoner who has filed three or more meritless or frivolous lawsuits is prohibited from proceeding *in forma pauperis* unless he is in imminent danger of serious physical injury.

A magistrate judge recommended that Brown be denied *in forma pauperis* status and that his complaint be dismissed without prejudice "because Brown had at least three strikes under 28 U.S.C. § 1915(g)... and had not 'shown how he was in imminent danger of serious physical injury at the time he filed his complaint.'" Brown objected and filed a motion to amend his

complaint, arguing "that he suffered and continues to suffer serious injuries as a result of the complete withdrawal of treatment." In his amended complaint, Brown "alleged that his health would deteriorate and he would die sooner because of the withdrawal of his treatment."

Although defendants had not yet filed a responsive pleading, the district court denied Brown's motion to amend, holding "that section 1915 prevents Brown from amending his complaint[.]" The court then dismissed the complaint, concluding that "based on 'three strikes' rule of section 1915(g), Brown could not proceed *in forma pauperis*." Brown appealed.

First, addressing whether § 1915 of the PLRA bars a prisoner from amending his complaint pursuant to FRCP 15(a), the Eleventh Circuit noted that it had previously held in *Troville v. Venz*, 303 F.3d 1256 (11th Cir. 2002), "that '[s]ection 1915(e)(2)(B)(ii) does not allow the district court to dismiss an *in forma pauperis* complaint without allowing leave to amend when required by Fed.R.Civ.P. 15.'" The court found that "[n]othing in the language in Sections 1915(g) in 1915A differs from section 1915(e)(2)(B)(ii) such that the court should not allow prisoners the same benefit of Rule 15(a) as any other litigant." The court held that the fact that "*Troville*" did not involve a prisoner[] was an immaterial distinction. Additionally, several of it "sister circuits have held that the screening provisions of the PLRA do not repeal Rule 15(a) nor preclude a court from granting leave to amend." See, e.g., *Gomez v. USAA Federal Savings Bank*, 171 F.3d 794 (2d Cir. 1999); *Cruz v. Gomez*, 202 F.3d 593 (2d Cir. 2000); *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000)(en

banc); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803 (10th Cir. 1999); and *Razzoli v. Fed. Bureau of Prisons*, 230 F.3d 371 (D.C. Cir. 2000).

The court "agree[d] with the majority of circuits that the PLRA does not preclude the district court from granting a motion to amend. Nothing in the language of the PLRA repeals Rule 15(a)... Brown had the right to amend his complaint under Rule 15(a). The district court, therefore, abused its discretion when it denied Brown's motion to amend."

Since Brown had three strikes under § 1915(g), the court was also required to decide if he was under "imminent danger of serious physical injury" so as to allow his *in forma pauperis* filing. The court concluded that Brown had made the requisite showing, finding that "[v]iewed together, the infections of which Brown currently complaining, including his HIV and hepatitis, and the alleged danger of more serious afflictions if he is not treated constitute imminent danger of serious physical injury."

Finally, the court found that Brown

had adequately stated a claim of deliberate indifference to his serious medical needs. With respect to the first prong of the deliberate indifference test, the court noted that HIV and hepatitis satisfy the definitions of serious medical needs, and "defendants wisely do not deny that Brown has serious medical needs." As for the second prong, the court found that "[t]aking the allegations of the complaint as true the continuing disregard of Brown's HIV and hepatitis constitute deliberate indifference." See: *Brown v. Johnson*, 387 F.3d 1344 (11th Cir. 2004). ■

PLRA Doesn't Alter FRCP 23 Class Certification Analysis

The Tenth Circuit Court of Appeals held that the Prison Litigation Reform Act (PLRA) does not change, limit or add new elements to the class certification and analysis of Fed.R.Civ. P. 23. The court reversed a lower court's denial of class certification, finding that the court improperly failed to address Rule 23's requirements.

Dennis Jones, Shirlen Mosby, Mark Shook and James Vaughn all suffer from severe psychiatric problems for which they were under psychiatric care and prescribed medication. In 2001 and 2002, each of them were confined in the El Paso County Jail in Colorado Springs, Colorado, as pretrial detainees and sentenced prisoners. While there, they received inadequate treatment of their serious mental illnesses. Mosby attempted suicide three times while housed in the jail.

On April 2, 2002, Jones, Mosby, Shook and Vaughn brought suit, alleging that Jail officials were deliberately indifferent to their mental health needs and numerous respects, and that the deprivations were life-threatening. Plaintiff alleged that "Jail officials' deliberate indifference to prisoners' mental health needs has led to the deaths of at least four prisoners and resulted in injuries to others." Plaintiff sought to certify the action as a class action, defining the class as "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso Jail."

Defendants moved to dismiss, "arguing that each class member was required to fully exhaust his or her administrative remedies under the" PLRA. Defendants claimed that "because only the class representatives had exhausted their remedies, the class could not be certified."

The district court denied "both the

defendants' motion for dismissal and the plaintiffs' motion for class certification[.]" ultimately concluding "that the PLRA precluded class certification because the "breadth [of relief sought made] the proposed class action not manageable with [the] court's limited jurisdiction." *Shook v. Bd. Of County Comm'rs of County of El Paso*, 216 F.R.D. 644 (D.Colo. 2003). The court gave plaintiffs 30 days to file an amended complaint for individual relief. Only injunctive and declaratory relief were sought and once the court entered its order "no other plaintiffs remained in the Jail and therefore they no longer had standing to seek individual relief. The district court accordingly dismissed the action."

The appellate court "first consider[ed] whether, as the district court concluded, the PLRA has changed the requirements for class certification under Rule 23." Ultimately, it found "that the PLRA does not alter the class certification analysis under Rule 23[.]" noting that other courts had reached the same conclusion. See: e.g., *Williams v. Edwards*, 87 F.3d 126 (5th Cir. 1996); *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001); *Anderson v. Garner*, 22 F. Supp.2d 1279 (N.D. Ga. 1997); *Skinner v. Uphoff*, 209 F.R.D. 484 (D.Wyo. 2002); and *Jones-El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001). The court concluded "that Congress did not intend the PLRA to alter class certification requirements under Rule 23 and that the district court erred in concluding otherwise."

The court then held that the "district court erred by not specifically addressing the traditional Rule 23 factors in denying class certification."

While the court agreed with plaintiffs that the district court erred in importing the Rule 23(b)(3) requirement of "iden-

tifiability" into the Rule 23(b)(2) analysis, the majority rejected the notion that Rule 23(b)(3)'s "manageability" requirement "is never a proper inquiry under Rule 23(b)(2)," a conclusion it found to be supported by the Fourth Circuit's decision in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 74 (4th Cir. 1998). One judge disagreed, however, finding that circuit precedent – *Adamson v. Bowen*, 855 F.3d 668 (10th Cir. 1988) – the standard rules of statutory construction, and decisions of the Fifth and Ninth Circuit in *Forbush v. J.C. Penny Co., Inc.* 994 F.2d 1101 (5th Cir. 1993) and *Elliott v. Weinberger*, 564 F.2d 1219 (9th Cir. 1977), make it clear that it is improper to use "a criterion found in Rule 23(b)(3) – such as manageability – as grounds for denying a Rule 23(b)(2) class."

The court reversed and remanded for further consideration "because the district court erred by denying class certification relief without addressing Rule 23(a)'s threshold requirements or assessing Rule 23(b)(2)'s requirements of general applicability[.]" See: *Shook v. Bd. Of County Commissioners of County of El Paso*, 386 F.3d 963 (10th Cir. 2004). ■

CALIFORNIA HABEAS HANDBOOK Edition 4.04.1 (Revised May, 2005)

By: Kent Russell
Prison Legal News Columnist:
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Appointment of Counsel Satisfies Access to Courts Requirement

The Second Circuit Court of Appeals held “that the appointment of counsel is a valid means of fully satisfying a state constitutional obligation to provide prisoners, including pretrial detainees, with access to the courts[.]” The court also held “that constitutionally acceptable access to the courts through appointment of counsel is not measured by reference to the Sixth Amendment’s guarantee of *effective* assistance of counsel.”

In 1996, Ronald Burdon was confined in the Chenango County, New York, Jail, facing several criminal charges. “While incarcerated, Bourdon requested reference materials from the jail’s law library in order to prepare *pro se* pretrial motions to dismiss the indictment and for substitution of counsel.

Jail officials “denied Bourdon’s request for materials, on the basis of that Bourdon was represented at the time by court-appointed counsel...from whom Bourdon could request the materials he desired.”

Bourdon renewed his request, without requesting the materials from his attorney, “stat[ing] only that he had not heard from his attorney and...that he was disappointed with the attorney’s services.” Jail officials again denied his request.

“Without reference materials from the library, Bourdon filed his *pro se* motions. The state trial court denied the motion to dismiss, finding that the motion was untimely and that Bourdon, rather than Jail Officials, was responsible for the late filing. The court, however, granted Bourdon’s motion for new counsel.”

Bourdon then brought suit in federal court, alleging that Jail Officials violated his constitutional right of access to the by denying him the requested reference material, “failing to maintain a law library with adequate and up-to-date materials, and failing to provide timely services of a public notary, all of which allegedly harmed Bourdon” by preventing him from filing a timely *pro se* pretrial motion to dismiss the state criminal indictment.

The district court granted summary judgment to defendants and dismissed the complaint. This decision was reversed by the Second Circuit in a summary ruling in *Bourdon v. Loughren*, 7 Fed. Appx. 116 (2d Cir. 2001) vacating the order, finding “that the District Court, before ruling in favor of defendants, should have apprised Bour-

don, a *pro se* litigant, of the consequences of failing to file a response to defendant’s summary judgment motion.”

On remand, the parties re-filed cross-motions for summary judgment.” The district court again found for defendants, concluding “that Bourdon’s right of access to the courts had not been denied, finding that Bourdon could have asked for an extension of time to move to dismiss the indictment and that the denial of Bourdon’s motion to dismiss resulted from Bourdon’s inaction, not because Bourdon was delayed access to notary services.” The court also noted “that Bourdon was represented by counsel during all times that he claimed he was denied access to the courts.”

Bourdon appealed, reiterating that “the alleged deficiencies in the jail’s law library, and the delay in the provision of notary services hindered his efforts to file a timely motion to dismiss” and that “he ‘was without effect of assistance of counsel’” when he requested the materials.

Noting that it had not previously addressed the precise question, the Second Circuit held “that the appointment of counsel can be a valid means of satisfying a prisoner’s rights of access to the courts.” The court observed that several of its sister circuits had already reached

the same conclusion. See: *e.g.*, *Peterkins v. Jeffes*, 885 F.2d 1021, 1042 (3d Cir. 1988); *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978); *United States v. Smith*, 907 F.2d 42, 45 (6th Cir. 1990); *Howland v. Kilquist*, 833 F.2d 639, 643 (7th Cir. 1987); *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981); and *Love v. Summit County*, 776 F.2d 908, 914 (10th Cir. 1985).

The court then interpreted the reference to “adequate assistance from persons trained in the law” found in *Bounds v. Smith*, 430 U.S. 817 (1977) as not incorporating “the effectiveness inquiry pertinent to the Sixth Amendment but instead refers to the capability of qualified and trained persons... to provide, in dispensing legal assistance, access to the courts.” Under this standard, the court found that Bourdon “must show that, on the facts of his case, the provision of counsel did not furnish him with the capability of bringing his challenges before the court, not that he was denied effective representation in the court.”

Applying this test, the court found that “Bourdon’s counsel also afforded him meaningful and constitutionally acceptable access to the courts for his challenge to the state criminal charges brought against him.” See: *Bourdon v. Loughren*, 386 F.3d 88 (2nd Cir. 2004). ■

No Qualified Immunity on Toothpaste, Inhaler & Ventilation Claims

The Seventh Circuit Court Of Appeals upheld a district court’s denial of qualified immunity to jail officials on claims of denial of toothpaste, withholding asthma inhaler and inadequate ventilation.

In 1984, two Indiana men disappeared. Neither the men nor their bodies were ever found but they were declared legally dead. “On August 2, 2000, brothers Herbert ‘Duke’ Board (‘Duke’) and Jerome Board (‘Jerry’)... were arrested and charged with the murders of the two men.” They were held in the Edgar County, Illinois, Jail for 126 days while awaiting trial. “On December 6, 2000, they were released from custody following their acquittal on the murder charges.”

The Boards then brought suit alleging numerous constitutional and state law violations related to their arrest, confinement and subsequent acquittal. Only three

claims survived “voluntary dismissal in the district court’s unchallenged grant of summary judgment in favor of the defendants.” The court found that defendants were not entitled to qualified immunity on the Boards’ claims of denial of toothpaste, withholding asthma inhaler and inadequate ventilation. Defendants filed an interlocutory appeal of the qualified immunity ruling.

The Seventh Circuit explained “that the constitutional rights of a pretrial detainee are derived from the Due Process of the Fourteenth Amendment and are distinguishable from an inmate’s right not to be subjected to cruel and unusual punishment under the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535, n.16 (1979).” Additionally, “pretrial detainees are entitled to *at least* as much protection as the Constitution provides convicted prisoners. See:

Cavalieri v. Shepherd, 321 F.3d 616, 620 (7th Cir. 2003)."

Beginning with plaintiffs' toothpaste claims, the court noted that Duke alleged that he was denied toothpaste for "three-and-a-half weeks, despite repeated requests for the same, which caused him pain and suffering and resulted in the extraction of a number of his teeth." Jerry alleged that he was denied toothpaste for approximately 16 weeks but did not suffer any immediate injury.

"[T]he deprivation of toothpaste over an extended parade of time... leading to serious health problems and the denial of toothpaste as a hygiene product without attenuated medical or dental consequences involved slightly different constitutional analysis." The former may be analyzed under the deliberate indifference tests related to current medical needs or conditions which pose a risk to future health. The latter may be analyzed only under the future health risk test.

The court rejected defendants' argument that "there can be no constitutional right to a supply of toothpaste," reiterating its "view that 'dental care is one of the most important medical needs of inmates.'" *Wynn v. Southward*, 231 F.3d 588 (7th Cir. 2001)(quoting *Ramos v. Lamm*, 639 F.2d 559, 576 (10th Cir. 1980)). "[T]he right to toothpaste as an essential hygienic product is analogous to the right to a nutritionally adequate diet."

The Court further observed that "[t]he risks posed by tooth loss... cannot be underestimated" and cited numerous serious, potentially life-threatening medical conditions which may stem from poor dental hygiene. The court also rejected defendants' claim that Duke's tooth aches were attributed "to the two donuts he ate every morning for breakfast, and not to the failure to receive toothpaste," noting "that the Jail provided the doughnuts on a daily basis as the sole breakfast food." Ultimately, the court held that the district court did not err in denying qualified immunity to defendants on the denial of toothpaste claims.

Next, the court concluded that the district court did not err in denying qualified immunity on Duke's claim that his asthma inhaler was withheld, necessitating two trips to the emergency room for

asthma-related problems. The court held that Duke had "sufficiently shown that his asthma was a serious medical condition..., threatening both his help at the time in his future health" and that he sufficiently established the deliberate indifference of the Jail staff to his medical need for his asthma inhaler."

Finally the court upheld the denial of qualified immunity on the inadequate ventilation claim. "[T]here can be no

question that the right to quick and healthy ventilation was, and has been for some time, a clearly established constitutional right at the time of the Board's incarceration." Additionally, jail officials knew or reasonably should have known "that the jail's ventilation system was not only inadequate, but also unhealthy" but failed to remedy the problem. See: *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005). ■

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Missouri's 5-Year Limitation Period Applies to § 1983 Claims; 8th Circuit Reverses Earlier Decision to Contrary

The Eighth Circuit Court of Appeals held that it previously erred in applying a three-year statute of limitations in a jail assault case. The court concluded that Missouri's five-year statute of limitations for personal injury actions applies instead. The court remanded for reinstatement of claims dismissed as untimely under the inapplicable three-year limitation period.

Missouri prisoner Ronald C. Sulik brought suit against numerous Taney County and City of Branson officials, alleging violations of his constitutional rights when he was assaulted in the Taney County Jail. The district court dismissed the complaint as untimely, but the Eighth Circuit reversed, concluding that Sulik's complaint was timely filed when he placed it in the prison mail. *Sulik v. Taney County, Mo.*, 316 F.3d 813, 814-16 (8th Cir. 2003) (*Sulik I*). It "remanded for reinstatement of the claims against all defendants except for the police officers, reasoning [that] claims against the police officers were governed by a three-year statute of limitations and remained untimely even if the prison mailbox rule was applied[.]" *PLN* has reported on these previous rulings.

"On remand, the district court expressed doubt about [*Sulik I's*] statute of limitations ruling but concluded it was bound by the law of the case." Therefore, the court dismissed the claims against the police officers as untimely. It dismissed the claims against two prosecutors for prosecutorial immunity and against another defendant for lack of state action.

Sulik appealed, asking the Eighth Circuit, "to revisit -- as contrary to precedent -- its holding in *Sulik I* on the issue of the three-year limitations period." The court explained that "[o]rdinarily, the legal holding in *Sulik I*... would be the 'law of the case' and would prevent relitigation of the issues" unless "the earlier panel opinion contains a clear error on a point of law and works a manifest injustice."

The court then concluded that its "holding in *Sulik I* applying a three-year statute of limitations to the claims against the police officers was a clear error of law, and letting it stand would work a manifest injustice." Accordingly, the

court "overrule[d] *Sulik I* on this point of law" finding that "Missouri's five-year statute of limitations for personal actions, Mo.Rev.Stat. § 516.120(4)(2000), applies to all of Sulik's section 1983 claims." The court then ordered reinstatement of those claims on remand.

The court upheld the dismissal of the other claims "for the reasons stated by the district court. "However, it found

that Sulik's "allocation was sufficient to state a claim against both the County and the City" and ordered "the district court to reinstate the County as a defendant and add the City as a defendant." Finally, the court denied "Sulik's motion for appointment of counsel and City detective Dalton's motion to dismiss the appeal as against him." See: *Sulik v. Taney County, Mo.*, 393 F.3d 765 (8th Cir. 2005). ■

Seventh Circuit Reverses Jail Lockdown Dismissal; Day After Christmas = Legal Holiday

The Seventh Circuit Court of Appeals reversed a district court's dismissal of a conditions of confinement suit for failure to state a claim.

Female pretrial detainees of the Cook County Jail in Chicago, Illinois, sued the jail superintendent and County alleging that the jail's practice of monthly lockdowns of 48 to 50 hours while guards searched for contraband "gratuitously expos[ed] them to dangerous and degrading conditions of confinement, and deprive[d] them of their liberty without due process of law and thus violated the Fourteenth Amendment." Plaintiffs allege that they were subjected to serious injuries when they were unable to summon guards when fights or other emergencies occurred during the lockdowns. Plaintiffs sought an injunction and damages.

On December 19, 2003, the district court entered its judgment dismissing the suit on January 7, 2004, plaintiffs filed a post-judgment motion under FRCP 59(e) for reconsideration, which was denied and plaintiffs appealed.

The Seventh Circuit was first required to address "a difficult question of appellate jurisdiction... given the limited scope of appellate review of a denial of a Rule 59(e) motion, the dismissal of the suit depends on whether the motion was filed within 10 days after the entry of the judgment." Excluding Christmas, New Year's and weekends, the motion was filed on the eleventh day. Thus, the court found that its jurisdiction turned upon whether December 26, 2003, is also a "legal holiday" which is excluded from the computation of time.

After an extensive analysis, the court held that the presumption is that the

President declared December 26 a legal holiday in that the presumption was not reported. Therefore, the court concluded it had jurisdiction to address the appeal.

Turning to the merits, the court found that "[t]he District Judge misunderstood the plaintiffs' claim, though forgivably since it is not well articulated. He thought they were arguing only 'that the searches could be performed faster and that detainees could then be immediately released from their cells.'... But the heart of the plaintiffs' claim, with enough merit to withstand a motion to dismiss, is that the jail is subjecting them to a risk of serious harm by an unreasonably protracted detention of them out of sight and hearing of guards. So the judgment must be reversed."

The court directed that "the first order of business on remand" should be to rule on plaintiffs' motion to certify the action as a class action. Next, "the judge should define the issues carefully to comport with the analysis in this opinion, in effect pruning the overlong complaint of untenable charges." Finally, the court directed that "the judge should probably address issues of immunity and municipal liability."

Lastly, the court rejected defendants' request for sanctions for plaintiffs having referred in their reply brief to the report of a grand jury investigation into abuses at the Cook County Jail. The court found that "[i]n submitting the report of the grand jury investigation, the plaintiffs were merely indicating that, yes, there may well be facts they could prove that would show they had a claim. There was no impropriety." See: *Hart v. Sheahan*, 396 F.3d 887 (7th Cir. 2005). ■

\$1,250 Settlement in Oregon Retaliation, Court Access Claims

A federal court in Oregon denied prison officials qualified immunity on a prisoner's freedom of association, access to courts and retaliation claims. The association and retaliation claims were later settled for \$1,250 and a transfer to another prison.

On December 21, 2000, Oregon Department Of Corrections (ODOC) prisoner Frank Phillips used a typewriter in the Snake River Correctional Institution (SRCI) Law Library to type "a letter to West Group Publishing Inc. (West Group), the supplier of the [library's] advance sheets, complaining about the SRCI library staff's mishandling of the subscription and seeking information about the subscription's distribution timeliness."

Phillips was not attempting to order any books but West Group interpreted his letter as a request for replacements of missing volumes, and sent replacements to SRCI. Phillips' name was included on the shipping label, but on January 19, 2001, SRCI mailroom staff sent the replacements to SRCI Law Librarian Lynn Hust.

Hust then issued Phillips a misconduct report related to his December 21, 2000 letter, charging him with six "major" violations. However, an ODOC Hearings Officer found insufficient evidence to support the alleged violations. He found Phillips guilty of only the "minor" violation of Disobedience of an Order III, for typing the December 21, 2000 letter because prisoners are authorized to use a law library typewriter only for legal work, not personal business letters.

Phillips maintains that SRCI Program Services Manager Gilmore told him the misconduct report was issued to discourage him from writing letters like his December 21, 2000 letter. Gilmore denies saying that.

Phillips was challenging his criminal convictions and had a June 18, 2001 due date for filing a Petition for a Writ of Certiorari in the United States Supreme Court. On June 11, 2001, he wrote the SRCI law library asking to use the comb-binding machine to bind his petition. Hust received the request on June 13, 2001, but did not answer it until June 18, 2001, stating only: "we do not comb bind materials for inmates."

Phillips then wrote Gilmore, requesting access to the comb-binding machine. Gilmore granted the request of June 25, 2001, but Hust did not allow him to into the library and bind his materials until

June 29, 2001. As a result of Hust's actions, Phillips' petition was filed late and denied as untimely. Phillips asserted that Hust's "delay in responding to his June 11, 2001 kite, and... denial of access to the comb binding machine, were... done in retaliation for [his] having recently prevailed in the disciplinary proceedings initiated by Hust."

Phillips brought suit against Hust alleging that she violated the First Amendment by impeding plaintiff's rights of free speech, to access the court, and to utilize the prison grievance system. He sought declaratory and injunctive relief, damages and attorneys fees, and costs.

Hust sought summary judgment, asserting qualified immunity and failure to exhaust available administrative remedies. Phillips filed a cross-motion for summary judgment. A March 31, 2003, the court issued an Opinion and Order denying summary judgment to Hust and granting Phillips summary judgment on Claim 2, but denying relief on Claims 1 and 3.

The court agreed with Phillips that Hust "mis-characterized the nature of plaintiff's claims" and that she failed to raise her qualified immunity defense with respect to Counts 1 & 3. It observed that "it would strain the bounds of common sense for this court to *sua sponte* consider a qualified immunity argument that defendant has completely failed to raise." Thus, it declined "to find that defendant is entitled to summary judgment on the basis of qualified immunity with respect to" Counts 1 & 3.

The court rejected Hust's qualified immunity argument on the merits with respect to Count 2 finding "as a matter of law that denying tools or services such as comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with the applicable Supreme Court

Rules, as to deny access to the courts under *Lewis v. Casey*, 116 S.Ct. 2174 (1996)." "[A] reasonable prison law librarian would have granted access to the comb-binding machine as soon as practicable under the *Lewis* standard... Qualified immunity does not protect the 'plainly incompetent.'" The court also rejected Hust's exhaustion argument, finding that "plaintiff... adequately alleged exhaustion."

The court denied Phillips summary judgment on Claim 1 because he "failed to demonstrate that the actions defendant took to enforce applicable prison regulations were not reasonably related to legitimate penological interests," and therefore, "he... failed to establish an essential element of Claim 1." Similarly, summary judgment was denied on Claim 3 because "there are genuine issues of material fact remaining as to defendant motivations regarding the alleged retaliatory conduct. In addition, plaintiff has not demonstrated that defendant was acting in the absence of legitimate correctional goals, which is an essential element of a retaliation claim." The court granted Phillips summary judgment on Claim 2 and held that damages on that claim shall be resolved at trial. See: *Phillips v. Hust*, 338 F.Supp. 2d 1148 (D. Or. 2004).

On August 10, 2004, the parties entered into an agreement whereby Phillips would dismiss Claims 1 and 3, in exchange for \$500 in damages and a \$750 in costs for a total of \$1,250 and a transfer from SRCI to the Oregon State Penitentiary. ODOC and Hust denied any liability, and plaintiff acknowledged that as a result of the settlement, he was *not* a prevailing party for purposes of 42 U.S.C. § 1988. He was not entitled to an award of attorney's fees, anyway, because he was a *pro se* litigant. ■

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On Remand From Supreme Court, Sixth Circuit Reverses Judgment on Guard Retaliation Claim

The Sixth Circuit Court of Appeals, on remand from the United States Supreme Court, reversed a district court's grant of summary judgment to a prison guard on a First Amendment retaliation claim.

Michigan prisoner Shakur Muhammad brought suit against guard Mark Close, alleging "Close violated his First Amendment rights by charging him with threatening behavior, which necessitates pre-hearing lockup, in retaliation for prior lawsuits and grievance proceedings not Muhammad had instituted against Close." Muhammad sought "\$10,000 in compensatory and punitive damages 'for the physical, mental, and emotional injuries sustained' during the six days of pre-hearing detention mandated by the charge of threatening behavior."

Initially, the District Court granted summary judgment to Close. The Sixth Circuit affirmed, relying on *Huey v. Stine*, 230 F.3d 226 (6th Cir. 2000) for its conclusion "that Muhammad's section 1983 claim was barred by the rule announced in *Heck v. Humphrey*, 512 U.S. 477 (1994)."

As discussed in John Midgley's June 2003 column, however, the United States Supreme Court reversed the Sixth Circuit's decision and remanded for further proceedings. *Muhammad v. Close*, 124 S.Ct. 1303 (2004). The Court held that *Huey* was wrongly decided and that Muhammad could utilize § 1983 to challenge the disciplinary action because no good-time credits or eliminated. See: [PLN, June 2004].

On remand, the Sixth Circuit addressed the merits of the district court's summary judgment findings. It noted that in "prior rulings... the District Court held that Muhammad had properly pleaded all the elements of a First Amendment retaliation claim, and that "Close conceded that the first element was satisfied,...Close argued, however, that he was entitled to summary judgment because there was insufficient evidence to satisfy the second and third elements."

Noting about the "district court's decision was based solely upon its determination that Muhammad had failed to produce sufficient evidence to satisfy the third element, causation..." the court found that "in reaching its conclusion, the

district court overlooked a key piece of evidence relating to causation: a type-written affidavit from" prisoner Bruce Coxton. This affidavit was "filed with the District Court as an exhibit attached to Muhammad's objections to the magistrate's report and recommendation [.]"

The court agreed "with Muhammad that the Coxton affidavit appears to be precisely the type of evidence of causation that the District Court thought was lacking." The court suggested that the affidavit was "a significant piece of evidence that... must be examined in connection with the causation analysis."

The court refused to address Close's challenges to the Coxton affidavit because it had been completely ignored by the

district court. "Close is free [however] to advance [his] arguments and the district court on remand."

The court also found it unnecessary to address Muhammad's argument "that the district court erred in rejecting his argument that temporal proximity between the protected conduct in a retaliatory action existed in this case, sufficient to prove causation[.]" Yet, the court suggested that given its "reliance on the Coxton affidavit,... temporal proximity alone may be 'significant enough to constitute and direct evidence of a causal connection so as to create an inference of retaliatory motive.' *DiCarlo v. Potter*, 358 F.3d 408, 422 (6th Cir. 2004)." See: *Muhammad v. Close*, 379 F.3d 413 (6th Cir. 2004). ■

Washington Prison Staff Properly Fired For Sexually Assaulting Prisoner

Division 2 of the Washington State Court of Appeals (Div. 2) has affirmed the summary dismissal of a prison guard's law-suit for wrongful discharge for sexual misconduct.

James Shinn was captain of a ferry serving the McNeil Island Correction Center (MICC). In March of 2000, an MICC sergeant accused him of giving contraband to Erin Turner, a female prisoner who worked on the ferry, in exchange for sex. Turner confirmed that Shinn had made inappropriate advances toward her.

On April 6, James Cooper, an MICC investigator, interviewed Shinn. Without allowing Shinn's union representative to speak on Shinn's behalf, Cooper placed Shinn on administrative leave.

On April 18, John Little, Shinn's supervisor, generated an Employee Conduct Report (ECR) condemning Shinn's conduct. Shinn received a copy of the ECR.

In May of 2000, Shinn was prosecuted for attempted custodial sexual misconduct. However, he was acquitted at trial.

On May 26, MICC Superintendent Alice Payne met with Shinn to discuss the ECR. On June 8 Payne formally found that Shinn was guilty of sexual misconduct and stated that disciplinary action would follow. On July 5 Payne notified Shinn by letter of a July 12 hearing to discuss his dismissal.

Shinn did not attend the hearing. He was notified by letter that his discharge would take effect on August 19, 2000.

Shinn sued the state, Payne, Cooper and Turner for violating his civil rights, wrongful discharge, negligent infliction of emotional distress, negligence and malicious prosecution. The Pierce County Superior Court dismissed all but the malicious prosecution claims, and Shinn appealed.

The civil rights claim was based on Shinn's claim that he did not receive adequate notice of the charges against him before being fired. The court found that the ECR and Payne's July 5 letter notifying him of the July 12 termination hearing satisfied any notification requirements, thus, that Shinn received all process due.

The court found that the wrongful discharge claim presented no real legal issues. Thus, the court found that issue to have been properly dismissed by the trial court.

The negligent infliction of emotional distress claim was also found to have been properly dismissed because the defendants owed no duty to Shinn, thus could not have violated any such duty.

Based on the above findings, Div. 2 affirmed the trial court's partial dismissal of the case and dismissed the appeal. The decision is unpublished. See: *Shinn v. Payne*, 2004 Wash. App. LEXIS 2992. ■

Any Reliance On AA or NA Participation During Parole Consideration Violates Establishment Clause

by John E. Dannenberg

The United States District Court, E.D. Cal., ruled that requiring a California life prisoner to attend Narcotics Anonymous (NA) or Alcoholics Anonymous (AA) as a predicate for parole constituted a state establishment of religion prohibited by the First Amendment. Furthermore, the court enjoined the Board of Prison Terms (BPT) from ever imposing such a requirement in the future, and ordered all records of past references to the prisoner's failure to attend NA expunged from his prison records.

Charles Turner, serving a 15-life sentence for second degree murder since 1979, had been denied parole by the BPT eight times. Each time he was admonished to attend NA or AA prior to his next hearing. In 1997, BPT Commissioner Steven Baker (a former San Diego Police Detective, whose small son was murdered) drove his mandate home: "Let me explain it to you so it's real simple. Do you want to get out of prison?". When Turner replied, "Yes," Baker continued, "Go to NA, learn those Twelve Steps, work those Twelve Steps. And this Board will not accept any excuses. Can I make it any simpler than that. ... [I]f you don't go to NA, I would never let you out of prison, ever. ... I can't make it any plainer, I really can't. NA is mandatory for you."

Although Turner, a Christian, had attended NA sporadically since his first parole denial, he was uncomfortable with the religious aspects of NA that required assertion of belief in a "higher power" and saying the Lord's Prayer among a group consisting of others (including atheists) who falsely so swore to get BPT credit for attendance. He sued under 42 U.S.C. § 1983 claiming the Board's actions amounted to establishment of religion prohibited by the First Amendment.

The court relied upon *Lee v. Weisman*, 505 U.S. 577 (1992) for the proposition "that government may not coerce anyone ... to participate in religion or its exercise" Applying this coercion test, the court followed the three-part test of *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996). First, as to the requirement of state action, the court found it clear that the BPT told Turner

he had to participate in NA to parole. Second, he was told if he didn't participate, he would never parole. Third, the coercion was religious, because the NA reference to "'God' necessarily implied a spiritual system of faith and worship." The Board's argument that 'God' could refer to, say, just a doorknob, fell flat under the facts of the case. Accordingly, the court followed the Second Circuit (*Warner v. Orange County Dep't Of Probation*, 115 F. 3 d 1068 (1997)) and the Seventh Circuit (*Kerr*, supra) to hold that "requiring participation in NA is an establishment of religion prohibited by the First Amendment."

The court rejected the Board's counter-argument that a recent establishment of secular alternatives to NA mooted Turner's complaint. "Mere voluntary cessation of illegal conduct does not moot a case; if it did, courts would be compelled to leave defendants free to return to their old ways." Moreover, the existence of secular alternatives would not "stop defendants from ... considering plaintiff's past failure to complete NA at future parole hearings."

Thereupon, the court ordered adoption of the Magistrate's Findings and Recommendations in full, specifying that "BPT Chair[person] Perez, their superiors, agents, co-employees and successors to state office be enjoined from considering plaintiff's refusal to participate in NA at any point in time as a basis for denying plaintiff parole." The court further enjoined Youth and Adult Correctional Agency Secretary Roderick Q. Hickman "and his successors, ... to expunge all references to plaintiff's failure to attend NA from any file maintained by the California Depart-

ment of Corrections (CDC)." Lastly, the court permitted plaintiff's counsel, Harry Arthur Oliver of Los Angeles, to apply for award of attorney fees and costs per 42 U.S.C. § 1988. See: *Turner v. Hickman*, 342 F.Supp.2d 887 (E.D. Cal. 2004).

Note: Any California lifer whose file contains unwanted references to BPT requirements to attend AA or NA should write the BPT and CDC to request expungement of their files prior to their next hearing. Of course, dealing with substance abuse remains a valid concern for parole, and those affected should seek secular treatment/counseling if they object to AA or NA. 📧

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Dismissal of *Bivens* Action for Non-Exhaustion Reversed

The Seventh Circuit Court of Appeals vacated a lower court's grant of summary judgment against a federal prisoner for failing to exhaust administrative remedies.

Federal Bureau of Prisons (BOP) prisoner Curtis Dale was stabbed seven times by other prisoners on the recreation yard at the U.S. Penitentiary Terre Haute. Nineteen days after the attack he was transferred to Oklahoma City, where he remained for seven days before being transferred to Lompoc, California.

Dale filed a *Bivens* action alleging that the Warden and two other BOP employees at Terre Haute knew he had been threatened but failed to protect him from attack by other prisoners.

The district court initially screened the complaint under 28 U.S.C. "§ 1915A and ordered Dale to supplement his complaint because he had not pleaded exhaustion." He responded that he requested grievance forms but was told the 20-day time limit for filing a grievance had expired and his only recourse was a claim under the Federal Tort Claims Act.

The district court was not satisfied with Dale's response, so it *sua sponte* dismissed Dale's complaint for failing to show that he exhausted his administrative remedies. Dale sought reconsideration, explaining that any failure to exhaust was due to the defendants' refusal to provide him with the BP-8 form he believes was necessary to prepare a grievance. The district court granted the motion and vacated its earlier order.

"The district court then dismissed the warden because Dale had not pleaded his personal involvement in failing to prevent the stabbing." The court also granted summary judgment to the remaining defendants, finding that Dale failed to exhaust his administrative remedies.

The Seventh Circuit noted that while exhaustion is a prerequisite to a *Bivens* suit, the failure to exhaust is an affirmative defense the defendants have the burden of pleading and proving. The court then rejected defendants' argument that since Dale's factual representations in response to their summary judgment motion were set forth in an unsworn response rather than an affidavit, there was no admissible evidence to support his version of events. The court noted that Dale included an "Affidavit in Support" in which he swore to the truth of the factual allegations in his response. "By declaring under

penalty of perjury that the [response] was true,...he converted the [response], or rather those factual assertions in the [response] that complied with the requirements for affidavits specified in the rule...into an affidavit, *Ford v. Wilson*, 90 F. 3d 245, 247 (7th Cir. 1996), thereby complying with Federal Civil Procedure 56(e). Therefore, Dale's verified response constitutes competent evidence to rebut the defendants' motion for summary judgment."

The court also rejected the lower court's characterization of Dale's evidence as "bald assertions," finding that the level of detail Dale provided "cannot be dismissed as 'bald assertion.'"

"Because Dale provided sufficiently

specific facts to support his allegation that he requested the correct grievance form at Terre Haute," the court explained, "the question becomes whether defendant's refusal to comply with his request means that Dale had no available administrative remedies." Ultimately, the court concluded that defendants failed to "meet their burden of proving that Dale had available remedies that he did not utilize." The court explained: "The defendants...have yet to give any reason why Dale was refused the forms he requested, or to explain how he could use the administrative grievance system without the forms mandated for that purpose." See: *Dale v. Lappin*, 376 F.3d 652 (7th Cir. 2004). ■

California Probationers and Parolees Not Similarly Situated As To Eligibility For "Prop. 36" Drug Treatment

by John E. Dannenberg

The California State Supreme Court held that Equal Protection claims as to parolees and probationers do not save a probation violator's claim for eligibility to receive alternative drug treatment in lieu of prison. Under California's 2000 Initiative Act "Proposition 36," courts are required to order probation and community-based drug treatment rather than incarceration for specified offenders whose newest crime is a "nonviolent drug possession offense" (NDPO). While this treatment is available to parolees whose earlier offense was not an NDPO, it is not available to probationers under the language of Prop. 36. The California Court of Appeal had ruled that Equal Protection principles bootstrapped probationers' eligibility to that of parolees (see *PLN*, Jun.' 04, p.11); the California Supreme Court now reversed.

Gregory Guzman had a February, 2001 conviction for corporal injury on a cohabitant and misdemeanor battery on a peace officer. Guzman was on drugs at the time. He took a deal for three years probation plus eight months county jail. In October, 2001, he pled guilty to another drug possession/use charge. Both of these new offenses qualified as NDPOs. Under Prop. 36, the court granted probation and ordered drug treatment. However, he was subsequently arraigned on a violation of his first probation, but the court denied

Prop.36 probation for that charge and imposed the two-year suspended prison term. The Court of Appeal reversed after determining that if Guzman had been on parole, not probation, he would have qualified for Prop. 36 in lieu of prison, and granted relief on Equal Protection grounds.

The California Supreme Court agreed with the appellate court's interpretation of the underlying statute that probationers were worse situated than parolees in this regard, but disagreed that the courts could "repair" the Legislature's intent by in essence rewriting the statute to invoke Equal Protection to retrospectively render the two classes "similarly situated as to the purpose of the law." The Supreme Court found that probationers had the ability to stay out of prison by behaving, but chose not to do so by violating both the law and the terms of their probation. Parolees, on the other hand, had by definition served their full term for the underlying NDPO and the criminal conduct that produced it when they were released onto parole. Completing their prison term thus ended any period of Prop. 36 ineligibility. But probationers were still subject to the prison term they had (so far) avoided. Therefore, they were not similarly situated as parolees for Prop. 36 drug treatment purposes. See: *People v. Guzman*, 35 Cal. 4th 577; 107 P.3d 860 (Cal. 2005). ■

Sixth Circuit Requires Total Exhaustion Under PLRA; Decision Conflicts with *Hartsfield*

A panel of the Sixth Circuit joined the Eighth and Tenth Circuits in holding that the Prison Litigation Reform Act (PLRA) requires total exhaustion. One judge dissented, however, criticizing the majority opinion as being invalid for conflicting with *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999).

Lamar William Jones Bey, a prisoner of the Michigan Department of Corrections (MDOC), filed nine grievances against guard Kelly Johnson and one against Grievance Coordinator Wayne Trierweiler, between October 2001 and April 2002. Some of those grievances were fully exhausted but several were not.

Jones Bey brought suit against Johnson and Trierweiler, alleging violations of the First Amendment and his Eighth Amendment right to be free of excessive force. The district court granted Defendants summary judgment, finding "Jones Bey had not fully exhausted his administrative remedies as required by the" PLRA.

The Sixth Circuit explained that it is an open question in the circuit, "whether the PLRA requires a complete dismissal of a prisoner's complaint when that prisoner alleges both exhausted and unexhausted claims." Citing *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000), the Majority claimed that the Circuit has "left unanswered...whether the PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims must be completely dismissed for failure to exhaust." It also acknowledged, however, that "at least one of [the] court's prior decisions suggests that total exhaustion is not required under the PLRA," (See *Hartsfield*) and several unpublished opinions followed this decision.

The dissent showed more respect for *Hartsfield*, concluding that it "is a binding opinion" which forecloses "the majority's failed attempt to apply a total exhaustion rule." The dissent viewed the majority decision as "a nullity to the extent that it conflicts with *Hartsfield*" and argued: "Because we are bound by *Hartsfield* unless and until the *en banc* court holds otherwise, the majority's contrary opinion is not the controlling law in the Sixth Circuit, and should not be followed by future panels of this Court.

The Majority noted that there is a Circuit split on the issue, comparing *Ross v. County v. Bernalillo*, 365 F.3d 1181, 1190

(10th Cir. 2004) (applying total exhaustion) *Kozohorsky v. Harmon*, 332 F.3d 1141 (8th Cir. 2003), (same) and *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000) (same), with *Ortiz v. McBride*, 380 F.3d 649 (2nd Cir. 2004) (rejecting the total exhaustion). Ultimately, it sided with the Eighth and Tenth Circuits.

The Majority also claimed that its decision was based "in large part" upon "the plain language of" 42 U.S.C. § 1997e(a), but the dissent found the Majority's "reliance on the PLRA language...unpersuasive." Rather "the majority must necessarily perform a gymnastic interpretation of other subsections of the statute, in order to reach its conclusion that Congress 'intended' total exhaustion."

Finally the Majority based its conclusion upon a comparison of prisoner civil rights litigation and habeas corpus, which the dissent found to be "completely inappropriate in light of clear Supreme Court precedent."

The dissent's criticism of the "total exhaustion" rule stemmed in part from its observation, and that of other courts, that "many prisoners do not understand the exhaustion rule" and "many, if not most, *pro se* prisoners have little or no education, resources or understanding of complex legal principles such as the exhaustion of administrative remedies." Meanwhile, "the total exhaustion rule is...likely to be a convenient means for district courts to expediently close the courthouse door to *pro se* prisoner litigants, without proper regard for the merits of their claims or consideration of their status." See: *Jones Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005). ■

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Fair Labor Standards Act's Minimum Wage Provision Not Applicable to Private Prisons

The Seventh Circuit Appeals Court affirmed a lower court's decision that held prisoners are not entitled to the minimum wage provision of the Fair Labor Standards Act, 29 U.S.C. § 201 (FLSA).

Jay R. Bennett and James W. Knipfer are prisoners at Whiteville Correctional Facility (WCF), a private prison in Tennessee owned by Corrections Corporation of America which is under contract to the Wisconsin Department of Corrections. The prisoners filed suit claiming they were entitled, as employees, to the minimum wage provision of the FLSA.

The lower court held that they were not entitled to any of the benefits of the FLSA. Consequently, the prisoners appealed.

The Appeals Court held the FLSA is intended for the protection of employees, and the prisoners are not classified as "employees" of their prison, whether the prison is a public or private one.

The Act unhelpfully defines "employee" as "any individual employed by an employer" and defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency." The Court held, however, the prisoners are not a part of this definition. "Although the minimum wage provision of the Act applies only to employees engaged in, or producing goods for, commerce or employed in an enterprise engaged in or producing goods for commerce, § 206(a)(1), we do not know whether Bennett and Knipfer were engaged in any such activities."

The Court further held that prisoners are not employed to earn a living, but to offset some of the cost of keeping them because the prison pays for their keep. If prisoners are put to work, it is for the goal of keeping prisoners out of trouble, allow for a smoother transition to the outside, or to provide prisoners with skills that can be used upon release; thus, reducing the likelihood of reoffending.

As far as the distinction between a prison being public or private, the Court held that it makes no difference in neither of the rights nor the liabilities of a state agency should be affected by its decision to contract out a portion of the services

that state law obligates it to provide. The fundamental point is that both public agencies and private firms have employees. But prisoners are not employees, the court determined.

In addition, the Court held that even though FLSA does not apply merely because WCF hired a private company to manage prison labor, FLSA applies to

prisoners working for private companies under work-release programs because of those prisoners are working as free laborers in transition and not under prison labor as in the case of Bennett and Knipfer.

The lower court's decision was affirmed in its entirety. See: *Bennett v. Frank*, 395 F.3d 409 (7th Cir. 2005). ■

Washington Appeals Court Reverses the Dismissal of a Slip-and-Fall Negligence Action; State Responsible for Negligence of Prisoner Laborers

In an unpublished opinion, the Washington Court of Appeals held that a trial court erred in dismissing a prose prisoner's negligence action against the Washington Department of Corrections (DOC) in a slip-and-fall case.

Dick Baker was a prisoner at McNeil Island Penitentiary in 1997. On July 17, 1997, sometime between midnight and 2 a.m., Baker went to the unit bathroom. "As he stepped along the railing... he slipped and fell..., hitting the back of his head. He blacked out momentarily and then heard the guard calling out to ask if he was 'okay'. Baker replied that he was, and continued to the bathroom."

Back in his cell, Baker "discovered that the back of his head was covered with a wet slimy substance that he identified as cement sealer." Apparently, "prison 'porters' place cement sealer on the floor and later buff the floor after the sealer is dry. This is done during the graveyard shift,... The usual procedure is to place cones and tape around areas that have been mopped or sealed to alert prisoners that the area is not safe. On this occasion, Baker did not see either cones or tape present."

The following morning, Baker went to the prison infirmary, told them he had fallen onto the back of his head and neck. Two weeks later, Baker returned to the infirmary, complaining of headaches, a sore neck and blurred vision following periods of reading. The physician's assistant on-duty diagnosed a concussive headache localized in the back of the head.

Baker brought suit against DOC in state court for injuries suffered as a result of the fall. Baker was unable to retain counsel and represented himself during the ensuing jury trial.

"[A]t the close of Baker's case, DOC moved to dismiss..., arguing that DOC had only a duty of ordinary care toward Baker and that Baker had failed to prove a breach of that duty. The trial judge denied the motion."

DOC then presented its case, asserting "that the fall never happened." This was based largely upon the testimony of Jimmy Carrett "who testified that he was the guard on Baker's unit and maintained the log book for the unit. If Baker had fallen, he would have noted the fall in his log book, but there was no such notation... On cross examination, Baker pointed out that he had not been in the unit that Carrett said he guarded." Carrett and Lieutenant Terry Wetland also "denied that cement sealer was used on floors in 1997. It had been used earlier but its use was discontinued because it was too slippery."

After DOC rested, it renewed its motion to dismiss. "The court granted the motion, ruling that Baker had failed to prove DOC's standard of care, had thus failed to establish a breach of duty, and had failed to provide any 'evidence of any proximate cause between a head injury,... and the Department Of Corrections.' The jury was dismissed without deliberating upon the case."

At a subsequent hearing, DOC acknowledged that the wrong logbook had been introduced into evidence, the correct

logbook was “found and contained an entry stating that ‘inmate Baker exited the room and slipped on wet sealer.’” Baker disagreed arguing that “the logbook demonstrated that false evidence had been presented at trial as well as ‘perjured’ testimony, and as such were grounds for a mistrial.”

“The trial court expressed concern that the new evidence countered so much of the State’s case. The court decided to sign the order to dismiss, but she dismissed without prejudice. Baker inquired what dismissal without prejudice meant. The trial judge explained that he could continue with the case and that the ruling was in Baker’s ‘favor.’”

The Court of Appeals reversed explaining that “[t]he correct logbook confirmed Baker’s testimony and thus negated a great deal of DOC’s evidence at trial.” The court observed that while a “dismissal without prejudice ordinarily gives the plaintiff another day in court” it would not do so for Baker because “the statute of limitations had expired and Baker was precluded from refile [the] case.” Therefore, the court held that “the trial court erred in dismissing the case without prejudice and in failing to grant Baker’s request for a mistrial, the only remedy capable of bringing the proper evidence before a jury.”

Turning to the merits of Baker’s negligence claim, the court discussed DOC’s duty of care, explaining that “where the State draws a financial advantage from prison laborers, the State is legally responsible for reasonably foreseeable negligence by such laborers.”

The court then found that the “conflicting testimony created a question of fact for the jury” with respect to whether there was a breach of duty by DOC. Rejecting DOC’s argument “that Baker cannot recover without expert medical testimony to establish proximate cause” the court concluded that while “Baker needed expert medical testimony to establish that he suffered long-term medical repercussions as a result of the fall[]” his “own testimony about his pain and headaches in the days following his faults are matters clearly within the experience of laypersons.” Thus, “his testimony on short-term injury was sufficient to go to the jury.” See: *Baker v. State of Washington*, 2004 Wash. App. LEXIS 2312

2nd Circuit Reverses *Sua Sponte* § 1915 Dismissal; Parolee Owed Duty of Habitable Residence

The Second Circuit Court of Appeals reversed a district court’s *sua sponte* dismissal, pursuant to 28 U.S.C. § 1915(e)(2)(b)(ii), of a New York parolee’s action, for failure to state a claim.

“Alonzo Jacobs, a parolee under the supervision of the New York State Division of Parole,” brought suit in federal court against several parole officers. He alleged that Defendants violated his “civil rights by the paroling him to his mother’s unsafe and unsanitary residence, refusing his request to relocate to a homeless shelter, refusing to assist him in obtaining employment through the Division of Parole Job Placement/Referral Program, and coercing him to sign a sex offender registration form upon his release from prison even though [he] was not convicted of a sex offense.”

Pursuant to § 1915, the district court *sua sponte* dismissed for failure to state a claim, concluding “that Jacobs did not allege a violation of any right protected by the United States Constitution or by federal law.”

The Second Circuit reversed, because it could not “say that Jacobs... failed to state a claim that his placement in an allegedly uninhabitable home violated the state’s affirmative duty to ‘assume some responsibility for his safety and general well-being’ while he remained under its supervision and subject to the restrictions of parole.”

Citing *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989), the court explained that “having agreed to parole Jacobs to the home in which he sought to be paroled, the state assumed a very limited duty

of ensuring that it did not *require* him to remain in a place that turned out, at least according to his allegations, to be uninhabitable.”

“Because Jacobs alleges that the State effectively *compelled* him to live in unsafe conditions,” the court could not “conclude ‘beyond doubt’ that he ‘can prove no set of facts’ that would entitle him to relief.” Therefore, the court reversed “with respect to the state’s decision to parole him to allegedly unsuitable housing and its alleged refusal to allow him to move.”

With respect to the sex offender registration claim, the court agreed that Jacobs had not stated a claim. It suggested, however, that “the district court may... wish to permit Jacobs to file an amended complaint in the event he has some grievance as to other restrictions placed on him in connection with his alleged classification as a sex offender by the Probation Division.” The court affirmed the dismissal of Jacob’s remaining claims. See: *Jacobs v. Ramirez*, 400 F.3d 105 (2d Cir. 2005).

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Arizona: On March 22, 2006, David Leyva, 24, a guard at the Pima county jail was arrested on charges that he conspired to possess an unidentified narcotic drug.

Arkansas: On March 21, 2006, a brawl involving 12 prisoners that started over a bag of stolen instant coffee was quelled by guards using pepper spray. Three prisoners were injured in the fight. Prisoner Charmorro Williams is expected to lose an eye after being struck in the eye with a lock in a sock, another prisoner suffered a broken jaw. Some three dozen prisoners were moved to other prisons afterwards.

Brazil: On March 23, 2006, prisoners at the Jundai jail rioted and seized control of the prison, which was designed to hold 120 but was holding 470 at the time of the riot. At least seven prisoners died of smoke inhalation from fires started by the prisoners to protest the transfer of prisoners to other jails.

Colorado: On March 22, 2006, a jury found state prisoner Clair Lloyd Beazer, 42, guilty of third degree assault, a misdemeanor, for gouging out the eye of fellow prisoner William Means, 41. Prosecutors had charged Beazer with second degree assault, a felony. No reason was given for the attack.

Colorado: On March 25, 2006, Juan Carpio and Manual Luna, both 24, escaped from the segregation unit on the fourth floor of the Pueblo county jail by dismantling a window frame and climbing down bed sheets. While climbing out of their cell their 55 foot rope broke and the men fell about 35 feet, hitting a security fence. Carpio was injured in the fall and recaptured about an hour later, Luna got away. Carpio was awaiting trial on kidnapping and burglary charges and extradition to Missouri on murder charges. Luna was awaiting trial on armed robbery charges. This was the first successful jail escape since 1980. The jail is badly overcrowded, designed to hold 183 prisoners, it held 508 at the time of the escape. A third prisoner in their cell decided to stay behind and was being investigated as an accessory to escape.

Colorado: On March 27, 2006, David Frisco, 48, a Larimer county bail bondsman who operated bail bond businesses Colorado Bail Bonds, Golden West Bail Bonds and Acoma Ten Percent Bail Bonds was sentenced to 12 years in state prison for demanding sex, stolen property and

drugs from people accused of crimes in exchange for posting their bond. Frisco also video recorded his sexual encounters with the extortion victims, without their knowledge. In addition to possessing copious amounts of stolen property, drug and bomb manufacturing ingredients, Frisco was not licensed as a bail bondsman.

Florida: On February 25, 2006, a jury convicted state prisoner Dwight "Tommy" Eaglin, 30, of capital murder for killing prison guard Darla Lathrem, 38, and prisoner Charles Fuston, 36, with a sledgehammer while trying to escape from a prison in Punta Gorda in 2003. On March 30, 2006, circuit judge William Blackwell sentenced Eaglin to death for the murders. Eaglin's co-defendants, Stephen Smith, 44, and Michael Jones, 49, are scheduled for trial later this year.

Georgia: On March 27, 2006, prisoners attempting to escape from the Ortochala prison in Tbilisi in this former Soviet republic rioted and set the prison on fire. Police stormed the prison and in the ensuing gun battle at least two guards and seven prisoners died. Elena Tevdoradze, head of the parliament's committee on human rights said "I consider one of the reasons for the uprising the fact that six inmates had been beaten brutally in the prison hospital."

India: On March 24, 2006, over 80 Marxist Naxalite guerrillas stormed a jail in R Udagiri in the province of Orissa and freed its prisoners. During the attack the guerrillas killed two policemen, police claimed to have killed three guerrillas.

Indiana: On March 22, 2006, a Steuben county judge held a bench trial brought by Mark Collier, who was convicted of the attempted murder of his ex wife, against Grace Bertioia, the wife of sex offender Timothy Bertioia, 48, who was his cellmate in the Steuben county jail while he was awaiting trial. During his jail stay Collier received a divorce settlement and at Timothy's suggestion, gave Grace a power of attorney to open a bank account to deposit his \$11,156.66 divorce settlement. According to his lawsuit, Grace then proceeded to systematically loot the bank account, buying household appliances for herself, paying her husband's attorney fees and otherwise pilfering the money. Judge Fee has not issued a ruling yet. Timothy was not named in the suit. He shared a cell with Collier while serv-

ing a sentence for forcing two children younger than six to perform sex acts on him, each other and a dog while they stayed with him. Police also found over 700 images of child pornography on his computer.

Iowa: On March 11, 2006, Jonathan Havener, a prisoner at the state prison in Anamosa, was awakened by prison guard Richard Warner after his hot pot caught fire while he was sleeping and filled his cell with smoke while he was sleeping. Havener thanked Warner for saving his life. Warner also infractioned Havener for leaving his hot pot on too long.

Iowa: On March 21, 2006, Darrell Alderton, an HIV positive prisoner in the Johnson county jail was charged with sexually assaulting another prisoner in the jail. Alderton is awaiting trial on charges that he sexually abused a 16 year old boy and exposed him to HIV.

Massachusetts: On March 21, 2006, the Plymouth county jail fired jail guards Steve Anstatt and Rick Stanphy and demoted captain Chris Hughes and suspended him without work pay for 40 days and suspended guard David Rose. The discipline occurred for the guards allowing prisoners working in the jail's print and embroidery shop to tattoo themselves.

Michigan: On March 21, 2006, Jodi Axley and Kathy Sleep, prison employees who had already been charged with helping a prisoner escape from the Baraga Maximum Security Facility in August, 2006, were charged with a felony count of sexual assault for allegedly having sex with the same prisoner.

Michigan: On March 28, 2006, former US assistant attorney Richard Convertino, 45, and state Department regional security officer Harry Smith III, 49, were indicted by a federal grand jury in Detroit for conspiracy, obstruction of justice and making false declarations. The charges stem from the duo's botched terrorism prosecution of North African immigrants on charges they formed a terrorist cell. Two of the immigrants were convicted and later had their convictions reversed when it was discovered that Convertino had concealed evidence that would have aided their defense. In a second case Convertino is accused of giving a judge false information in order to reduce a defendant's sentence.

Michigan: On March 30, 2006, Jody Evans, 32, a guard at the Otsego county jail in Gaylord was suspended for three days without pay for spreading toothpaste on the stomach of a sleeping prisoner. In 2002 she and another female guard had been disciplined for applying women's make up to male prisoners. She had previously been disciplined for another incident, which was expunged from her record per her union contract, that resulted in a lawsuit settlement of \$1,500 to a prisoner. It sounds like Ms. Evans might be in the wrong line of work.

Mississippi: On March 30, 2006, Tomeka Brown, 26, a former guard at the Geo Corp. run East Mississippi Correctional Facility was sentenced to a three year suspended sentence after pleading guilty to helping prisoners Gregory Malone, 26, and Christopher Roy, 24, escape from the prison. Brown admitted driving the two men to Tuscaloosa and paying for their motel room. Both men, who had been serving sentences for murder, were recaptured shortly afterwards.

Nevada: On March 21, 2006, an administrative hearing officer upheld the firing of prison guard Bruce Jackson for punching Associate Warden of Operations Isidro Baca on July 18, 2005, while working at the High Desert State Prison. Baca claimed Jackson punched him on the face and left side when he ordered him to write a report about the mistaken release of a prisoner.

New York: A series of three fights on March 25 and 26th, 2006, at the Elmira Correctional Facility led to a prison wide lockdown. Groups of 4 to 8 prisoners were involved in each incident. No reason was given for the disputes.

New York: On March 29, 2006, 24 former prisoners who had applied for jobs at Kennedy and La Guardia airports were arrested for allegedly lying on job application forms that asked them if they had been convicted of a criminal offense.

Ohio: On March 29, 2006, Greg Kopp, 40, a former guard at the Garfield Heights jail pleaded no contest to sexually harassing a female prisoner in the jail and was sentenced to 30 days in jail and one year of probation. Kopp admitted to asking the prisoner obscene questions and making vulgar remarks while he watched her shower.

Pennsylvania: On March 29, 2005 a jury found Wackenhut Corrections Corporation employee Sandra Denise

Belt guilty of numerous crimes in relation to her theft of more than \$26,000 in prisoner funds between January and May 2001. Belt was employed at the Delaware county prison. Although "the money involved funds taken from inmates' accounts, the prisoners were reimbursed as they were released and so were not victims," said Detective Sgt. Joseph Ryan. "The inmates never lost money,... It was the prison that lost money," testified Ryan. On April 14, 2005, Belt was sentenced to 11 ½ to 23 months in jail for the theft.

Pennsylvania: On March 29, 2006, an unidentified guard at the Northeast Prison Complex in Philadelphia lost his loaded .38 caliber Smith and Wesson revolver while transporting a group of 10 prisoners to the jail. The guard was suspended for 20 days pending an inquiry. Jail officials claim to have no idea where the gun is but don't believe it is in the jail.

South Dakota: On March 21, 2006, Tara McBride, 23, a prisoner, pleaded guilty to distributing methamphetamine to fellow prisoner Heather Steele, 25. McBride was sentenced to an additional 8 years in prison, Steele, who had also pleaded guilty was sentenced to three ad-

ditional years in prison.

Tennessee: In a move ostensibly aimed at halting the concealment of contraband, Department of Corrections officials banned the sale of peanut butter on prison commissaries claiming that prisoners were using the 18 ounces jars to conceal guns, drugs and cell phones in them. The DOC announced it would return the 4,600 jars of peanut butter it had on hand to a vendor and replace them with one ounce packets of peanut butter.

Texas: On March 28, 2006, Sylvia Rivas, a nurse at the Cameron county jail, was arrested on charges she stole medications intended for prisoners, including narcotics, anti anxiety pills and more.

Texas: On March 30, 2006, Louisiana Correctional Services, a private, for profit, prison company, sued the *San Antonio Express* and Hearst Newspapers claiming it had been libeled when the newspapers described corruption and mismanagement at the LCS run Bexar county jail. Jonathan Donnellan, the paper's senior attorney responded: "The paper was simply fulfilling its role as the eyes and ears of the public, and based its reporting on public records, public meetings and officials' statements." 📰



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Prisoner Suit Alleging Sexual Assault By Colorado Sheriff's Staff Reinstated

by John E. Dannenberg

Reversing the U.S. District Court (D. Colo.), the Tenth Circuit U.S. Court of Appeals held that a review of the record showed that female prisoners alleging sexual assault by Huerfano County Jail (Colorado) sheriff's deputies had made a sufficient factual showing to survive summary judgment.

On October 13, 1998 prisoner Tereza Gonzales was escorted to the Commissary by Huerfano jail administrator Robert Martinez ("Major Bob") to a small commissary room to fetch a comb for her. Inside, Major Bob pulled a knife and told Gonzales, "Once you're in this room, you belong to me," and proceeded to sexually assault her. The same day, prisoner Amanda Guel was called to the control room by senior detention officer Dominick Gonzales and also sexually assaulted. Both women reported the crimes to Huerfano County Sheriff John Salazar, who agreed to meet with them the next morning. Instead, Salazar drove Tereza to a court appearance and told her to give her report to her public defender. Upon their return to jail, Major Bob called Tereza to the control room, where he said, "Let's start off where we left off yesterday." He forced her into a kiss and body embrace, but she pushed away.

Salazar then met with both women, the public defender and the District Attorney (DA). Shortly thereafter, the DA called Salazar and told him to release both women. The DA's investigation resulted in Major Bob's and Dominick's suspensions; both were later charged with and

convicted of the assaults.

Gonzales then sued under 42 U.S.C. § 1983, alleging that there were other incidents of sexual assaults at the jail of which Salazar and Martinez were aware, but that both failed to take steps necessary to assure the safety of women prisoners, thereby violating Gonzales' Eighth Amendment rights against cruel and unusual punishment. The complaint further alleged failure to provide adequate supervision and training of sheriff's department personnel. Salazar and the county moved for summary judgment claiming that the allegations contained no constitutional violations and that Salazar was qualifiedly immune. The magistrate judge granted the motion.

The Tenth Circuit disagreed. It held that the prisoners met the test of *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) where officials "disregarded an excessive risk to inmate health and safety" by the fact of

the prior incidents establishing notice. "An Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.*, at 842. Reviewing proffered evidence of five other women who claimed similar assaults at the jail, and further evidence that Dominick had been arrested at a local bar for harassing female dancers there, the Tenth Circuit found that there was substantial evidence that Salazar both knew of his employees' salacious behavior and failed to protect prisoners from it. Thus, there was a triable issue of fact (deliberate indifference) and summary judgment could not stand. Accordingly, the Tenth Circuit reversed the district court and remanded for further proceedings. See: *Gonzales v. Martinez*, 403 F.3d 1179 (10th Cir. 2005). ■

Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news

about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.

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The Celling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 Pages. \$19.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

Everyday Letters For Busy People, by Debra Hart May, 287 pages. \$15.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters 1048

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$11.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

Spanish-English/English-Spanish Dictionary, 60,000+ entries, Random House, \$5.99 Two sections, Spanish-English and English-Spanish. All entries listed from A to Z. Hundreds of new words. Includes Western Hemisphere usage. 1034

Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. & Canada, by Jon Marc Taylor, 341 pages. \$24.95. Includes contact info & outlines courses offered by over 250 education providers. Info on high school, vocational, paralegal, law, college and graduate courses. One of a kind prisoner resource. 1047

The Citebook, 21st ed., by Tony Darwin, Starlite, 306 pages, \$41.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

Deposition Handbook, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$29.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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Roget's Thesaurus, 717 pages. \$5.99. Over 11,000 words listed alphabetically linked to over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and identifies informal and slang words. 1045

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Capital Crimes, by George Winslow, 360 pages. \$19.00. Explains how economic policies create and foster crime and how corporate and government crime is rarely pursued or punished. 1024

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$17.00. Documented and has first hand reporting on law enforcement's war on the poor. Covers paramilitary policing and SWAT teams, the INS and prisons. 1002

The Perpetual Prisoner Machine: How America Profits from Crime, by Joel Dyer, 318 pages. \$19.00. Exposes how private prisons, banks, investors and small companies profit from the prison industrial complex, and prison growth adds to revenue & profits. 1025

Crime and Punishment In America, by Elliott Currie, 230 pages. \$12.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

Worse Than Slavery: Parchman Farm & the Ordeal of Jim Crow Justice, by David Oshinsky, 306 pgs \$14.00. Analysis of prison labors roots in slavery. Focuses on prison plantations and self sustaining prisons. Must reading to understand prison slave labor today. 1007

States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World, by Danny Cox & John Hoover, 256 pages, \$14.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

BOP Occupational Training Programs Directory, 124 pgs. \$10.00. Directory listing vocational and education programs available to prisoners in every federal prison. Includes contact info for BOP national, regional and CCM offices, and BOP facilities. Invaluable if considering a training or education transfer. 1053

Criminal Injustice: Confronting the Prison Crisis, by Elihu Rosenblatt; South End Press, 374 pages. \$18.00. A radical critique of the prison industrial complex. 1009

Marijuana Law: A Comprehensive Legal Manual, by Richard Boire, Ronin, 271pages. \$17.95. Examines how to reduce the probability of arrest and successful prosecution for people accused of the use, sale or possession of marijuana. Invaluable information on legal defenses, search and seizures, surveillance, asset forfeiture and drug testing. 1008

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Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$13.95**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson; Lawrence Hill Books, 368 pages. **\$16.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016 ☐

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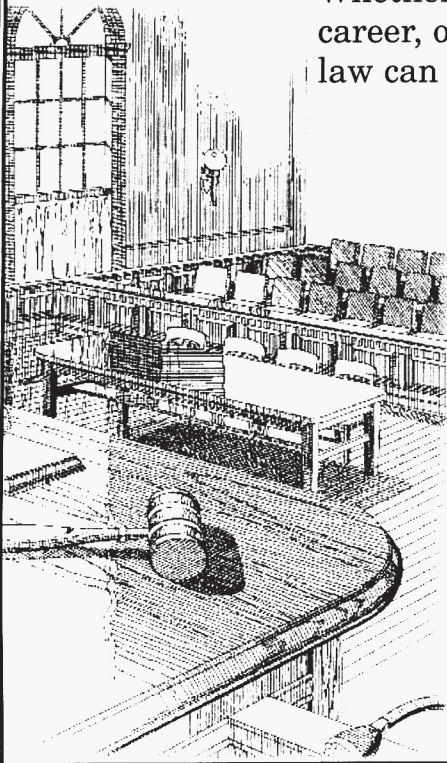
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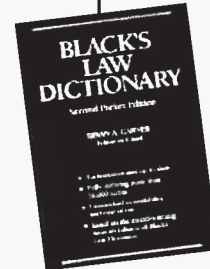
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Dedicated to Protecting Human Rights

May 2006

Scandal, Suicides, Corruption and Abuse Abound at New York City's Rikers Island Jail

by Gary Hunter

When Rikers Island was purchased in 1884 it was only 87 acres. The city of New York made it a landfill and expanded it for the city's Department of Correction a fact that has piled as much garbage above the ground as beneath. Corruption on Rikers Island reaches from bottom to top and has resulted in the abuse, brutalization and deaths of countless prisoners. Rikers Island is the jail complex for New York City which holds pretrial detainees and those serving sentences of less than one year and sentenced felons awaiting transport to the state prison system. Currently holding around 14,000 prisoners, Rikers Island

has held as many as 20,000 prisoners. It is one of the largest jails in the country.

Corrupt Chiefs

Dominick Labruzzi, a captain at Riker's Island juvenile jail, was charged, on January 31, 2006, with sexually assaulting several teenage boys under his custody. Several young boys, who had no contact with each other, told strikingly similar stories to investigators. Each boy described a basement to where Labruzzi would take them then fondle their genitals as he pretended to search them.

"I was thinking, that wasn't right.... He had me take off my pants and searched me again and told me to squat down, I don't know what he was doing behind me," said one boy.

A second youth told a similar story. "He searched me and put his hands in my pocket and started touching me perversely down there...on my private parts... he told me to strip and he told me to squat down...I was thinking something was wrong here."

One Rikers' investigator told reporters that all of the victims were "Young Spanish kids, no facial hair, curly black hair, very innocent looking, very young looking....They all describe the same thing. The pinching of the nipple, the frisking of the hand in the pockets. In a couple of instances he interviewed them totally naked."

Other officials confirm that Labruzzi's methods fell far outside the normal procedure for a strip search. As many as a dozen boys described how they were taken to a basement with a metal door. One

youngster was so distraught he initially considered suicide. He eventually agreed to an interview with ABC reporter Sarah Wallace.

Sarah: "Did he use a key to get in the basement?"

Boy: "Yes, it was a metal door...He patted me down and he searched me and he took my clothes and he touched my nipple, then my private parts."

Sarah: "And then you were naked then?"

Boy: "Yes...he was squeezing my private parts." One question brought a flood of tears to the teen who was barely able to continue.

Sarah: "He asked you for oral sex?"

Boy: "Yes."

Sarah: "Did you feel pressure to do it?"

Boy: "I was scared. The Captain, he threatened me that if I told anyone, he'd come back for me, one way or another. I wanted to kill myself."

Sarah: "Why did you want to kill yourself?"

Boy: "I was frightened."

The young prisoner says he never gave in to Labruzzi's request for sex. But the sheer terror and trauma drove him to the mental health clinic. It was at this point he discovered there were other victims.

Sarah: "What do you think should happen to him?"

Boy: "I feel he should be arrested and put in jail for what he did."

Authorities agree with the boy's assessment. Labruzzi was charged with 10 counts each of child endangerment, forcible touching, third degree sexual

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Rikers Island Jail (cont.)

abuse, and harassment. He is currently suspended without pay and free on \$30,000 bond.

Former Rikers bureau Chief Anthony Serra was sentenced to two one year terms in jail on charges of felony grand larceny and misdemeanor conflict of interest. Serra, a major player in Gov. Pataki's election campaign, had originally faced a 144-count indictment. The former chief had illegally used Department of Correction employees to remodel his home then falsified payroll documents to show they were at work. Both sentences will run concurrently with an eight month federal sentence for tax evasion. Serra was convicted on the tax charge for money he failed to report while working on Gov. Pataki's campaign. Serra will also be required to serve two months of house arrest, two years on parole and pay \$50,000 in restitution in addition to the \$25,000 he has paid already.

Robert Boccio, an agency director for the Department of Juvenile Justice (DJJ) resigned his post in late February 2006 when the Department of Investigation (DOI) began scrutinizing inappropriate departmental practices. Boccio's resignation is directly related to the August demotion of Crystal Monge the former Deputy Commissioner for Operations and Detention.

Both Boccio and Monge are accused of "cooking the books" in an effort to misrepresent management reports that ranged from everything to "weapons and narcotics recoveries" at the DJJ to falsifying the times for court appearances.

The investigation began in September 2004 when, according to one insider, "DJJ has revised its data on recovered contraband, as a result of an intensive review of the systems used to calculate these statistics."

Boccio's annual salary, with the DJJ, was \$75,978. Monge's demotion resulted in a drop in pay from \$124,811 annually to \$74,118.

In 2004 Mitchell Hochhauser, a deputy warden at Rikers, was sentenced to 1-3 years in prison for his role in the theft of a Salvador Dali painting that the famous artist had donated to the prisoners of the jail during a visit in 1965. Several other guards and employees were charged and convicted in the theft.

The article following this story about

the absolute corruption of former New York jail chief Bernard Kerik shows that corruption within the New York City Department of Correction truly begins at the top. A book could easily be written about the depth and breadth of high level corruption at Rikers Island in the past 20 years. Moreover, assorted criminal investigations are far from complete.

Brutality

Rikers' prison, Anna M. Kross Center, became an arena of abuse on October 5, 2005. It initially began as a clash between a guard and a prisoner when Kenneth Robinson slashed guard Alan Gold in the face with a sharpened watch face. Robinson fled but, with nowhere to run, he was soon apprehended. It could have and should have ended there but it didn't.

Guards were intent on sending a message. Dozens of infuriated guards, dressed in riot gear and armed with batons, stormed the cellblocks bent on revenge.

"Who's in charge of this house?" a guard screamed at Michael LoMonaco as he punched him repeatedly.

"You are, you are!" LoMonaco screamed back but it did not stop the beatings.

LoMonaco, a mental health patient, was among dozens of prisoners who were beaten as they lay handcuffed on their bunks. Guard Joseph Collins was captured on video beating prisoner Sequan Prude in the face.

"They kicked him in the back and the ribs," said his grandmother Lottie Prude, when she saw him. "But his face. Oh God. I didn't want him to see me crying. I couldn't help it."

Kareem Williams was also beaten repeatedly by guards. His mother, Carolyn Williams, visited Kareem three days later. Kareem had a black eye and a list of 16 victims which he managed to pass to his mother. More than a dozen prisoners were injured.

The October incident only brought to a head a sore that has been festering at Rikers for years. A lawsuit filed in 2002, in behalf of over 20 prisoners, was settled on February 28, 2006 as the city agreed to pay \$2.2 million to prisoners victimized by jail guards. Among the most notable victims were Shawn Davis who was blinded in one eye, Eric Richards received a ruptured eardrum and Charles Paige suffered a fractured cheekbone. [See accompanying article for details.]

"The very first blow was to my face,"

said Paige. He was handcuffed behind his back at the time.

Paige, a 46-year old Muslim was undergoing a cell search on December 4, 2001 when a Rikers' guard stepped on his prayer rug. When Paige protested, he was escorted to another room. When he returned to his cell, after the search, two

of his holy books were submerged in the toilet.

Paige began banging on the window of the guard picket. The 130-pound Paige was then pepper sprayed, handcuffed and beaten. At one point he was held from behind by one guard and punched in the face by another. When it was over Paige's face was fractured just below his right eye.

Shawn Davis is schizophrenic, easily excitable and now serving time in state

prison in Beacon, New York. When he could not obtain his medication Davis threw a plastic chair. Davis was quickly subdued by guards, handcuffed behind his back and dragged down the hallway to his destination. Near the end of the incident one guard punched Davis in the face another kicked him in the temple.

"Both eyes just shut down," said Davis. Despite an emergency operation Davis is now permanently blind in his left eye.

New York Brutality Settlement Affecting 22 Prisoners, 14 Units Settles for \$2.2 Million

by Gary Hunter

Settlement of a 4-year-old lawsuit, between brutalized prisoners and the guards who attacked them, was achieved on February 17, 2006. Most notable was the \$2.2 million in damages that will be divided between the plaintiffs and their attorneys. But a variety of other important changes were also obtained through the settlement.

Originally the suit was raised in response to a series of high-profile complaints in which guards had beaten prisoners on various units. Shawn Davis, Eric Richards and Charles Paige sustained injuries severe enough to receive coverage in several newspapers, and they became examples in investigations surrounding illegal use-of-force procedures inside various New York City jails and prisons.

Twenty-two prisoners, on fourteen units, sought monetary damages as well as injunctive and declaratory relief. The terms of the settlement also required a variety of physical changes inside the different prisons as well as extensive administrative revisions in the manner that use of force incidents are documented and investigated.

Under the provisions of the settlement the defendants agreed to:

- Install wall-mounted video cameras in areas designated by plaintiff's attorneys. Installation of these video cameras requires notification, by defendants, to plaintiff's attorneys on a semiannual basis until such time as all agreed-to locations are "operable and recording" (the exact locations of the cameras were sealed by court order);

- Maintain a command level order requiring the ESU to carry hand-held cameras when conducting searches and to record searches and any related uses of force;

- Implement a department-wide Revised Use of Force Directive;

- "DOC will create a new Investigation Division (ID) manual [and]... distribute that manual by December 31, 2006 or within twelve [months] after the Effective Date, whichever is later;"

- Investigators are required to undergo a forty-hour training program and annual fourteen-hour training follow-ups;

- Use of medical forensics for particularly complicated

use of force incidents;

- ID investigators "shall interview inmates in DOC custody who have ... an interest in speaking to investigators from outside the facility [if that interest] has been indicated in writing;"

- An average of an eight-month time limit to complete investigations.

Specifically, investigative procedures are to be diagramed, updated and use of force participants photographed four times from no more than four feet away.

Use of force training is to include classroom instruction and gym training for all incoming guards. It will be followed-up at in-service reviews and reinforced monthly at roll-call.

Use of force will be tracked by location and incident. Tracking will also include any disciplinary charges and their outcome.

All points of the agreement are to be completed by November 1, 2009 at which time, if everything is satisfactorily completed, the agreement will expire.

The district court sealed the specific damage awards provided to the 22 named individual plaintiffs, which ranged from \$15,000 to \$575,000. The other class members will not receive monetary awards. The law firms of Sullivan and Cromwell LLP and Emery Celli Brinckerhoff & Abady LLP received \$700,000 and \$750,000, respectively.

All points of the agreement require total compliance by the following units: Adolescent Reception and Detention Center, Anna M. Kross Center, Bernard B Kerick Center, Bronx House of Detention, Emergency Services Unit, George Motchan Detention Center, George R. Vierno Center, North Infirmary Command, Otis Bantam Correctional Center, Rose M. Singer Center, Transportation Division, Queens House of Detention, Vernon C. Bain Correctional Facility, and West Facility.

The changes mentioned in this article are far from exhaustive. Many fine points exist in the settlement that require strict adherence by the defendants. As part of the settlement, the defendants did not admit to any culpability.

Injustice has no rightful place either in free society or in the prison setting. All too often those hired to enforce the law abuse it, and all too often they get away with it. It is too easy and convenient to target those forgotten behind the walls. That is why *PLN* exists. Because everyone should be informed, everyone should be safe, and no one should be forgotten. Source: *Ingles v. Toro*, U.S. District Court (S.D.N.Y.), Case No. 01-CV-8279(DC). A copy of the settlement is posted on www.prisonlegalnews.org. ■

The guards who delivered the blows reported that they were defending themselves. A superficial scratch to the left eyebrow was the only injury reported by any of the guards.

Eric Richards was punched in the face and slammed head first into some cell bars when he objected to a strip search in the Queens courthouse. The scuffle left Richards deaf in his right ear and partially blind in one eye.

When asked about departmental policy regarding head shots Corrections Commissioner Martin F. Horn jokingly replied, "Is that a drink?"

Horn's lighthearted attitude toward the violence inflicted on prisoners is reflected in the actions of his employees. Between January 1, 2000 and August 1, 2003 Rikers Island prisoners produced reports of head injuries to 738 prisoners. This figure, among others, are what initiated the recently settled suit which was brought by the Legal Aid Society and the law firms of Sullivan and Cromwell and Emerey, Celli, Brinckerhoff & Abady. Plaintiffs showed that jail guards often eschew more humane methods of control in favor of head strikes and face blows.

Legal Aid attorney Jonathan Chasan said, "Force is not a foreign concept in a prison...[but] they should be able to restrain without this level of injuries."

Research by attorney Steve J. Martin revealed that from January 2000 to August 2003 183 prisoners suffered either facial fractures, broken teeth or required stitches to the face. Martin also found that in April 2003, 42 serious incidents resulted in 13 head strikes. Separate research showed 46 head strikes from January to October 2004. Martin says it is clear evidence of "routine use of hard impact strikes to the head" in New York City jails. This case was recently settled and is reported in the accompanying article. This is the second major use of force class action suit that the NY DOC has settled in the past ten years.

The most recent incident at the Anna M. Kross Center has resulted in a \$1 million lawsuit now leveled at the DOC. It names fourteen prisoners who allege they were brutally beaten by guards while they lay handcuffed on their bunks.

"They said: F___ them all' and started swinging," remembers prisoner Jason Lewis. "They were yelling 'If y'all hurt one of ours, we'll hurt five of you.'"

Attorney Leo Glickman said the guards also "threatened them with further

violence if they saw a doctor for their injuries." Glickman represents 9 of the 14 prisoners.

Three guards have been arrested so far and several others are under investigation in connection with the beatings. Joseph Collins was captured on video tape punching Sequan Prude in the face. He faces charges of assault, harassment, official misconduct and a felony charge of filing a false report.

Nicholas Zito attempted to disable the security camera that captured Collins on tape. Zito was charged with official misconduct which carries up to a year in jail.

Captain Anastasia Henderson witnessed the beatings but failed to mention them in an official report. She was suspended for 30 days on grounds of official misconduct and falsifying records.

Both Collins and Henderson could receive up to 4 years in prison for their actions.

Illegal Medical Contract

The Commission of Corrections has tentatively ruled that New York's \$300 million contract with Prison Health Services (PHS) is illegal. Under New York law, profit-making corporate medical providers are required to be controlled by doctors. The reasoning is that business decisions will ultimately be tempered by medical wisdom. PHS violates this policy.

Prison Legal News (PLN) has published extensive data on the neglect and misdeeds of PHS. PHS is a Tennessee company that has been in the medical business in New York since 2001 and the leading prison health care provider in the U.S. To secure the Rikers contract PHS set up a professional corporation that is controlled by a doctor but is

"I know what a dump truck is, and I'm no dump truck! As an innocent man, I too have been to prison."

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Rikers Island Jail (cont.)

owned by PHS. All doctors employed at Rikers work for the PHS subcontractor. *PLN* has reported extensively on PHS's operation nationally and in New York state, see the August, 2005, issue *PLN* for more.

Assembly Health Committee chairman, Richard N. Gottfried said, "serious questions have been raised about the legality of the PHS arrangement. New York city may well have to make major changes in how it provides health care in city jails."

PHS vice president Benjamin S. Purser Jr. defended the contract. "The State Education Department has given PHS no indication that the contract is

anything other than legal and appropriate," he said.

Since all physicians have to be employed by the PHS subcontractor one obvious indicator of veracity would be the doctors themselves.

Bad Doctors

Follow-up investigations found that PHS employs doctors with questionable backgrounds. In 1986, the New Jersey Board of Medical Examiners deemed Dr. Edward M. Berkelhammer "a danger to the public." With his license expired, Dr. Berkelhammer administered a drug overdose to a woman he was putting through detox. He was caught lying about his record when he re-applied for his license in 1989. He was suspended for two months. New Jersey revoked his license again

in 1990 for failure to comply with their orders. But Berkelhammer is currently employed at Rikers by PHS.

Dr. Ammaji Manyam is also employed at Rikers. In 1990 Manyam was sentenced to a year in jail for conspiracy and attempted grand larceny. Manyam was caught selling blood while charging the state for false tests. California, New Jersey and New York revoked her license to practice medicine but in 1997 New York restored her credentials when she expressed a desire to work with prisoners.

PHS Prison Health Psychiatrist Joseph S. Kleinplatz lost his license to practice in New York when it was discovered that his diploma was fake. Kleinplatz was eventually, but not immediately, fired by PHS.

In fact, PHS discovered 10 unlicensed

New York's Top Cop Crumbles Under Personal Investigation

by Gary Hunter

Given the controversy and corruption that currently surrounds virtually every aspect of the New York City penal process, it's insightful to reflect on how one former New York top cop fared when his own affairs were placed under scrutiny. Alas, such scrutiny did not occur until after he had left government office.

Bernard B. Kerik, more affectionately known as "Bernie," served as both New York City corrections commissioner and police chief under former Mayor Rudy "Benito" Giuliani. In December 2004, President Bush picked Kerik to head the Department of Homeland Security. If appointed, Kerik's duties would have made him head of immigration services; however, his housekeeper/nanny turned out to be an illegal alien, and Bernie had neglected to pay taxes on her behalf. Once this became known his nomination was withdrawn within a week.

One White House official called it "Kerik's screw up, it was that simple." But "simple" implies there were no other complications, no baggage. And Bernie had plenty of baggage – and what was yet to be disclosed soon became woven into a far more scandalous personal and professional history.

That Kerik is a ladies man was no secret. The former commissioner admitted under oath to having an affair with jail guard Jeannette Pinero, and is accused of simultaneously having an affair with his publisher, Judith Regan. These affairs would have overlapped with his current marriage to Hala Kerik, which took place in 1998.

An apartment that had been donated as a rest area for police and fire fighters working on "ground zero," the site of the September 11, 2001 attack on the World Trade Center, was instead appropriated by Kerik for his personal use. Namely trysts with his lovers.

As if furtive romances weren't enough, allegations arose

that city police officers received overtime pay as they remained on the clock to work at Kerik's most recent wedding (his third). Another report suggested that, during his terms as corrections chief and police commissioner, Kerik received gifts from Interstate Industrial Corp., a company alleged to have connections to organized crime. Kerik's former friend, Larry Ray, who was hired by Interstate (and later indicted on securities fraud), claimed to have emails from Kerik promising the company inside information.

Kerik also was scrutinized for a \$6.2 million stock sale windfall he made in 2004 as an associate on the board of stun-gun manufacturer Taser International, a company that sells various products to the Homeland Security Department.

Additionally, Kerik may have cooked the books with respect to prison security while he was head of New York's Corrections Department. Kerik boasted a reduction in use of force incidents in the prisons from 490 to 118 between 1997 and 1999. But records show that reported minor incidents increased from 783 to 1,509 over the same period, suggesting that such incidents may have simply been down-played to reflect more favorably on the department. Prisoner injuries increased overall from 1,556 to 1,935.

Kerik was further accused of paying \$4.8 million for 11,000 stab-resistant vests for prison guards that were no better than a cheaper model already on the market. He allegedly ordered guards to strip-search suspects arrested for misdemeanor charges in direct violation of a federal court order. Which resulted in a \$50 million settlement to the victims, the biggest in New York City history.

Kerik was also implicated in the transfer of \$800,000 in tobacco rebate funds to the Correction Foundation, a group that he directed. The funds were from cigarettes that had been purchased by the city and sold to prisoners at Rikers Island at higher prices. At least \$142,000 was skimmed from the Correction Foundation by its treasurer, Frederick Patrick, who had been personally selected by Kerik. Patrick, who used the stolen funds to pay for collect phone-sex calls by prisoners, and would listen in to the pornographic ➤

psychiatrists in its employ but instead of firing them immediately it extended their tenure for 16 months. Only after the doctors failed to qualify by 2003 were they released. Three were rehired as social workers and mental health specialists.

Disgruntled Workers

PHS also suffers from a lack of esprit de corps among their workers. Disgruntled doctors and nurses have lodged complaints and quit since the company took over in January 2001.

"They came in and told us they were going to run this place like a family," said Chi Lam Fu, a pharmacist at Rikers. "That is definitely not the case."

Shirlean Sims, a medical secretary said, "They're cutting workers in every department. They gave me an ultimatum.

Now they have one secretary covering two units."

PHS has also undermined union assistance. "Every active delegate becomes a floater," said x-ray tech Reginald Russ. "We're disjointed and they know that. How can we have a union when our organizer can't even get into Rikers. Since December, management has not even acknowledged an 1199 request for access to members on the Island."

Floating is the practice of moving around staff to different facilities to avoid fines. Doctors and nurses are often sent to prisons with smaller case loads merely to sign paperwork to show that staff was on the premises.

"It became impossible to have a therapeutic conversation with a patient it was just checking off boxes," said Dr. Daniel

Selling. "The PHS administration could care less what I do with a patient."

Three senior clinicians have observed aloud that "The practice is clearly fraudulent."

Some doctors have complained that PHS implements practices that are potentially life threatening. Pharmacist Michael Persaud is worried about PHS policy that limited the use of chest x-rays to diagnose tuberculosis. Persaud and others insist that the move is designed to save money. PHS insists that skin tests are adequate.

"It's not just inmates they're endangering," said Persaud. "It's the doctors, the captains, the staff and their families."

Ernesto Marrero Jr., director of the City's Correctional Health Services Division defends PHS cutbacks and says that employees "have a different agenda...

► calls, subsequently received a one-year sentence for the theft. Before his arrest, Patrick had held numerous high ranking positions at both Rikers Island and within the New York Police Department.

Not a tolerant sort, Kerik reportedly threatened to hunt down people who weren't loyal to him. He refused five times to promote a corrections supervisor, Eric DeRavin, because DeRavin had previously taken disciplinary action against one of Kerik's girlfriends, Jeanette Pinero. DeRavin filed suit against Kerik and the city, and eventually received a \$250,000 settlement.

Kerik's tenure at the New York Police Department also was not without controversy. While he served as Police Commissioner, two dozen Glock handguns purchased with city funds were given, at no charge, to top police officials. He had special "medals of valor" produced for friends and government officials whose only act of "valor" appears to have been being one of his cronies. Kerik further used private funds from the Police Foundation to make up to 30 plaster busts of himself, which he distributed as gifts.

After leaving the police department in 2002, Kerik worked as a security consultant for Giuliani Partners, a company formed by former Mayor Giuliani, and as CEO of Giuliani-Kerik LLC, an affiliate of Giuliani Partners. For a short period in 2003 he held the post of interim Minister of the Interior in Iraq shortly after the US invasion of Iraq. He is presently the head of The Kerik Group, which provides Homeland Security and business security services; despite his checkered past and allegations of misconduct, he was the keynote speaker at the American Correctional Association's Winter 2005 conference.

Kerik's past misdeeds continue to make life difficult for his friends and associates. In April 2006, New York Corrections Dept. spokesman Tom Antenen was demoted after federal wiretaps revealed that he and Kerik had spoken on the phone. Antenen had been interviewed by the Department of Investigation, which was checking into whether Kerik had given preferential treatment to his ex-girlfriend,

Jeannette Pinero. Antenen had been ordered not to discuss matters raised in the interview, but mentioned Pinero in his conversation with Kerik.

Most recently, on May 4, 2006, the *New York Post* reported that the city had taken action against a construction company central to a grand jury investigation involving Kerik. New York officials denied permits for Interstate Industrial Corp. to work within the city following a ruling by the Business Integrity Commission. The Commission found that the owners of Interstate "lacked character, honesty and integrity," and had bought the company from Salvatore "Sammy Bull" Gravano's brother-in-law, Edward Garofola, and Michael "Mickey Scars" DiLeonardo, who have connections to the Gambino crime family.

Previously, in November 2005, New Jersey's Division of Gaming Enforcement found that Kerik had engaged in misconduct relating to his dealings with Interstate. It was during the New Jersey investigation that Kerik invoked the Fifth Amendment right against self incrimination at least nine times. He refused to answer a number of questions, including whether he received anything of value from Interstate or if he was asked to do anything on behalf of the company.

A New York grand jury is presently investigating whether Interstate paid for almost \$200,000 worth of renovations to Kerik's apartment in the Bronx, and if the firm hired Kerik's brother, Donald, in exchange for Kerik's assistance with influencing city officials. Indictments are reportedly pending.

Meanwhile, in 2001, New York's Manhattan Detention Complex, commonly known as "The Tombs," was christened the Bernard B. Kerik Complex. Which may be a fitting tribute to Kerik ... especially if he ends up doing time there himself. However, it is worth noting that while he was actually running the City's jail system he succeeded in keeping this information under wraps and for now at least, continues to do very well for himself. ■

Sources: *New York Post*, *NY1.com*, *New York Times*

Rikers Island Jail (cont.)

They're simply throwing stones."

But some stones are rattling the right doors. The New York State Nursing Association (NYSNA) took PHS to task when the prison provider required RN's at the jail to perform HIV tests on every incoming prisoner. PHS ordered the nurses to test without doctor's orders, to interpret test results and to inform prisoners whether or not they tested positive. Every one of these steps is outside of an RN's medical training and illegal. Yet PHS threatened nurses with dismissal if they didn't comply.

When confronted by the NYSNA, however, PHS backed off.

"To fire nurses over such a controversial policy would not only have invited a lawsuit...it would have crippled any of PHS's attempts to recruit," said Suzanne Calvello, NYSNA nursing representative.

Calvello filed a grievance which eventually stopped the illegal practice. NYSNA then went a step further with their investigation of PHS policy. What they found was troubling.

PHS had placed jail nurses in charge of gathering a prisoner's medical history at intake and assessing that history to determine what tests to run. The entire screening process was outside the scope of an RN's training. NYSNA pressured PHS to bring the process into compliance.

Suicides

City health officials have also been critical of PHS treatment of seriously ill prisoners, especially the mentally impaired. Deficiencies have become glaringly apparent in the area of what some have termed a season of suicide.

Carina Montes was 29 when she hanged herself in the Rikers' jail on February 6, 2003. She was first diagnosed with depression when she was 8. Her records show that she had attempted suicide at ages 13, 18 and 25. Yet in her 5 month stay at Rikers, for shoplifting 30 tubes of lip-stick, Montes never saw a psychiatrist.

A physician noted at intake that Ms. Montes suffered from bipolar disorder and prescribed psychotropic medication. But the PHS floater policy lost track of both Montes and her records.

Montes arrived at Rikers on September 12, 2002 where a doctor recommended an immediate mental health exam. But it was three months later, and only after

a guard noted Ms. Montes' strange behavior, that anyone saw her. Not that it mattered. On December 7th Montes was seen by a floater who placed her on suicide watch. But suicide watch in Rikers prison for women consists of other suicidal prisoners, who are paid 39 cents an hour, to check on each other.

Still, Montes had a slim chance of survival. In late December she was seen by mental health specialist Brett Bergman. But Bergman had no idea Montes was bipolar or on suicide watch because her file could not be found. Bergman noted, "Patient appears to be doing well and was stable." Bergman saw Montes twice more in January but her file was never found.

On February 2nd Montes got into a fight with another prisoner and was placed in isolation. No mental health worker came to see her; no one even noticed that she was refusing her medication which included the insulin for her diabetes. The only notice she got was from Linda Vega, one of her 39 cent peers, who heard Montes say, "Everything I love don't love me."

Vega looked in the cell and saw a weeping Montes sitting with strips of torn sheets between her legs. Vega immediately notified guard Kje Demas. Demas went to the cell and asked Montes if she was okay.

"I'm O.K.," replied Montes. "I'm just going through something."

Demas left. Montes was found dead just before 5:00 p.m.

Tragically, Montes was only one of several suicides to succeed under the watch of PHS in 2003. Jose Cruz was on suicide watch but was placed in a cell outside the direct view of prison guards. He hanged himself with his bedsheet in January.

Less than two weeks later Joseph Hughes hanged himself just four hours after a psychiatrist had noted that he was not a danger to himself. Hughes medical file indicated a history of hallucinations and suicidal gestures.

Montes followed Hughes by ten days. James Davis hanged himself with a bootlace in June 2003. Sixteen days later a 19-year old barely survived when he was rescued by another prisoner after he had hanged himself from a metal stud in the ceiling. The young man had just returned from a psychiatric evaluation.

In virtually every instance incompetence on the part of PHS employees and deficiencies in PHS policy was to blame. In Davis' case two guards, two nurses and a doctor administered CPR for 15 minutes

unsuccessfully but none thought to remove the bootlace from his neck. Neither were they aware that cardiac medication and oxygen tanks were close by, one of the dangers of the "floater" policy.

Guards had first noticed David Pennington acting strangely on July 15, 2004. His bizarre behavior was enough to get him a referral to see a mental health worker the next day. Pennington told his interviewer about his previous psychiatric institutionalizations and about two previous suicide attempts. Pennington had slashed his wrists in 1997 and overdosed on pills in 1998. On July 17th Pennington was sent to the mental health unit again after he learned of a relative's death. The social worker decided that Pennington was stable enough to return to his cell.

On the morning of July 18th jailers sent Pennington to the mental unit a third time. This time his social worker sent him to see a psychiatrist. After a brief interview the psychiatrist sent Pennington back to his cell and noted in the chart, "he is not suicidal or homicidal."

About noon Pennington began having seizures and auditory hallucinations. Jailers sent him back to the psychiatrist who again did nothing for him. Pennington was sent back to his cell untreated. Ten minutes before 3:00 p.m. a distraught Pennington used a bed sheet to hang himself to death.

State investigators concluded that "This deliberate refusal to provide treatment to patient with active suicidal ideation who was directly referred by another physician constitutes professional medical misconduct on the part of the psychiatrist and flagrantly inadequate mental health care by PHS, INC."

Cathy Potler, executive director of the Board of Correction questioned "what happened between the time he was noted to be hallucinating and suicidal and the time he was found unresponsive in his cell? [He did] everything he could to attract psychiatric attention to himself."

Investigators also noted that Pennington had reported during his interviews that his father had committed suicide in prison. Pennington's attending psychiatrist was fired three months later for unrelated reasons.

Charon Watkins hanged himself, on March 18, 2005 at Rikers Otis Bantum Correctional Center. Watkins scribbled the number of his girlfriend on a piece of paper tied his bedsheet around his neck

and hung himself from the faucet on his sink. His was the second suicide in 2005.

In spite of the lethal results of the "floater" policy, PHS not only has gone unpunished for prisoner deaths, they have been rewarded. Their contract was renewed in January 2005.

Psychiatrist Douglas Cooper quit from frustration during that 2003 season of suicide. "The staff does the best they can," he said. "What's left they sweep under the rug."

Michele Garden was the psychologist who treated Jose Cruz. She also quit that year. "I had no training as to what we do when a patient becomes depressed and becomes suicidal," she lamented.

Working for PHS was like "juggling hand grenades" Said Dr. Douglas Cooper. "One of them was going to go off, hopefully not in your hands." A 9-year Rikers veteran, Dr. Cooper quit in August 2003.

Religious Rukus

New York City mayor Bloomberg suspended Rikers' head chaplain for making what many considered to be anti-American and anti-Semitic remarks. The controversy stems from speeches made last year by Imam Umar Abdul-Jalil to the Muslim Students Association in Arizona.

During those speeches Jalil was secretly recorded by The Investigative Project [a group that bills itself as investigating Muslim armed struggle groups and which is reportedly linked to Israeli intelligence services], as saying, "We have terrorists defining who a terrorist is... We know that the greatest terrorists in the world occupy the White House..."

Jalil also said that innocent Muslims "not charged with anything" are "literally tortured" in the Metropolitan Correc-

tional Facility in Manhattan. His speech sparked a firestorm of responses from various sources and was literally called a "Hate Speech" and "Hate Tirade" by the *New York Post*. [Editor's Note: PLN has reported the findings of the Department of Justice's own Inspector General that prisoners rounded up in the aftermath of the 9-11 attacks on pretextual charges were in fact systematically tortured and abused in federal jails in New York City. Thus the first statement may be an opinion, the lat-

ter is not disputed except by those who will argue about whether systematic beatings and abuse constitute "torture."]

Fortunately, Bloomberg exercised more restraint than the *Post* in his judgment of Jalil. The mayor defended the chaplain's right to free speech but initiated his March 11, two week, no pay suspension from his \$76,000 a year job, saying that Jalil should have told the audience that his speech reflected only his personal views and by not doing so

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Rikers Island Jail (cont.)

his actions brought “discredit upon the department.”

Bloomberg went on to say that “Looking across America, it seems that free speech is being attacked by the right under the guise of patriotism and by the left through academic intolerance that stifles necessary debate. As Americans, we should never pander to xenophobia, anti-intellectualism or convention.”

While Bloomberg’s observation is indisputably accurate the *New York Times* points out that the flawlessness of his reasoning may actually jeopardize his bid for reelection as it alienates both right and left wingers.

But just as Bloomberg’s Jewish heritage gives him a unique perspective on Jalil’s position as a Muslim, Jalil’s heritage as an African-American, a former prisoner, and an American-born Muslim gives him a unique perspective in the insidious nature and abuse in America’s prisons.

Jalil’s record as head chaplain was described as “flawless” and he has the vocal support of the jail’s Jewish chaplains. Rabbi Leib Glanz said, “The man has no, not even a fraction of, anti-Semitism in his bones.”

ADA Violations

Attorneys and civil rights groups have joined forces in a class action suit on behalf of mentally disabled prisoners against the state of New York. Shari L. Steinberg and David M. Lubitz of Swindler, Berlin, Shereff, Friedman LLP along with attorneys from the Legal Aid Society, the Urban Justice Center and Judge David L. Bazelon Center For Mental Health Law have filed an Equal Protection claim for mentally disabled prisoners who have

been systematically denied access to drug treatment programs.

The class action suit names only prisoner plaintiffs William G. and Walter W. who suffer from mental disabilities (schizophrenia and bipolar disorder) as well as chemical addiction. Both are guilty of non-serious crimes and subsequent parole violation. Each plaintiff was referred to a substance abuse program (MICA) in lieu of incarceration and both have languished in jail for months because of a shortage of facilities that can treat both their addiction and mental health conditions.

Conversely, parole violators without mental disabilities, who are recommended for MICA often leave jail within days. The suit alleges that the state leases jail beds from the city for \$34 a day and that these funds should be directed towards plaintiff’s treatment rather than their incarceration. Plaintiffs are seeking relief under Title II Section 504 of the American with Disabilities Act and the Rehabilitation Act.

Gay Unit Closed

Rikers gay prisoners lost their exclusive housing unit late last year as homosexuals were housed in either general population or protective custody. The closing marks the end of a 30 year old jail procedure.

“It was the only area of the department where inmates could choose where they wanted to live,” said Martin Horn, city correction commissioner.

When the alternative housing was originally created the concern was that weaker prisoners became prey for aggressive prisoners in general population. But more recently the gay housing unit had become a security risk.

“What we ended up with was this housing unit where people were predatory and people were vulnerable. The very units that should be the most safe, in fact, had become the least safe,” said Horn. No evidence was provided to support this claim.

Gay activists are not pleased. “This is not a change for the benefit of the prisoners, this is a change for the benefit of the administration,” said Carrie Davis, a social worker at New York’s Lesbian, Gay, Transsexual and Transgender Community Center. “What they’re saying is, people who by virtue of immutable characteristics are going to be put in 23-hour lockdown. Does that sound fair?” she asked.

D. Horowitz, attorney with the Sylvia Rivera Law Project, says that the new protective restrictions violates a 1982 state ruling that confinement of prisoners for 22 hours a day, based solely on their sexual orientation is unconstitutional.

“People should not be punished for wanting to be safe,” said Horowitz.

Department spokesman Tom An-tenen said that only those gay prisoners who felt threatened would be placed in the lockdown facilities.

Los Angeles has the only remaining gay jail facility in the country.

Human Rights in New York City

In the largest city in the United States, and the financial capital of the world, prisoners on Rikers Island are routinely abused by staff, denied adequate medical care and not protected from their fellow predatory prisoners. *PLN* routinely reports on jury verdicts and settlements in lawsuits brought by Rikers Island prisoners. The jail has been the subject of a 30 year old class action suit challenging many conditions of confinement, *Benjamin v. Horn*. Despite decades of court orders the jail still fails to fulfill basic duties like repairing broken windows, maintaining control of vermin and effective heating, cooling and ventilation. Separate class action suits have been successfully brought by the heroic lawyers of the Legal Aid Society’s Prisoner Rights Project, headed by John Boston, on numerous aspects of Rikers Islands’ operation, including the failure to provide an education to imprisoned children, provision of services to the mentally ill, overcrowding, ventilation and overall conditions, discrimination against women prisoners, living conditions and treatment of mentally ill prisoners and much more as would require several more pages to detail, but which we have previously reported in *PLN* and which are available on our website. Were it not for the minimal judicial oversight and modicum of accountability provided by litigation things would be far worse than they are.

The truth is that almost everything that is not supposed to happen in jail is happening on Rikers Island, and has been for several decades. A lack of political will and accountability ensure this will most likely continue. ■

Sources: *ABC News, News Day, New York Daily News, New York Post, New York Times*

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If your group or organization is having a criminal justice related rally, meeting or gathering and you would like to distribute free copies of PLN to your members and attendees, let us know and we will supply copies of Prison Legal News and information flyers. Contact Don Miniken at 206-246-1022 or dminiken@prisonlegalnews.org.

Former Florida Correctional Privatization Commission Official Pleads Guilty to Stealing State Funds

by David M. Reutter

The former Executive Director of Florida's now defunct Correctional Privatization Commission (CPC) has pled guilty to charges of fraud and money laundering involving almost \$225,000 in state funds.

Alan Duffee headed the CPC from May 2002 until June 2004 when the Florida legislature voted to abolish the five-member panel and put the Department of Management Services in charge of administering state contracts with private prison companies.

According to the indictment, Duffee siphoned money from a major repair-and-maintenance fund that the state required prison management companies, including GEO Group and Corrections Corp. of America, to maintain for replacing or fixing equipment costing more than \$5,000 that breaks down at the state's five privately-operated prisons. The fund consisted of a percentage of monthly payments the Florida Department of Corrections made to the companies operating prisons in Bay and Gadsen Counties and at Lake City, South Bay and Moore Haven.

The indictment charged that Duffee "did knowingly and willfully devise ... a scheme and artifice to defraud, and to obtain money and property," illegally from the prison maintenance fund. Duffee allegedly set up a bank account at People's First Bank of Tallahassee in the CPC's name—without the knowledge of the five commissioners—and made himself sole signatory on the account. He later directed the Wachovia Bank in Jacksonville to move \$224,972.92 in checks and wire transfers from the repair-and-maintenance fund to the People's First account.

Duffee then began padding his own pockets. The indictment lists three wire transfers totaling \$174,972.92 in 2003. Duffee also used the United Parcel Service to deliver checks totaling \$50,000 to the account he had set up. Two other counts said Duffee withdrew cashiers checks from the People's First account for \$27,597.93 on May 13, 2003 and for \$73,117.51 on May 30 of that year.

The grand jury indictment authorized seizure of Duffee's home in Northeast Tallahassee, which Leon County records show he purchased for \$113,500 in 2003, a Ford Focus, and up to \$224,972.92 in cash—the amount Duffee is accused of stealing.

Duffee pled not guilty in a Northern Florida U.S. District Court on September 8, 2005. He faced up to 20 years and fines of \$250,000 on all counts. However, in February 2006 he entered into an agreement that involved pleading guilty to three of the six federal charges. On April 20, 2006, Duffee was sentenced by U.S. District Court Judge Robert Hinkle to 33 months in prison, the maximum term that could be imposed under the sentencing guidelines.

According to the Florida Dept. of Law Enforcement, Duffee had spent \$22,805.48 on personal house and car expenses; \$5,477.28 on furnishings; \$11,789.63 for clothes and personal effects and \$16,105.29 on recreation and other expenses. He was ordered to pay full restitution and will be placed on supervised release for three years following his release. "This is the guy in charge of privatized prisons and he's stealing more money than I'd expect 90 percent of the people in those privatized prisons stole. It boggles the imagination," stated prosecutor Tom Kirwin. Duffee's attorney, Ben Phipps, who argued for probation, said he was "especially concerned about putting a professional prison administrator in the prison system."

Duffee's legal problems, however, didn't end with his prison sentence. Shortly after resigning as CPC's Executive Director in June 2004, Duffee

bought a lobbying firm, The Windsor Group. Duffee served as president and CEO of Windsor, which has 18 clients—mainly social-service and rehabilitation organizations such as the Brain Injury Association, Christian Prison Ministries, and Human Service Associates.

The founder of Windsor is now suing Duffee for \$750,000 yet to be paid in the deal. "He has been unwilling or unable to pay according to the terms of our agreement," said Barney Bishop. "There were supposed to be two large cash down payments. The first payment was 90 days late, and the second is now 120 days late." Bishop declined to cite figures but said the first installment of the down payment "was a substantial six-figure amount," and the second "was substantially more than that."

In March, 2006, Bishop said, Duffee paid him \$6,150 with a check that bounced. He intends to file a complaint with Leon County's bad check division.

Now, however, it appears that a bad check charge is the least of Duffee's worries, as he is scheduled to report to federal prison on June 20, 2006. ■

Sources: *Tallahassee Democrat*; *St. Petersburg Times*

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From the Editor

by Paul Wright

This issue marks the 16th anniversary of the founding of Prison Legal News. Since *PLN*'s first issue was published on May 1, 1990 we have now published 192 issues. This is a significant accomplishment since most magazines in general measure their existence in the single digits of issues published. At this point *PLN* is the longest lived independent magazine founded by prisoners in US history. No small accomplishment in a country with hundreds of years of prison history and a penal press since at least 1800.

PLN has steadily grown, from 10 hand typed, photocopied pages to our current size of 48 pages. In addition, our website provides a vast amount of information with all *PLN* back issues, court cases and much more on it. It is the largest and best source of information on all things prison and jail related on the internet.

We are continuously striving to improve *PLN*'s coverage, service and utility to our readers. This summer we plan to expand our book selection and add more titles to the books we offer our readers. I am also very excited to announce that a new *PLN* anthology on the political economy of mass imprisonment is forthcoming, co-edited by myself and Seattle attorney Tara Herivel. We co-edited *Prison Nation: The Warehousing of America's Poor* (Routledge, 2003) which is available from *PLN*. We still have not settled on a title but I will keep readers apprised of its progress as we go.

Building *PLN*'s subscription base is one of our priorities since it will ensure *PLN*'s survival into the future. Our Subscription Madness campaign lets current readers and supporters purchase subscriptions for other, new subscribers. It costs us about 60 cents to mail out a sample copy of *PLN*. Almost two dollars if we have to send it first class. Subscription Madness helps us pass along the savings to readers as we don't have to send out multiple samples. If you know someone who is interested in the criminal justice system, and this includes policy makers, legislators, judges, journalists and others, consider buying them a subscription to *PLN*. We currently have around 4,700 subscribers and would like to double that by our next anniversary issue.

This issue of *PLN* has feature articles on abuse and corruption in prisons in very different parts of the world, places we cover on a fairly regular basis. One is the Rikers Island Jail in New York City, the other is Abu Ghraib in occupied Iraq. Abu Ghraib is now synonymous around the world with abuse and torture. Rikers Island is not since jail officials don't allow staff to bring cameras into the facility. For many decades jails across the United States, especially in major cities, have been especially atrocious pits of overcrowding, medical neglect, brutality and abuse. *PLN* covers jail issues on a regular basis. However, these isolated stories fail to give the whole picture. Each beating, suicide, medical neglect death, etc., needs to be seen as part of a bigger picture and not an isolated incident.

The next few months will see stories

in *PLN* about both jails around the US (the January, 2006 issue of *PLN*'s cover story was on jail's in Texas) and the civil commitment of sex offenders around the country. Both are issues that get relatively little attention. We hope to shed some light on both.

On *PLN*'s 16th anniversary I would like to thank all those who have helped *PLN* over the past 16 years and who have stuck with us when times have been tough. At this point, you are all too numerous to name but you know who you are. Without everyone's support *PLN* would have ceased to exist long ago, like most publications in general and prisoner magazines in particular. We have beaten those long odds thanks to the dedication and support of our volunteers, staff members, supporters and readers. At *PLN* we are all looking forward to many more years of publishing. 📖

Fall Escapes Plague Local, State Agencies in Houston Area

by Michael Rigby

During a two week period in late 2005, prisoners in the Houston area escaped from all levels of custody. One prisoner escaped from the city jail, another vanished from the back of a prison van, and a third--a twice convicted death row prisoner--walked unimpeded out of a county jail. All three escapes were clearly due to human and procedural errors, but officials in each case refused to take responsibility.

Lawrence Darnell Thomas, 36, spent about three hours on the run following his escape from the Houston Police Department jail. Thomas was arrested around 4:30 p.m. on November 16, 2005, for an alleged carjacking. Upon arrival at the jail, Thomas broke free and ran when the cop pulled him from the backseat of the patrol car. He had slipped out of his handcuffs on the way.

Using dogs and a helicopter, police apprehended him about 8:30 p.m. Thomas, who police described as "thin but muscular," was returned to the jail with handcuffs on his wrists and a double set on his ankles. Police Captain Dwayne Ready would not say whether the handcuffs had been applied im-

properly the first time. But it seems likely. Used properly, handcuffs are effective restraints.

Similarly, officials with the Texas Department of Criminal Justice (TDCJ) aren't saying how a state prisoner escaped from a prison van under the noses of two guards. Instead, he's being compared to "Houdini."

Carlos Kidd, 25, escaped on October 31, 2005, while being transported from the Ramsey One unit in Rosharon to the University of Texas Medical Branch in Galveston. Kidd had claimed he swallowed razor blades and taken pills. Though he was the only occupant in the van--separated from two guards in the front only by a latticed metal screen--he wasn't discovered missing until the van arrived at the hospital.

Kidd, who was serving a 10-year sentence for aggravated robbery, was arrested in nearby Dickinson about nine hours later. He was still wearing his white prison uniform.

Along the way, Kidd had somehow liberated himself from his handcuffs and leg shackles, said prison officials. He then removed the back window, crawled out, and

replaced it--all undetected. "It's baffling," said TDCJ spokeswoman Michelle Lyons. "There were no stops other than those that were necessary for traffic, such as at stoplights at intersections."

Obviously there's more to the story, but for weeks prison officials refused to say how the investigation was progressing. However, in a December 1, 2005, interview with FOX26 News, Kidd disclosed his secrets. His escorts had stopped to buy hamburgers, also buying him one. Before resuming their trip, the guards removed Kidd's handcuffs and leg shackles so he could eat comfortably. Kidd used the opportunity to slip out the unbarred back window.

Kidd, who claims he was raped by a former guard on another unit, says he was only trying to escape the abuse he has been subjected to in prison. [See *PLN*, August 2005 for more on Texas prison rapes.] It's unknown if the guards were disciplined or fired for the escape.

At the Harris County Jail (HCJ) in downtown Houston, deputies involved in the high-profile escape of Charles Victor Thompson did receive discipline, but only after officials were forced to take responsibility. One deputy was eventually fired and 8 received minor punishment ranging from letters of reprimand to 10 days suspension.

Thompson's escape from HCJ on November 3, 2005, set off a nationwide manhunt. He had been transferred from death row to the county jail for re-sentencing ordered by the Texas Court of Criminal Appeals. On October 28, 2005, a jury reaffirmed his death sentence for fatally shooting his ex-girlfriend and her new boyfriend.

The day after his escape, Thompson's prison ID and the free-world clothes he had worn out of the jail were discovered across the street. Jail officials initially blamed everyone but their own security. "I think that's the clearest indication we have so far that somebody is helping him, even if it's just somebody dropping off a change of clothing," said Lieutenant John Martin, a spokesman for the Harris County Sheriff's Office.

After Thompson's capture in Shreveport, Louisiana, three days later, a clearer picture emerged. The only help Thompson really had was lackadaisical security, short-staffing, and complacent jailers.

Thompson, 35, told investigators he had smuggled his prison ID, a handcuff key, and the clothes he wore to his re-

sentencing into the jail. On the day he escaped, Thompson met his lawyer in an attorney booth. The guard who escorted him--and who was later fired--failed to lock the door or properly restrain him. When his attorney left, Thompson shed the handcuffs and removed his bright orange jumpsuit, under which he wore civilian clothes. Thompson then left the unlocked attorney booth and bluffed his way out of the jail by claiming to be with the Attorney General's office and flashing his prison ID with the word "offender" taped over. Thompson was recaptured, drunk and penniless, without incident.

Faced with a public relations nightmare, officials were finally forced to admit fault. "There is no good way to spin this," Martin said. "The point is there were multiple errors on the part of our personnel. This is 100% human error that could have been prevented and it wasn't."

According to others, short-staffing also played a role, though officials deny it. "They are so shorthanded," said Richard Cobb, an attorney with the Fraternal Order of Police. "They claim they're not, but who's kidding who?" Cobb further said he was told that on the day of the escape no one was available to escort Thompson to the attorney visitation booth. At the 2:00 p.m. shift change a deputy escorted Thompson to the booth then left for the day.

James Rytting, the attorney who spoke with Thompson in the booth, said Thompson had called his firm, Phillip Hilder & Associates, seeking representation for an appeal. Rytting said that when he left he told guards he was "done with Thompson," a signal that Thompson was ready to be returned to his cell. Thompson was discovered missing an hour later.

To make matters

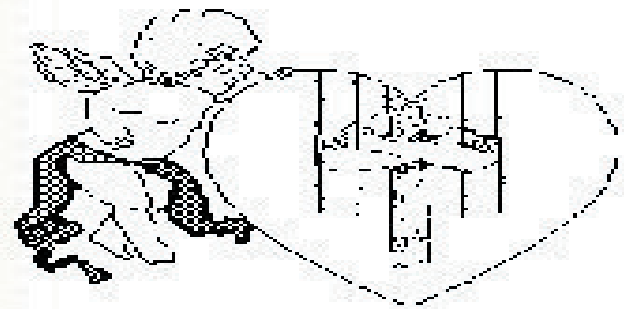
worse, the few guards who are on duty don't always do their jobs. According to one long-time jailer who asked not to be identified for fear of retaliation by his co-workers, some guards nap and play video games while on duty. He also said many guards regularly leave their posts unmanned well before their shifts are over. The allegations ring true. In July 2005, the state decertified the jail for a second time because of overcrowding and inadequate staffing.

Following the escape, attempts were initially made to cast suspicion on the German anti-death penalty group Alive. "They're not suspects, but they did visit him [in Harris County] before his escape, and they are opposed to the death penalty, so we're looking at them," said Marianne Matus, spokeswoman for the Houston office of the U.S. Marshals Service. Nothing suggested the group aided Thompson, and they were soon cleared. Apparently in Harris County--the nation's death penalty capital--anyone who doesn't support state-sanctioned murder is a potential suspect. ■

Sources: *Houston Chronicle*, *AP*, *Reuters*, *thefacts.com*, *KPRC*, *Shreveport Times*, *USA Today*, *FOX26 News*

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Abu Ghraib: Enduring Symbol of Hated Regimes

by Matthew T. Clarke

Abu Ghraib, a 280-acre prison complex located 20 miles west of Baghdad, is a well known symbol to the Iraqi people. Abu Ghraib holds about 3,500 of the approximately 10,500 prisoners held by American forces in Iraq. All prisoners bound for the American military's three long-term prisons are first processed at Abu Ghraib. Under Saddam Hussein, it was known as the center of brutal torture and murder of Hussein's political opponents. Ironically, that reputation may have grown under Abu Ghraib's U.S. military management. Numerous cases of abuse of prisoners have been well documented and previously reported in *PLN*. [*PLN*, Sept. 2004, p.1; Nov. 2006, p. 36; Dec. 2006, p. 1; Apr. 2005, p. 1]. Succinctly said, Abu Ghraib is still known as a place to which people go and, if they return at all, come back in much worse shape than when they entered. It is known as a location of torture and, perhaps worst of all, it is known as the location where thousands of innocent people are imprisoned.

"How can these be innocent people?" you might ask. "After all, they are suspected insurgents and terrorists, aren't they?" and indeed they are categorized that way by the U.S. government. However, according to the U. S. military's own statistics, the vast majority of the Iraqi prisoners in U.S. custody are innocent.

To start with, the arrest of an Iraqi is often an intensely dangerous operation--for the Iraqi. Many Iraqis are beaten upon arrest, often they are shot. Family members may be threatened, beaten or killed to coerce "cooperation" with U.S. forces. Often the arrests are "sweeps" of entire neighborhoods or are based upon faulty information given U.S. forces by Iraqis with a grudge against the person being arrested. The military claims it does not keep statistics on beatings and killings during the arrest procedure, but many reports of abuse have been confirmed by the International Red Cross and the military's own statistics speak of huge volumes of innocent Iraqis being imprisoned.

Iraqis who survive the arrest procedure are given multiple layers of review of their cases. At the battalion level, about 20% of arrestees are released without charges. This review generally takes place within 72 hours of incarceration and is

conducted by a battalion legal officer.

The second review occurs at division level and generally takes place within 14 days following arrival at a divisional prison. That review results in the release of 36% of the remaining prisoners.

A third level of review by a mixed board of American and Iraqi officials occurs after the prisoner arrives at Abu Ghraib. The board--which consists of three U.S. officials and six Iraqis from the ministries of interior, defense and human rights--releases over half of the prisoners it reviews due to lack of evidence of guilt of a crime. This review process takes about 90 days and the prisoner is not allowed any input into the matter. In fact, neither the prisoner nor the prisoner's family is informed of when the board meets or what its decision was. If the board decides to release a prisoner, it may do so unconditionally, or may require the signature of a guarantor of future good behavior. Such a guarantor could be a tribal elder, for instance.

Of those prisoners who end up going to trial before an Iraqi court, approximately 33% are acquitted. However, the trials occur only after additional lengthy imprisonment. Only 650 trials took place between August 2004, when the board was established, and late April 2005. During that time, the board reviewed 9,400 cases, unconditionally releasing 2,200 prisoners and requiring a guarantor for 3,100 released prisoners. That left an additional 4,100 prisoners requiring trials.

One might say that, with all this review and release, the system must be working well. Such an attitude would be naive. Although 78.2% of all arrestees are released before trial due to lack of evidence and another 17.1% are acquitted for a total of 95.3%, this often occurs only after lengthy detention and never occurs without the prisoners having first been subjected to the dangerous arrest procedure and the abuses which seem endemic in the U.S. military detention facilities in Iraq. It also ignores the hardships the arrest and detention of innocent Iraqis places on the family of the arrestee. The arrestee is often the male head-of-household and sole breadwinner in the Iraqi culture. Imprisoning innocent men and placing their families into a situation of near-starvation is hardly an effective ap-

proach to instilling respect for the law in the Iraqi people.

Imagine the reaction in the United States were the police to arrest and incarcerate 19 innocent citizens for every criminal convicted and sent to prison. That would mean the arrest of 38 million innocent citizens for the two million prisoners currently serving time in U.S. prisons. Including the arrestees who are on probation would push the figure toward 100 million. Would the U.S. population put up with every other adult citizen being subjected to a false arrest and imprisonment for a few days to a few months or would they too arise in armed rebellion?

Every innocent Iraqi arrested and incarcerated without reason and his family become more favorably disposed toward the insurgency. Thus, even before the proof and photographs of torture and abuse of prisoners surfaced, Abu Ghraib had become a symbol of American imperial hubris, just as it once was a symbol of the arrogance and cruelty of the Hussein regime.

Abu Ghraib, combined with Camp Bucca near Basra in southern Iraq which holds over 5,000 prisoners and Camp Cropper, near the Baghdad, which holds over 100 "high-value" prisoners, makes up the long-term U.S. military prison system in Iraq. Most of the prisoners are male. Some of the prisoners are children as young as eleven years of age. In all, 65,000 prisoners have been taken in Iraq and Afghanistan, at least 108 of whom are known to have died after arriving at a U.S. military detention facility as of March 2005. Twenty-seven of those deaths are being investigated as possible homicides by U.S. personnel.

Because Abu Ghraib has become such a hated symbol of U.S. military domination in Iraq, it has also become a locus of resistance to U.S. occupation. Since Baghdad fell in April 2003, numerous violent incidents have attended Abu Ghraib and the other U.S. military prisons in Iraq. They intensified in the first few months of 2005. For instance, on January 13, 2005, 38 prisoners escaped from an Abu Ghraib prison transport bus after it came under insurgent attack. Ten were quickly recaptured. On January 31, 2005, live ammunition was used to put down a riot at Camp Bucca in which prisoners' homemade sling shots had a

greater effective range than the non-lethal weapons issued to U.S. military guards. Four prisoners were killed and six others wounded.

In March 2005, several escape tunnels up to 600 feet long were discovered at Camp Bucca.

On April 1, 2005, a riot at Camp Bucca left twelve prisoners and two guards injured. On April 2, 2005, insurgents launched a large-scale, multi-pronged, company-sized coordinated attack on Abu Ghraib. Up to 200 insurgents carrying weapons ranging from WWII issue rifles to anti-aircraft missiles used sophisticated techniques, including three car bombs and initial feints to attack the prison complex from three sides. Seven U.S. soldiers were seriously injured during the battle. Another 16 received shrapnel wounds, 13 prisoners were killed and the bodies of two insurgents were discovered after the two-hour firefight. Also discovered were three unexploded bombs, two of them in trucks and one using a tractor. These had apparently been intercepted by reinforcements coming to aid the prison complex and the drivers had fled or been killed. The boldness, intensity and sophistication of the attack impressed U.S. military commanders. On April 6, 2005, two days after the major attack, the Abu Ghraib prison complex was again attacked using a suicide tractor bomb.

On April 1, 2005, a riot at Camp Bucca left 12 prisoners and 1 guard injured. Eleven prisoners escaped from Camp Bucca by cutting a hole in the fence on April 16, 2005. Ten of them were quickly recaptured. Also in April 2005, two violent clashes at Camp Bucca left one prisoner dead, twelve injured, and a senior camp commanding officer seriously wounded. In May 2005, eleven Camp Bucca prisoners escaped through a tunnel. On May 26, 2005, three prisoners escaped from Abu Ghraib through two holes in the perimeter fence. On June 5, 2005, an escape attempt at Abu Ghraib developed into a stone-throwing riot that left four guards and six prisoners injured.

Clearly, Abu Ghraib will continue to be a symbol of the abuses of the American occupation. Likewise, it will continue to attract supporters to the Iraqi insurgency. While an immediate withdrawal of US forces from Iraq and Afghanistan would resolve the ongoing problem, that does not appear likely any time soon. Another possible cure for this is to end the abuse of prisoners and make the operation

of Abu Ghraib and the other overseas American military prisons totally transparent by allowing free and frequent unannounced inspections of the prison by neutral international organizations such as the Red Cross and the media. However, since torture is an integral part of US counterinsurgency strategy, that is not likely either.

Unfortunately, neither withdrawal nor reform seem to be on the U.S. government's agenda. Whereas a female guard at Camp Bucca who participated in an organized mud wrestling exhibition as part of a going-away party for soldiers from another unit was promptly disciplined, in January 2005, the Army closed early its investigation into the abuse of prisoners by its personnel with little discipline handed out for the 56 cases of abuse it investigated. Even cases as egregious as Army personnel robbing Iraqis at gunpoint at U.S. checkpoints were confirmed, but never brought to court. Meanwhile, Human Rights Watch released a report confirming routine torture and abuse in Iraqi government prisons and the reports of abuse in U.S. military prisons continue to flow unchecked by the Abu Ghraib scandal and the reform of prison

guard training the Army claims to have undertaken in its aftermath. Thus, at Abu Ghraib and other U.S. overseas military prisons worldwide, the business of abusing and torturing prisoners seems to be proceeding as usual.

The cover-up is also proceeding as usual. The ACLU filed a lawsuit in October 2003, seeking release of the remaining undisclosed 87 photographs of prisoner abuse at Abu Ghraib. Top Pentagon officials have strongly opposed the release, claiming that it would add fuel to the propaganda mills of those opposing U.S. occupation in Iraq and endanger U.S. military personnel. Despite the opposition, on September 29, 2005, New York federal district judge Alvin Hellerstein ordered the release of 74 photos and three videotapes taken at Abu Ghraib. Thirteen other photos and one other videotape were not ordered released. Hellerstein noted that terrorists "do not need pretexts for their barbarism" and opined that not releasing the pictures would be like submitting to blackmail. Sadly, he did not note that the actions of the U.S. military personnel shown in the photos, which reportedly depict scenes of guards sexually abusing, torturing and murdering prisoners--not



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Abu Graib (cont.)

the release of the photos--is what might endanger U.S. personnel. *New Yorker* reporter Seymour Hersh, who originally broke the Abu Ghraib story, reports that thousands of torture and abuse photos from Abu Ghraib exist that have not yet been made public which depict, among other things, the torture of children by US troops at the prison.

In a similar case, on December 3, 2004, the *Associated Press* published 15 photographs of SEALs in Iraq sitting on hooded and bloodied prisoners. Four SEALs sued *AP*, but have now agreed to drop the case and not appeal a federal district court judge's decision in favor of *AP*. The judge had held that it would be unreasonable for the SEALs to expect the photos to remain private after one of the SEALs' wives posted them on a commercial photo-sharing web site. This undermined the SEALs' case. Each party agreed to pay its own attorney fees and court costs.

The commander of U.S. Central Command, General John Abizaid, criticized the release of the Abu Ghraib photos. "When we continue to pick at the wound and show the pictures over and over again, it just creates the image--a false image--like this is the sort of stuff that is still happening, and it's not," said Abizaid.

However, abuse of prisoners by U.S. military personnel was always more widespread than the Pentagon wanted to admit and is continuing. On September 13, 2005, Captain Christopher M. Bering, commander of the Cincinnati, Ohio-based 377th Military Police Company was charged with dereliction of duty and making a false official statement in relation to the investigation of the death of Dilawar and Mullah Habibullah, two detainees found dead following abuse at Bagram Airfield, Afghanistan, in December 2002. Staff Sgt. Brian L. Doyle and Sgt. Duane M. Grubb, whom Bering commanded, were also charged--Doyle with dereliction of duty and maltreatment, Grubbs with assault, maltreatment and making a false statement. Charges against Bering, the only officer charged in this case, were later dismissed.

On September 6, 2005, Sgt. Keri Patterson, also of the 377th, testified that she saw Sgt. Christopher W. Greator and Sgt. Darin Broady abuse Habibullah. The

testimony came during the trial of Greator, on charges of abusing Habibullah and covering up the abuse. Patterson, who was working in the isolation unit of the military prison at Bagram Airfield, testified that she saw Broady administer "a kind of kung-fu kick" to the knee of Habibullah, who was in chains at the time. She said Broady and Greator took turns beating Habibullah, who died of a pulmonary embolism caused by clots which the beatings apparently induced in his legs.

On August 23, 2005, specialist Glendale C. Walls, a military intelligence interrogator with the 377th, pleaded guilty to dereliction of duty and assault and was sentenced to two months in prison for abusing Dilawar. Walls and military intelligence interrogator Sgt. Selena M. Salcedo, who pled guilty to similar charges, were at the Bagram Airfield in Afghanistan when the abuse occurred in December 2002. Salcedo was demoted, given a letter of reprimand and forfeited \$250 per month for four months. Pfc. Willie V. Brand faced the most serious charges in the abuse of Dilawar. In August 2005, a military jury convicted him of assault, maltreatment and making a false official statement. He was reduced to the rank of private, but not given any prison time. Spc. Brian E. Cammack, who had pled guilty to the abuse and testified against Brand, was sentenced to three months in prison. Spc. Joshua R. Claus intends to pled guilty to the abuse of Dilawar and another detainee. Sgt. James P. Boland was given a letter of reprimand for his involvement in the abuse of Dilawar. All of the soldiers are reservists from Ohio. All told, 11 reservists from the unit were charged in the two murders and military juries acquitted ever single one of them of murder.

On June 2, 2005, David Passaro, a former Special Forces soldier who had been charged with abuse of prisoners in Afghanistan, was charged with assaulting his girlfriend in Raleigh, North Carolina. Passaro was recruited by the CIA for anti-Taliban and al-Qaida operations in Afghanistan. He was previously charged with having beat prisoner Abdul Wali with his hands, feet and a large flashlight for the two days in June 2003, preceding Wali's death. He is now additionally charged with assault, injury to personal property and misdemeanor larceny in North Carolina. Passaro was released from jail in August 2005, following a federal judge's determination that he was neither a flight risk nor a threat to community safety.

Passaro's girlfriend might disagree with that determination. Passaro, who claims he is being scapegoated by the military in atonement for the Abu Ghraib scandal, faces up to 40 years in prison and \$1 million in fines if convicted of the charges from Afghanistan. Given the track record of acquittals, dismissed charges and no prison time meted out to all other US government personnel charged with torturing and murdering prisoners in Iraq and Afghanistan, Passaro has little to worry about.

On June 2, 2005, military officials announced criminal charges against Sgt. Santos A. Cardona and Sgt. Michael Smith, two dog handlers, for using their un-muzzled military dogs to terrify prisoners at Abu Ghraib until they urinated on themselves. The abuse allegedly took place between November 2003 and January 2004. One of detainees was attacked by a dog Cardona was handling. Cardona faces up to twenty years in prison if convicted on all charges.

Sixteen American security guards and three Iraqi contractors are being investigated by the Naval Criminal Investigative Service for spraying Iraqi civilians and U.S. Marine positions with assault rifle fire from moving vehicles. Civilian security contractors in Iraq have a reputation for hair-trigger reactions, but are almost never prosecuted for their crimes. The security guards under investigation in this case, who deny having fired on anyone, have already left Iraq.

American officials are beginning to feel some pressure to release additional Iraqi prisoners. In August 2005, 1,000 prisoners who had been incarcerated for months without charges were released from Abu Ghraib. The release followed a request by Saleh al-Mutlaq, a Sunni negotiator, to Iraqi President Jalal Talabani to release as many uncharged detainees as possible before the October 15, 2005, referendum on the new Iraqi constitution. U.S. officials released a statement claiming that all those released had been accused of non-violent, minor crimes and all had admitted their guilt and promised future good conduct. However, if they were only accused of minor, non-violent crimes, why were they being held in a high-security prison?

A U.S. resident, Numan Adnan Al-Kaby, was released from a U.S. military prison in Baghdad on September 6, 2005. Al-Kaby was arrested in a sweep following a mortar attack on U.S. forces

in April 2005. In July 2005, a military tribunal determined that Al-Kaby was innocent. Nonetheless, he remained in prison until his family filed a federal lawsuit. The military claims that, after the determination that Al-Kaby was innocent was made, the military received additional information and only completed its investigation on September 4, 2005, two days after the suit was filed. The federal judge had set a hearing for September 8, 2005, and ordered the government to explain Al-Kaby's continued detention.

Mark Rosenbaum of the American Civil Liberties Union, one of Al-Kaby's attorneys, said the government's explanation was "a bald-faced lie" and alleged that the military was covering up a "huge scandal" of illegal detention of hundreds or thousands of innocent Iraqis.

Adding substance to Rosenbaum's accusations was the fact that Cyrus Kar, an Iranian-American filmmaker who had been arrested in May 2005, on suspicion of involvement in a terrorist plot, and was exonerated by a military panel, but was not released until a few days after his family filed suit in July 2005. Kar was Al-Kaby's neighbor in prison.

Fifty Arabs who had been abducted and secretly transferred to prisons in Kurdish-dominated northern Iraq, were released in accordance with an agreement between Arab and Kurdish leaders announced on September 2, 2005. This was touted as the "first stage" toward releasing or returning to Arab-controlled areas all prisoners who had been illegally transferred to Kurdish-controlled prisons. The prisoners had been seized by Kurdish security forces as part of a campaign to abduct Sunni Arabs, Turkmen and other minority ethnic groups in Kirkuk, Mosul and other cities with large Kurdish populations and transfer them to prisons in Kurdish-controlled northern Iraq. The release came amid pressure from the U.S. to resolve the situation involving extrajudicial detentions which were causing tensions between the Arabs and Kurds. The agreement was brokered by 116th Brigade Combat Team commander Brig. Gen. Alan Gayhart. The detainees had already been held for six months to a year. Most had been held in private houses that held up to 75 prisoners. Many complained of verbal and psychological abuse during their incarceration.

Meanwhile, Abu Ghraib continues to take its toll of American lives. In August 2005, Army Staff Sgt. James McNaugh-

ton, 27, a NYPD police officer serving at Abu Ghraib, was killed when a sniper's bullet struck him in the head while on duty in one of the prison's watchtowers. He was the first NYPD officer killed in Iraq. Currently, 272 other reservist members of the NYPD are on active military duty. New York lost its first firefighter last

year in Baghdad when Christian Engledrum was killed by a car bomb. ■

Sources: *Los Angeles Times*, *Houston Chronicle*, *Sacramento Bee*, *Washington Post*, *USA Today*, *Arab Times*, *New York Times*, *Seattle Times*, *Associated Press*, *BBC News*, *Miami Herald*, *Reuters*.

Lawyers Bilk Cornell for Millions, San Francisco Jail Scammed

In an attempt to recoup millions of dollars, private prison operator Cornell Companies, Inc., has filed lawsuits against lawyers entrusted to oversee the company's funds for land deals.

Cornell, based in Houston filed the latest suit on August 26, 2005, in Houston's 333rd District Court against Locke Liddell & Sapp and David Montgomery, a partner in the firm, alleging malpractice, breach of contract, breach of fiduciary duty and fraud.

The complaint alleges the defendants gave Cornell the "green light" to place \$13 million into an account that was supposedly an escrow account. "There was no escrow agent; there was no escrow account," contends Scott Hershman, a Cornell attorney. That money was placed in the account with the intention to buy land for developing a prison in Colorado.

Cornell says \$5 million was improperly taken from the account, and it incurred millions of dollars in fees, expenses, and transaction costs to pursue the missing money and finalize the land deal with another attorney.

The lawsuit comes as a surprise to Locke Liddell, who was representing Cornell on other matters when the suit was filed. "They just filed this thing without any notice to us," said John McElhaney, Locke Liddell's spokesman.

Cornell had problems with an escrow account in a Georgia deal. In that case, Cornell sued Longboat Global Advisors, alleging that company's Vice President, attorney Edgar J. Beaudreault, handled a construction loan transaction on behalf of Longboat, which was providing financing for the Colorado project. Once again, Cornell placed money into an escrow account that turned out to be a regular bank account.

Cornell alleged fraud, conversion, breach of contract, and other claims. In December 2004, a jury awarded Cornell

almost \$6.5 million in actual damages and \$1.4 million in punitive damages. Hershman, however, doubts Cornell will recover because the money is gone.

The City of San Francisco has been defrauded in another way; it contracted with a company that did not have a valid contractor's license to build its new 768 bed San Bruno jail. The jail is more than a year late in opening.

"Not only did they not do the work they were contracted to do, they failed to inform us that they had criminal convictions against them and that they had their state license pulled," said City Attorney Dennis Herrera.

The contractor, London-based AMEC, declared the jail completed April 8, 2005, and left a week later. The City's \$125 million fraud suit contends that 10 percent of the jail's locks do not work, the emergency alarms do not work, and neither does the vent system.

AMEC, however, has filed its own claim against the City: \$26 million for changes and extra work the city ordered on the jail and \$8 million for the delays that ensued.

While the suit ensues, the jail sits empty. ■

Sources: *Law.com*; *San Francisco Gate*

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Report Details Suicide and Homicide Rates in Prisons, Jails

by Michael Rigby

Even though suicide and homicide rates among prisoners have been falling since the 1980s, thousands still die in U.S. prisons and jails every year. During 2001 and 2002, 5,824 state prisoners died in custody, according to a Bureau of Justice Statistics (BJS) report released in August 2005. Another 2,843 prisoners died in local jails from 2000-2002.

Jail suicide rates have fallen sharply in recent years, from 129 per 100,000 prisoners in 1983 to 47 in 2002. Suicide rates in state prisons have also showed a steady decline, from 34 per 100,000 in 1980 to 16 per 100,000 in 1990, and have since stabilized at 14 per 100,000 in 2002.

Similarly, murder rates in state prison have dipped sharply, from 54 per 100,000 in 1980 to 4 per 100,000 in 2002. Murder rates in local jails showed a slight decline, from 5 per 100,000 in 1983 to 3 per 100,000 in 2002.

The report is the first based on data collected under the Death in Custody Reporting Act of 2000 (Public Law 106-297). DICRA requires states receiving funds under the Violent Incarceration and Truth-in-Sentencing grant program to submit quarterly reports detailing deaths that occur in custody. Local jails began reporting in 2000, followed by state prisons in 2001, and state juvenile authorities in 2002.

Jails

Suicide is a great killer among jail prisoners, accounting for 32.3% of all jail deaths during 2000-2002. Only illness (47.6%) was responsible for more. Other jail prisoners died from AIDS (5.9%), homicide (2.1%), accidents (3.3%), intoxication (5.2%), and unknown causes (3.6%).

Among the 50 largest U.S. jail jurisdictions, death rates varied widely. While 12 had death rates of fewer than 100 per 100,000 prisoners (the lowest being Suffolk County, Massachusetts with only 29), 16 had rates of 200 or more deaths

per 100,000. The deadliest was Baltimore, Maryland, with 381 deaths per 100,000 prisoners, followed by Jacksonville, Florida (341), and Davidson County, Tennessee (291).

Surprisingly, the suicide rate of the 50 largest jurisdictions (29 per 100,000) was half that of all other jails (57). While 8 of the top 50 jurisdictions reported no suicides during 2000-2002, 10 reported suicide rates of at least 50 per 100,000. Clark County, Michigan led with 107, followed by Wayne County, Michigan (97), and Baltimore, Maryland (88). [See *PLN* July 2005 for more on Maryland's deadly jails and prisons.]

Even more suicides typically occurred in the nation's smallest jails; and, as jail size decreased, the suicide rate increased. In the smallest jails, holding fewer than 50 prisoners, the average rate was more than 5 times higher (177 per 100,000) than the largest jails (32).

For the most part, males and white jail prisoners had the highest suicide rates. On average, men (50 per 100,000) were 56% more likely to commit suicide in jail than women (32). White jail prisoners were also more likely to commit suicide (96 per 100,000) than Hispanics (30) and blacks (16).

Age and proximity to admission were also factors in jail suicide rates. With the exception of child prisoners under age 18 (who had the highest rate--101 suicides per 100,000), jail suicide rates increased with age. Prisoners aged 18-24 had the lowest rate (38 per 100,000), followed by those aged 25-34 (47), 35-44 (53), and 55 or older (58). Nearly half (48%) of all jail suicides occurred during the first week. Age and race/ethnicity were not correlated to jail murder rates, which averaged 2.1%--for 59 murdered prisoners--during 2000-2003.

Prisons

Of the 5,824 state prisoners who died during 2001-2002, 80% were attributed to "illness/natural causes." Two-thirds of the deaths involved prisoners age 45 or older. Other causes of death were AIDS (8.8%), suicide (5.8%), homicide (1.5%), accident (0.9%), intoxication (1.2%), and "other/unknown" (1.3%).

Just as in local jails, white prisoners were more likely to die from all causes

in prison (327 deaths per 100,000), than blacks (243) or Hispanics (207). White state prisoners were also the most likely to commit suicide (22 suicides per 100,000), compared to Hispanics (18), and blacks (8). Race/ethnicity also correlated with homicide rates in state prisons. Hispanic prisoners were more likely to be murdered during 2001-2002 (7 homicides per 100,000 prisoners) than whites (5) and blacks (2).

Nationwide, 337 state prisoners committed suicide in 2001 and 2002. Four states accounted for 42% of all suicides: California (52), Texas (49), New York (21), and Illinois (20). Nearly half of all states (24) reported 3 or fewer suicides.

As for proximity to admission, 7% of state prisoner suicides took place during the first month of imprisonment, 65% after the first year, and 33% after 5 years. This trend was reversed for homicide rates: only 1% of prison murders occurred during the victim's first month, while 67% of murder victims had served at least 2 years and 37% at least 5 years.

During 2001-2002, 87 state prisoners were murdered. Three states accounted for 43% of all prisoner homicides, with California and Texas again leading (21 and 10 per 100,000 respectively), followed by Maryland (6). No other state reported more than 5 murders during the same period, and many--31 in 2001 and 29 in 2002--reported no murders.

According to the report, "[a]ll but 8 of 87 prisoner homicides during the 2-year period were committed by other inmates (91%). Of those 'other homicide' events, most involved escape attempts or cases in which assailant identity [guards?] was not established." Perhaps that's why no autopsy or post-mortem examination was performed in 8% percent of prison murders. All the data is self reported by the jails and prison systems which may be why data on how many prisoners are murdered by staff are not included even when staff are criminally convicted of the homicides.

Copies of the report, *Suicide and Homicide in State Prisons and Local Jails*, NCJ 210036, are available on the web at www.prisonlegalnews.org or by writing NCJRS, P.O. Box 6000, Rockville, Maryland 20849-6000. ■

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See Page 45 for more information.

Four CCA Guards Indicted in Murder of Nashville Prisoner

by Matthew T. Clarke

Four guards have been indicted for reckless homicide and aggravated assault in the July 2004 murder of a female prisoner at the Metro Detention Facility in Nashville, Tennessee, previously reported in *PLN*. [see *PLN*, Apr. 2005, p. 14]. The Metro facility is run by the Corrections Corporation of America (CCA), America's largest private prison company, which is based in Nashville.

Estelle Richardson, 34, was incarcerated at the Metro Detention Facility. On July 5, 2004, at 5:37 a.m., she was found unresponsive on the floor of her solitary confinement cell. CCA claims Richardson had fought with other prisoners. However, other prisoners could not have been responsible for the severe injuries that caused her death because she was alone in her cell at the time. Thus, only CCA employees could have killed her.

An autopsy revealed a fatal skull fracture, four broken ribs and liver injuries. The medical examiner said the injuries were consistent with blunt force trauma caused by Richardson's body being slammed against a hard surface, and could not have been self-inflicted. Her death was ruled a homicide.

In September 2005, CCA guards William Woods, 26; Keith Andre Hendricks, 35; Jeremy Neese, 24; and Joshua D. Schockman, 23, were indicted on reckless homicide and aggravated assault charges. They were arrested and then released on \$25,000 bond. They had been placed on paid administrative leave since the murder, and face maximum sentences of four years in prison for reckless homicide or six years in prison for aggravated assault.

Richardson had a non-violent criminal

history. She was in jail on a food stamp fraud charge at the time of her death. She also had a probation violation hold from a previous drug possession conviction.

In an interview, Woods admitted that the guards had an altercation with Richardson the day before she died, after she refused to clean her cell. Richardson struggled with the guards when they attempted to handcuff her after they sprayed her with chemical agents. However, Woods denied that any of the guards hit Richardson or injured her so as to cause the fatal injuries.

Davidson County prosecutors blame the lengthy delay in filing charges against the CCA guards on a federal investigation. According to them, the state conducted its investigation and forwarded the results to federal prosecutors who, after an investigation of their own, determined that the charges were best prosecuted in state court.

For Richardson's brother, Tyrone Gibson of Lansing, Michigan, the prosecution is the beginning of the end.

"I think it's a beginning of a long conclusion," said Gibson, who was in Nashville attending a hearing in the criminal cases. "I think anyone who has been involved has already had a foregone conclusion that these four men have to face justice here. And the family of my sister, who has been dead over a year now, will eventually have some closure."

The guardian of Richardson's children, Saviyance Beck, 15, and Savion Richardson, 8, filed a suit on their behalf seeking \$60 million in damages. Other family members filed a lawsuit seeking \$160 million. "It's for her kids," said Estella Buie, Richardson's mother. "And my whole family – for them to get justice for her." But justice can be elusive, even when it's obtained.

On February 22, 2006, Richardson's family settled their lawsuit against CCA for an undisclosed amount; the terms of the settlement were confidential. Gibson, Richardson's brother, said the settlement was welcome but "It really doesn't, in a sense, relieve us, as far as the loss of my sister. To be honest, it's really hard. The family is now turning its attention to the pending criminal charges against the CCA guards."

It remains to be seen whether justice will be done in the city where CCA has its corporate headquarters. On October 5, 2005 all four CCA guards, who remain on the company's payroll, entered pleas of not guilty and denied having used excessive force on Richardson. CCA declined to comment on the charges filed against its employees, and the firm has refused to release information regarding the salaries the guards continue to be paid while they are on administrative leave. ■

Sources: *Nashville Tennessean*, *Nashville City Paper*, *New York Times*, *Associated Press*, www.newschannel15.com.

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Habeas Hints: Evidentiary Hearings

by Kent Russell

This column is intended to provide "habeas hints" to prisoners who are considering or handling habeas corpus petitions as their own attorneys ("in pro per"). The focus of the column is habeas corpus practice under the AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

The evidentiary hearing is the "Catch 22" of habeas corpus practice. Although getting a habeas corpus petition granted is, of course, the ultimate goal on habeas corpus, virtually no habeas petition is granted these days unless the petitioner manages to prevail first at an evidentiary hearing on the petition. Meanwhile, however, the judge deciding the habeas corpus petition has very broad discretion to grant or deny a hearing, and more than 95% of the time the judge will exercise that discretion by denying the petition summarily – that is, *without* granting a hearing.

Ironically, although the AEDPA is to blame for most of the procedural roadblocks a habeas corpus petitioner faces today in getting his habeas corpus heard on the merits, the law regarding evidentiary hearings is not very different now than it was before the AEDPA. That is because, although the AEDPA is supposed to make evidentiary hearings harder to get by precluding the federal court from granting one absent a showing amounting to actual innocence, the AEDPA restriction doesn't apply unless the petitioner has either: [1] already had an evidentiary hearing in state court, or [2] has failed to act with "reasonable diligence" in unsuccessfully attempting to develop the claim in state court. #[1] would have some teeth on federal habeas corpus if state courts typically granted evidentiary hearings, but the fact is, they don't: Most state courts grant hearings nearly as seldom as they grant habeas corpus petitions – in other words, once in a blue moon. As to #[2], because a state habeas corpus petitioner has so little leverage in getting a state court to order a hearing, very little is expected or required to get past #[2] beyond covering the basics. Therefore, so long as the prisoner files a state habeas petition adequately alleging facts which, if true, would entitle the petitioner to relief, all the petitioner has to do to satisfy the "reasonable diligence" requirement of

#[2] is to ask the state court to grant an evidentiary hearing and wait for the state court to deny that request, which is what will happen virtually all the time.

Furthermore, by properly asking for an evidentiary hearing in state court and having that request denied, the Petitioner gains an important advantage when s/he gets to federal court: Because the federal court is required by federal law to accept as true any factual allegations that are made and supported in federal court, when the state court has made findings against the petitioner on those facts without first ordering a hearing – i.e., precisely what normally happens in state court – the state's fact-finding procedure is deemed "unreasonable", which means that the state's factual findings are not binding on federal habeas corpus. See: *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004).

By understanding and applying the above principles, a knowledgeable habeas corpus petitioner can, on the one hand, maximize his or her chances of getting an evidentiary hearing granted in the first place; and, if unsuccessful in that endeavor, use that to their advantage when federal habeas corpus comes around and the State is trying to sink the petitioner's ship based on "bad" factual findings made by the state court without first granting a hearing.

With this in mind, consider the following "Habeas Hints" regarding evidentiary hearings.

- Because of the deference due to state court decisions under the AEDPA, a petitioner should always try to bring something "new" to the table on habeas corpus that was not already dealt with during the direct appeal in state court. Because of the basic rule that nothing can be raised on direct appeal which was not contained in the appellate record, combined with the exhaustion requirement which prohibits the federal court from considering anything that was not presented first to the state courts, a petitioner should use state habeas corpus to get this "new" material into the record before going on to federal habeas corpus.

- Always ask for an evidentiary hearing when filing a state habeas corpus petition at every level of the state court system. This can easily be done by typing the words "EVIDENTIARY HEARING

REQUESTED" in a prominent place on the first page of the each petition filed in state court. (I do it in the caption, under the case number.)

- Only factual allegations that are backed up by proof are required to be taken as true on state habeas. Therefore, make sure that the factual allegations you make in your state habeas corpus petition are clearly stated in the petition, and are supported by evidence contained in the exhibits that you present to the state court in support of the petition. For instance, if you are alleging ineffective assistance of counsel (IAC) on state habeas, then you not only need to clearly state in your petition what trial counsel failed to do, but you also have to submit documentary evidence to show what an effective lawyer *would* have done. Thus, for example, if you contend that it was IAC for counsel not to have called certain witnesses, then say so in your petition, but also include with your habeas exhibits declarations from the witnesses who weren't called, which set forth the facts the witnesses would have testified to had they been brought to court by trial counsel.

- The process of exhaustion in state court is not completed until you present your factual allegations to the state's *highest* court. Therefore, you can "beef up" your allegations on state habeas corpus as you move up through the state court system. For example, filing a state habeas corpus petition at the superior court (trial) level is not absolutely necessary, but it serves to stop the AEDPA clock from running, and the clock remains stopped for the entire time that you are proceeding up the state ladder through one round of state habeas corpus filings – including the time *between* filings in the various state courts. Thus, you can continue your habeas investigation after you've filed in the lowest state court to toll the AEDPA statute of limitations, and, for example, you can add additional witness declarations to support your petition as you move up the ladder through the intermediate appellate court and then to the state's highest court. One caveat, however: Be sure not to blow any state-imposed deadlines as you move between levels of the state court system on state habeas. In many states, there is a 30-60 day deadline for filing in the next court after a previous denial in the lower court.

In California the timing rules are more relaxed, but there is still a requirement to proceed between levels without “unreasonable delay”. To safely stay within California’s reasonable time requirement, I recommend filing at the next level of the California system within 60-90 days of a previous denial, and never taking more than 6 months between filings. See: *Evans v. Chavis*, 126 S.Ct. 846 (2006).

- When you do file your federal habeas corpus petition after exhaustion is completed in state court, request an evidentiary hearing in federal court. Again, you can simply type the words “EVIDENTIARY HEARING REQUESTED” on the front page of the federal petition.

- After the federal court orders the Respondent to answer your federal habeas corpus petition, you will be permitted to file a Traverse. You should ask for an evidentiary hearing at two points in the Traverse: First, when you file the “pleading” portion of the Traverse, in which you respond briefly to the contentions in the Answer, ask for an evidentiary hearing in the concluding section, which is called the “prayer”. Also, Respondent’s brief in support of the Answer will almost always include a section entitled “Standard of Review”, in which the Respondent will remind the court of the “deference” that is due under the AEDPA to the state court denials of your habeas claims. Normally there will be nothing inaccurate about Respondent’s summary of the standard of review, as deference to state court adjudications is a routine feature of the AEDPA. On the other hand, because the law regarding factual disputes is largely favorable to the petitioner when a hearing has been denied in state court (see *Taylor*, cited above), the Respondent will usually stay away from mentioning anything about that in its brief. Therefore, consider using something like the following response in the “Standard of Review” section of your own brief in support of the Traverse:

Petitioner agrees that Respondent’s “Standard of Review” contains an accurate summary of the governing law regarding the deference due under the AEDPA to state court adjudications on the merits. On the other hand, Respondent omits entirely from its discussion what may be the most important standard of review to be considered at this juncture in the litigation – the standard this court must apply in deciding whether or

not to grant Petitioner an evidentiary hearing on one or more of the habeas corpus claims.

A petitioner on federal habeas corpus is entitled to an evidentiary hearing where the petitioner establishes a “colorable” claim for relief, and where the petitioner has never been accorded a state or federal hearing on his claim. *Earp v. Oronski*, 431 F.3d 1158, 1167 (9th Cir. 2005), citing *Townsend v. Sain*, 372 U.S. 293 (1963) and *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5, (1992). In stating a “colorable” claim, a petitioner is merely required to allege specific facts which, if true, would entitle him to relief. *Ibid.* Granted, under the AEDPA, a federal court is not required to order a hearing where the petitioner failed to develop the facts in state court. In such cases, the federal court accords a presumption of correctness to the facts found by the state court, and need not hold any evidentiary hearing unless those facts are rebutted by clear and convincing evidence. On the other hand, no AEDPA deference is due where the state has made an “unreasonable” determination of the facts; and: “Where a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an ‘unreasonable determination’ of the facts.” *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004).

In sum, an evidentiary hearing is required under the AEDPA – and an appellate court will remand for a hearing if the district court rules without granting one – “where the petitioner establishes a colorable claim for relief and has never been accorded a state or federal hearing on his claim”. *Earp*, supra, at 1167.

Here, Petitioner requested an evidentiary hearing at every level of the state habeas proceedings, and each of the courts to which he applied ruled without granting him an evidentiary hearing. As a result, (1) Petitioner is entitled to an evidentiary hearing in this court before the court can make any credibility determinations on the facts alleged in the petition and supporting exhibits; and (2) Any controverted “facts” found by the state court while denying a request for an evidentiary hearing necessarily

result from an “unreasonable determination” of the facts, and hence are not entitled to any presumption of correctness. *Earp*, supra, at 1167; *Taylor*, supra, at 1101 [“Where the state court’s legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it.”].

- If the district court denies your petition without granting an evidentiary hearing, reiterate the above argument in filing your Objections to the Magistrate’s Report and Recommendation, and again in asking for a Certificate of Appealability when you file your Notice of Appeal. ■

Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which explains habeas corpus and the AEDPA. The latest edition (Ed. 4.5) is now shipping, and can be purchased for \$29.99 (cost is all-inclusive for prisoners; others pay \$5 extra for postage and handling). No particular order form is necessary; just send your check or money order to the Law Offices of Russell and Russell, 2299 Sutter Street, San Francisco, CA 94115.



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Nearly 7 Million Under Correctional Supervision In U.S.

by Michael Rigby

At yearend 2004, nearly 7 million adults were in prison, on parole, or on probation in the U.S.--2.5 million more than in 1990--according to a study by the Bureau of Justice Statistics released on November 2, 2005.

Put another way, roughly 1 in every 31 adults were under some form of correctional supervision on December 31, 2004. By comparison, approximately 1 in 36 adults were under supervision in 1995, and about 1 in 88 in 1980.

The number of adults on parole increased by 20,230, or 2.7%, during 2004, more than double the average yearly increase of 1.37 since 1995, according to the study. A total of 765,355 adults were on parole at year's end.

Overall, discretionary releases by a parole board have declined significantly over the past two decades, from 55% in 1980 to 22% in 2003, the study found. During the same period, mandatory releases to parole (due to sentencing statutes or good-time provisions) increased from 19% to 52%. The unwillingness of parole boards to grant early release, regardless of prisoners' conduct or accomplishments while in prison, is simply another facet of the "lock 'em up and throw away the key" mentality.

Thirty-nine states showed an increase in the number of parolees during 2004, with 10 states experiencing double-digit growth. Nebraska led with 24%, followed by Vermont (16%), and New Mexico (15%). Allen Beck, who oversaw the study, says the rise in parole numbers is a natural consequence of the spike in prison populations during the 1990s.

Of all parolees at yearend 2004, 41 % were black, 40% white, and 18% Hispanic. One in 8 parolees were female. About 187,000 parolees, or 39%, were re-imprisoned in 2004 due to technical violations or new offenses.

The number of probationers also grew in 2004, to 4,151,125--an increase of 6,343. According to the report, 26% of people on probation were convicted of a drug offense, 15% for driving while intoxicated, and 12% for larceny or theft.

Whites comprised 56% of those on probation, but made up only 34% of the prison population, the study found. "White people--for whatever reason--seem to have more access to community

supervision than African-Americans and Hispanics," said Jason Ziedenberg, who heads the Justice Policy Institute, which advocates for alternatives to mass imprisonment. Blacks, he said, constituted 41% of prisoners at yearend 2004, but made up only 30% of probationers.

As for prisoners, the U.S. prison population grew 1.97 in 2004, a high of nearly

2.3 million (2,267,787) by year's end.

Get a copy of the report, *Probation and Parole in the United States, 2004*, NCJ 210676, on the Web at www.prisonlegalnews.org or by writing NCJRS, P.O. Box 6000, Rockville, Maryland 20849-6000.



Additional source: *Associated Press*

Banned From the Hood

by Matthew T. Clarke

In Chicago, gang-leader parolees may be required to stay away from the turf of their gang as a condition of parole. Returning to the hood results in returning to prison. Other cities are using innovations such as "gang-free safety zones" and court orders prohibiting gang behavior by known gang members. Civil rights advocates question the constitutionality of these measures.

Shawn Betts, a leader of the 4 Corner Hustlers, a violent street gang, was released from prison in October 2004 with the parole stipulation that he not return to the area controlled by his gang. He was made aware of the fact that he would be monitored by police for compliance with the stipulation. Nonetheless, less than six hours after his release from prison, he violated his parole.

Betts was under surveillance when he ducked into a van driven by his friends. They drove into Indiana briefly. Thus, Betts violated his parole by leaving the state without permission. The violation would probably never have been known had Betts not been being watched to make sure he did not return to his former turf.

Betts's revocation was the indirect result of a controversial new strategy by Chicago to rollback the gang violence plaguing its streets. Chicago police say that banishing paroled gang leaders from their former turf is working. Police say gangs commit about 50% of all homicides in Chicago. The institution of the turf restrictions in 2004 coincided with a 25% decrease in homicides for that year. Homicides in 2005 have continued to decrease, but only by a couple of percentage points.

According to Thomas Epach, Jr.,

the executive assistant to Chicago Police Superintendent Philip Crane, it is unclear how much the parole restriction had to do with the homicide reduction as police also launched other anti-gang initiatives in gang-controlled areas to help reign in the estimated 68,000 Chicago gang members. However, the restrictions and attendant surveillance have definitely increased the authorities' knowledge of gang leaders' activities. They have also dampened the violence that usually accompanies a paroled gang leader's reassertion of power in his gang.

Civil rights advocates and defense attorneys claim that the restrictions are unconstitutional infringements on the parolees' right to associate with family and friends. They also claim it makes finding work difficult for the parolees. Jorge Montes, chairman of the Illinois Prisoner Review Board, disagrees. He notes that the restrictions only apply to a small number of gang leaders whom authorities determined would be a threat to public safety.

Darren Jones, a leader of the Traveling Vice Lords, a street gang based in Chicago's west side, was released in January 2005, with the parole stipulation. Over the next three months, police watched while Jones reestablished old "business" connections and traveled into his gang's turf multiple times. They arrested him on multiple parole violations in March 2005.

Los Angeles took another tack in battling violent street gangs. It sought court orders prohibiting gang members from associating with one another, intimidating neighborhood residents, and being lookouts who warn people engaging in criminal activity of the approach of po-

lice. It also established nearly 500 square miles of "safety zones" in which public behavior is highly regulated and gang-like behavior prohibited. Similar safety zones are being tried in El Paso, San. Antonio and Chicago.

In El Paso, Texas, police identified 35 members of the Barrio Azteca gang, established the "Segundo Barrio" area near downtown as a safety zone and obtained court orders banning the members from associating with each other within the zone. They also established a 10:00 p.m. to 6:00 a.m. curfew for the gang members within the zone. According to El Paso police Sgt. Marylou Carrillo, between when the order took effect in April 2003, and January 2005, business burglaries decreased 33%, robberies decreased 20% and overall crime decreased 12% within the Downtown area.

Although the California Supreme Court upheld the use of court orders against gang members in a 1997 opinion involving San Jose, the U.S. Supreme Court may not be so accommodating. In 1999, it struck down a Chicago anti-loitering ordinance that targeted gang members by allowing police to arrest them if they ignored a police warning to move. The ACLU, which successfully overturned the loitering ordinance, also opposes the parole restrictions as violations of the parolees' civil rights.

Another criticism of the parole restrictions comes from the suburban areas near Chicago. Suburban officials believe the parole restrictions will merely result in the migration of gangs to suburban areas. According to Larry Ford, assistant federal Bureau of Alcohol, Tobacco, Firearms and Explosives director, some gangs have already been driven to the suburbs by intense police surveillance in urban areas. There, "they are finding less competition for turf and less (police) scrutiny," said Ford.

Whether the parole restrictions, court orders and gang-free safety zones will turn the tide on gang violence remains to be seen.

"It's hard to say which snowflake causes the avalanche," said Epach. "Our aim is simple. We're trying everything to take the catalysts for violence out of the equation." Except of course the poverty that fuels crime and gangs in the first place. ■

Source: *USA Today*.

California DOC Bans Dying Parolee From His Family's Town

A terminally ill prisoner, paroled in February 2005 from one of a small northeast California town's two state prisons, was denied his request to live out his remaining days with his wife, a resident of that prison town (Susanville). Parole agents of the California Department of Corrections and Rehabilitation (CDCR) cited the reason that state law requires one normally parole to the county where he was last living, and that alternatively housing him in the prison town would disproportionately increase the potential crime rate there.

Thomas Jones, 41, admits having committed over 20 felonies, for which he has done 20 years in four stints in CDCR's Susanville prisons. He's also an Aryan Brotherhood gang member festooned from head to toe with gang tattoos, including swastikas. But while in prison, he changed his ways and married Amanda, whose Susanville relatives include a prison guard and a local cop. Jones has the added support of his own brother and parents living in Susanville.

But notwithstanding Jones' lethal and disabling emphysema lung disease and his strong family ties, CDCR paroled him to a halfway house five hours away in high-crime-rate Alameda County, where he is enrolled at Laney College to get a basic education.

CDCR's ironic parole rules thus take a dying man away from his wife, parents and brother, and export him to a distant crime-infested locale to gain an education unredeemable in his remaining life span, all to avoid his living in a small town heavily populated by prison guards. CDCR has further banned Jones from even setting foot in Susanville for so much as a visit. Thus isolating Jones from his family and forcing him to die alone bodes ill for CDCR's heavily touted new "rehabilitation" agenda. ■

Source: *San Francisco Bay Guardian*.

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BJS Director Sacked For Telling Truth About Racial Profiling

by Matthew T. Clarke

Lawrence A. Greenfield was the director of the Justice Department's Bureau of Justice Statistics (BJS), a low-profile government agency that employs some 50 people for the task of preparing reports on statistical analysis of criminal justice-related issues such as crime patterns, police tactics, drug use and prison populations. BJS is located in a separate building from the Justice Department and has traditionally been largely independent of political influence. He was appointed to that post by President Bush in 2001 following 19 years of high marks as a statistician and administrator at BJS. However, in August 2005, he was sacked by White House officials after he refused to alter a Congressionally-mandated report on racial profiling to soft peddle the disparate treatment of black and Hispanic drivers stopped by police.

The report was conducted in 2002 and based on interviews with 80,000 drivers. It showed that, while white, Hispanic and black drivers are stopped at about the same rate--9%, black and Hispanic drivers were much more likely to be searched or be subjected to a police use of force than white drivers. The news release on the report prepared under Greenfield mentioned the disparate treatment. It was reviewed by then acting assistant attorney general Tracy A. Henke, who signed marginal notes on those findings stating: "Do we need this?" and "Make the changes." Greenfield refused to delete the findings and change the release to read only that white, Hispanic and black drivers were stopped at about the same rate on the grounds that it would render the release incomplete and misleading.

Henke was later nominated by President Bush for a senior position at the Department of Homeland Security. She claims not to remember the incident. Greenfield was first summoned to the third-ranking Justice Department official's office and questioned on his handling of the release, then called to the White House personnel office and told to resign because he was being replaced.

Greenfield was six months from retirement with full benefits. Therefore, he exercised his right as a senior executive to move to a less senior position. He will probably be placed in the Bureau of Prisons. Joseph M. Bessette, a former BJS

official, was offered the directorate. He refused and praised Greenfield's work.

"I've never met a finer public servant, and I think the agency has been taken to new heights by Larry," said Bessette.

The report was published on the internet without a press release. This virtually ensures that it will be buried among the many less-important published government reports.

Meanwhile, the attempts by the Bush administration to control the politically-sensitive content of BJS reports is causing anxiety among BJS employees. Some de-

gree of tension between statisticians and policy makers is normal, but, according to a senior BJS statistician, "in this administration, those tensions have been greater, and the struggles have been harder."

"Larry wanted to ensure that the integrity of the data was not compromised, and that's what's causing a lot of anxiety. We've seen a desire for more control over BJS from the powers that be, and that's what seemed to get Larry in trouble," said another long-time BJS statistician. ■

Source: *New York Times*.

Connecticut's Mistreatment of Mentally Ill Prisoners and Detainees Enjoined

by John E. Dannenberg

The Connecticut Department of Corrections (CDOC) entered into a settlement agreement in September 2005 that specified extensive changes to its policies for confining and treating mentally ill prisoners and detainees. In response to a 42 U.S.C. § 1983 suit brought in U.S. District Court (D. Conn.) on behalf of such prisoners by Connecticut's Office of Protection and Advocacy for Persons with Disabilities (OPA), the settlement provides for immediate injunctive relief, continuing monitoring, and \$191,000 in attorney fees and costs.

CDOC uses a "unitary" correctional system to house both convicted prisoners as well as pre-trial detainees. Regardless of confinement status, any imprisoned person, if determined to be mentally ill, is confined at CDOC's high-security Northern Correctional Institution (NCI) or the Garner Correctional Institution (GCI). GCI has 40 beds for Acute (IPM) and Intensive (IMHU) mental health housing for disruptive prisoners with mental illnesses. At NCI, prisoners are disciplined via a three-level "phasing" program, which includes punitive deprivations that aggravate mental illness for those who already have it and foment mental illness for those who don't. OPA's suit attacks these inhumane conditions, which serve only to perpetuate mental illness in CDOC.

The complaint described in detail the stark conditions of Phase I,

II and III confinement at NCI. In the concrete, almost totally boxed-in cells, Phase I prisoners are locked up virtually 24 hours a day. When let out briefly for showers or "recreation," they get precious little exercise as they are confined in full body restraints. Visitation is non-contact and there are no programs. Phase I prisoners can spend years in this state of total idleness. As a result, mental illness is prevalent at NCI, often with catastrophic deterioration, including documented incidents of suicide and suicide attempts by swallowing razors, overdosing on drugs, banging heads on the wall, and compulsive self-mutilation. Since NCI prisoners are double-celled, the stress grows proportionate to the relative incompatibility of the cellmates.

Adding insult to injury, many Phase I prisoners remain stuck in Phase I status because their worsening mental illness itself causes violent acts resulting in disciplinary recommitment to the Phase I regimen. Mental health staff speak to these prisoners, if at all, through the food tray slot and within earshot of other prisoners, hardly a confidential, let alone meaningful, treatment setting. Moreover, mental illness often goes undiagnosed when staff members brand such prisoners as "malingerers." The "treatment" for such a designation is to be summarily stripped naked and tied down in four-point restraints, following

extensive use of force and/or violent cell extractions. Prisoners in GCI's IMHU fare no better, suffering the same draconian three-phase program as in NCI. In sum, "oppression" and "exacerbation" best describe "mental health treatment" in CDOC.

The settlement agreement, approved by the Connecticut Legislature, expressly admits to no wrongdoing or violation of anyone's constitutional rights. Nevertheless, it openly repairs the obvious wrongs perpetrated by CDOC in dealing with mentally ill prisoners and detainees. Structurally, the agreement (not a "consent decree") is for a three-year period, with court supervision available if the independent court-appointed overseers cannot come to terms on an issue. It was agreed the settlement would not be controlled by Prison Litigation Reform Act (PLRA) principles, except as to attorney fee rates.

First, seriously mentally ill prisoners must be removed from NCI, and such prisoners shall be excluded from NCI's administrative segregation program. NCI prisoners shall be subject to periodic mental expert evaluations and, if serious mental illness is detected, they must be removed within ten days. A minimum staffing level of mental health professionals is set forth, to be no less than one per 150 prisoners. Psychotropic medication shall be provided under a psychiatrist's care. All mental health services shall be provided under properly confidential conditions, permitting both privacy as well as a place where the patient can feel non-threatened. Use of force, discipline and mechanical restraints against the mentally ill are proscribed, except during "exigent circumstances," which are defined. This includes not wearing hand restraints during non-contact visiting.

The agreement goes on to outline programming in Phase I, II and III in a manner that promotes, rather than deters, progression out of such confinement. Accommodations shall be made for the hearing impaired, sight impaired as well as those with learning disabilities, including ADD and ADHD. Conditions of confinement shall permit commissary-purchased audio entertainment devices plus more out-of-cell time. Programming shall include visitation and telephone privileges as well as group activities to permit socialization. Importantly, every NCI and GCI staff person shall receive

at least eight hours of annual training, to include suicide prevention, recognition of mental illness signs, communication skills with such prisoners, and alternatives to discipline and use of force. Progress is to be monitored during the three-year period of the agreement, including semi-annual audit reports by the independent consultants.

Attorney fees of \$177,850 and

West Virginia Prisoner Sued By Victim's Mother Following \$50,000 Award

On August 16, 2005, state prisoner Mark Allen Harris was awarded \$50,000 for facial injuries he sustained when he fell out of a jail van. Two days - later, the mother of Harris's 12-year-old niece, whom he was convicted of sexually assaulting, filed a \$10 million civil lawsuit against him.

In 2002, while jailed on the sexual assault charges, Harris fell out of the back of a transport vehicle as he was being led into the Kanawha County Judicial Annex. Unable to break his fall because he was handcuffed, Harris fell on his face, shattering facial bones and knocking out several teeth. Harris sued.

After finding guard Anthony Leonard and his employer at fault, the jury awarded Harris a total of \$50,000: \$30,000 for past pain and suffering, \$10,000 for loss of enjoyment of life, and \$10,000 for annoyance and inconvenience. Harris was represented by attorney Paul Stroebel of the Charleston law firm Stroebel & Johnson. See: *Harris v. Leonard*, Kanawha County Circuit Court, Case No. unknown.

Following the verdict, Greta Thomas, the victim's mother, sued Harris in Kanawha County Circuit Court seeking compensatory and punitive damages for her daughter's injuries. She also asked the court to prevent Harris from collecting the \$50,000 judgment.

Harris is currently in prison. He received a life sentence for kidnapping and molesting his niece in 2001, under the state's three-strikes law. In 1988 he was convicted in the stabbing death of a 2-year-old, Deric Baylor. Before Harris went to prison for that crime, he escaped from the Kanawha County Jail and spent a month on the run. Harris served the next 10 years in prison for the boy's death and felony escape before he

costs of \$13,131 were approved, with provisions for up to \$20,000 in ongoing fees and \$5,000 in costs per year for the prisoners' attorneys. In addition to representation by the OPA, the prisoners were aided by the ACLU's National Prison Project's Washington, DC attorney, David Fathi. See: *State of Connecticut OPA v. Choinski*, U.S.D.C. (D. Conn.), Case No. 3:03CV1352 (RNC). ■

was released in 1999. ■

Sources: *Charleston Gazette*, *wbir.com*,

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Sixth Circuit: RLUIPA Held Constitutional Under the Spending Clause

by John E. Dannenberg

The Sixth Circuit U.S. Court of Appeals, acting on remand from the U.S. Supreme Court's recent ruling (*Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005); *PLN*, July 2005, p.30) (*Cutter II*) that the Religious Land Use and Institutionalized Persons Act (RLUIPA) was constitutional under the U.S. Constitution's Establishment Clause, subsequently ruled that the RLUIPA is also constitutional under a Spending Clause challenge raised by Ohio state prison authorities.

In *Cutter II*, the U.S. Supreme Court upheld Ohio prisoners' rights to practice "non-mainstream" religions (e.g., Wiccan, Satanist), to include accommodations not imposing unjustified burdens on other prisoners or jeopardizing the effective functioning of the prison. However, in deciding *Cutter II*, the Court did not reach the alternative challenges raised by Ohio as to RLUIPA's constitutionality under the Spending and Commerce Clauses. In this new ruling upon remand, the Sixth Circuit held that the Spending Clause did not bar RLUIPA and that therefore no Commerce Clause analysis was necessary.

Guided by principles set down in *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), the court noted that the Spending Clause (Art. I, § 8, cl. 1) authorizes the power to require states to comply with federal directives as a condition of receiving federal funds. *Dole* sets down five limitations on this power, including furthering the general welfare, conditioning receipt of funds unambiguously, requiring such funds to relate to a federal interest in a national program, assuring that such funds are not so significant as to amount to coercion, and verifying that conditions of these funds not violate any other constitutional provision.

The Sixth Circuit analyzed Ohio's complaints under all five limitations. Importantly, it held that RLUIPA's requirements are not related to funding religious programs, but rather are directed to the noble cause of promoting prisoners' rehabilitation (an admitted federal interest) through sincere faith and worship. Citing to *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002) and *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), the court found that Congress may allocate federal funds both to prevent infringing on prisoners' individual liberties as well as to promote prisoners' rehabilitation. That only 1.6%

of Ohio's prison funds are federally based does not excuse Ohio from obeying RLUIPA because Ohio always has the right to opt out of accepting federal funds to avoid RLUIPA. Significantly, the court found that "the RLUIPA requirements ... are reasonably calculated" to address the federal interest in inmate rehabilitation."

The court also rejected Ohio's argument that RLUIPA permits federal distribution of "recipient-wide" rather than "program-specific" funds, in excess of Spending Clause authority. The court distinguished Ohio's suggested precedents on the grounds that RLUIPA does not restrict Ohio's ability to exercise any fundamental right. Indeed, Ohio prison officials "have no constitutional right, much less a fundamental [one], to limit the

exercise of religion by inmates."

Moreover, answering Ohio's Tenth Amendment challenge, the court found that RLUIPA does not require Ohio to enact or administer a federal program. Rather, it requires Ohio to refrain from acting in a way that interferes with prisoners' exercise of religion (subject to a least restrictive means test). In sum, RLUIPA does not regulate the operation of a prison and therefore is a permissible exercise of Congress' Spending Clause powers.

Having reached this result, the Sixth Circuit did not need to reach Ohio's Commerce Clause claim, and accordingly remanded the case to the district court for further proceedings consistent with their opinion. See: *Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir. 2005) (*Cutter III*). ■

California DOC Diverts \$480,000 of Drug Treatment Money for Movie Studio

The California Department of Corrections and Rehabilitation (CDCR), while overrunning its 2005 \$6.4 billion state budget by \$543 million, nonetheless diverted \$480,000 of unspent drug treatment money to a private foundation to create a movie studio.

The Amity Foundation, based in Porterville, California, had \$3.75 million in contracts to operate drug treatment programs at five CDCR prisons. When \$480,000 remained unspent, instead of returning the excess to the state's general fund, Amity spent it to create training videos for far-flung prisons to aid counselors in drug programs there. Substance abuse program funds were used to buy everything from high tech cameras to 50-inch plasma screen television sets. They also put the one video they made so far, a 3 1/2 hr. production featuring a renowned drug treatment expert, on sale for \$100 on Amity's Web site.

Calling this a "giant waste of taxpayer money," a furious state Senator Jackie Speier, when leading a hearing on waste and inefficiencies in state government, held out Amity's largesse as the worst example of those reviewed, topping the 9,000 unaccounted-for state-owned vehicles and countless stolen laptop computers.

The misappropriation was brought to light by "whistle blower" Richard Krupp,

a sharp-eyed CDCR computer analyst who successfully sued CDCR for \$500,000 for retaliation for his having reported \$200 million in wasteful guard overtime charges. Dean Borg, CDCR's legislative liaison, told Speier that the \$480,000 couldn't have been spent on other types of prison drug treatment programs, but Speier snapped, "I don't buy that." Krupp's meticulous investigation revealed a May 2004 letter from CDCR official Jim L'Etoile literally approving the video equipment purchase. Krupp's criticism of Amity's purchases noted that CDCR had an excellent studio in its training academy plus a \$1 million annual contract with the University of California (San Diego) to provide training to drug treatment counselors. "It makes no sense at all from a taxpayer standpoint," Krupp said.

As a result of the publicity, Borg belatedly asked Amity to return the equipment to CDCR. Rod Mullen, Amity's CEO, said privately that their movies were intended to save money for CDCR by making them available to CDCR's remaining 29 prisons.

Krupp, meanwhile, reported that his new boss had suggested repeatedly that Krupp should get another job. It might behoove CDCR to reserve the \$480,000 for another retaliation lawsuit. ■

Source: *San Francisco Chronicle*.

Texas Prisoner Writers' Retaliation Lawsuit Proceeds

by David M. Reutter

A Texas federal district court has granted in part and denied in part prison officials' motion to dismiss Texas prisoner's lawsuit alleging he was retaliated against for having articles published criticizing the Texas Department of Criminal Justice-Correctional Institution's Division (TCDJ).

Prior to his February 21, 2005, release on mandatory supervision, William Bryan Sorens spent most of his 21 years in prison writing and selling articles for publications without interference from prison officials. That changed after Sorens published the first in a series of two articles critical of TCDJ.

The first article was to appear in the March 2003 edition of *Playboy Magazine*. The second article, titled *Locked down and Locked out: An Inside View of Prison Censorship*, was purchased by *Penthouse Magazine* for its April 2003 issue.

Prison officials charged Sorens with disciplinary infractions for having "established an unauthorized business within TDCJ." After a "sham" disciplinary hearing on March 18, 2003, Sorens was found guilty, receiving 30 days of commissary and cell restriction, 180 days loss of good time, and reduction in class from state approved Trusty III to Line I.

Sorens then received several retaliatory job changes that did not comport to his medical classification and restrictions, which were only changed after his family complained, culminating in a transfer to a maximum security prison that houses death row prisoners.

When a May 11, 2003, *Associated Press* article questioned the propriety of Sorens' disciplinary case, TCDJ's Director restored Sorens' lost gain time. Nonetheless, Sorens' release date was still extended 40 days due to the line change. After release, Sorens brought the civil rights action at issue.

Sorens alleged that the application of TDCJ's rule to him violated his rights to due process and free expression, caused him to lose good-time credits, which delayed his release from TDCJ, and caused him to suffer money damages because TDCJ wrongfully prohibited him from writing for pay. The defendants moved to dismiss.

First, the district court held the PLRA does not apply because Sorens was not imprisoned when he filed his

complaint. The Court then held that it could not conclude that Sorens would be unable to prove a set of facts the Warden Gary Mohr, Assistant Warden Robert Chance, and Kelli Ward had retaliated against him for publishing articles critical of TDCJ. Director Janie Cockrell, however, took no action that could be found to be retaliatory.

The Court, moreover, held that the filing of retaliatory disciplinary charges can give rise to an independent § 1983 action or can be part of a procedural due process review of a disciplinary action, and it violates due process to punish prisoners for acts that they could not have known

were prohibited. Sorens stated sufficient facts to state such a claim.

The Court, additionally, found Sorens' complaint to be insufficient to make a determination of defendants qualified immunity claim. As such, the Court granted Cockrell's motion to dismiss, denied all other defendant's motion, and ordered Sorens to file an amended complaint within 30 days detailing how each defendant infringed his rights. See: *Sorens v. Estate of Warden Gary Mohr*, USDC, SD TX, Case No: H-05-1195. *PLN* will report the outcome of the case. This ruling is available on *PLN's* website. ■

Robots Package Medications for Jails

In a 21st Century move designed to both save \$1 million per year and improve the accuracy of drug dispensing in county jails, Contra Costa County, California has "hired" robots to replace pharmacists and nurses in the packaging and dispensing of medications to prisoners in three of its jails.

By leasing three SafetyPaks from Omnicell, Inc. for \$5,000 per month, the county anticipates that the jail pharmacist can be dispensed with and eleven of its nurses' weekly working hours trimmed from 40 to 32.

The machines are capable of both preparing pill doses as well as packaging them, adding bar code tracking which allows for ensuring that patients receive the medications while making a written record of all dispensations. In addition, the system will permit the county to maintain a single pharmacy for all of its

needs, eliminating both separate storage/accounting as well as wasteful throwing away of unused medications when they expire. The SafetyPak concept is cost-effective even for Contra Costa's Martinez jail, where only 100 out of 700 prisoners regularly take prescription medicines.

As an added benefit, the jail anticipates that its nurses' time will now be more effectively spent on providing health care. ■

Source: *Corrections Professional*.

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Florida's Juvenile Justice: Convicted Sex Offender Rapes Disabled Youth in His Care

Once again, Florida's Department of Juvenile Justice (DJJ) is under close scrutiny for failing to protect a severely mentally disabled teenager from sexual abuse.

At the center of this scandal is Robert, an orphan with the mind of an infant. The 15-year-old wears diapers and plays with blocks. Guards at Robert's Tallahassee juvenile detention center were unable to care for him. Their solution: They assigned 17-year-old Lee Donton to bathe, clothe, and change Robert's diaper. The problem: Donton was in the center for a 2004 rape conviction. He now faces two new counts of raping Robert.

Robert's problems began in 2000 when his mother became terminally ill. After she died in February 2, 2004, Robert became increasingly aggressive toward his elderly grandmother and aunt. At 300 pounds, Robert was understandably difficult to handle. Between December 2004 and May 2005, Robert had been charged four times with battery on a person 65 or older.

In May, 2005, Judge William Gary ordered Robert indefinitely detained. "His care needs are more than our staff are trained to provide," a mental health counselor told Judge Gary.

On June 16, Tony Threats, a lock-up supervisor, sent an e-mail to the superintendent and assistant superintendent that advised, "I was made aware by one of my staff yesterday that youth Lee Donton, a sexual offender, is being allowed to shower and/or change [Robert's] diaper during the 7-3 shift and it was common practice and all staff, including the lieutenant, were made aware of it. It was reported that the lieutenant was questioned by a staff member and the response was, 'We have bigger things to worry about right now.'"

A public report says that two different detainees told police they saw Donton in the act of having sex with Robert in his cell. One of the youths told "staff members," who got to the cell in time to observe Donton with "his jumper half on, half off...and...sweating and nervous." One of the teens told police he saw one of the guards "with the suspect's boxer shorts, walking down the hall carrying them like there was something on them." The report says no such evidence was ever recovered.

Since Robert's abuse was reported to police and a Department of Children & Families (DCF) child abuse hotline, DJJ has gone into cover-up mode. Videotapes are missing of the cell area. "Once again," said Rep. Gustavo "Gus" Barreiro, a Miami Republican, "the only tapes that were missing are the tapes that can prove these allegations."

By the summer of 2005, Robert had been in contact with three state agencies: DJJ, DCF, and the Agency for Persons with Disabilities. "Clearly, the system has

failed this young man," said John Hall, a statewide director for the Association for Retarded Citizens in Tallahassee. "Shame on everybody involved."

It is a sad commentary on the state of Florida that its only solution to meet the needs of a severely mentally disabled child is to imprison him because it lacks the resources to provide treatment and care for him outside of prison and in prison is woefully incapable of doing so. ■

Source: *Miami Herald*

\$150,000 Paid to Indiana Juvenile Jail Detainee for Sexual Assault

Following an Indiana federal district court's denial of summary judgment to the Marion County Sheriff, the Sheriff settled the matter by giving \$150,000 to a pretrial juvenile detainee that was raped in the Marion County Jail (MCJ).

Seventeen-year-old Ryan Merriweather was arrested for armed robbery of a Chuck E. Cheese restaurant in December 2000. Because of the violent nature of the charge, Merriweather was housed in MCJ's juvenile wing rather than housed in the juvenile center.

While lying in his cell on December 17, 2000, reading, Merriweather overheard several other detainees planning to rape him. Three juvenile detainees, Darvito Arnold, Richard Childs, and Mitchell Ludy, entered Merriweather's cell and grabbed him before he could call for help. A fourth detainee Donald Skipper, acted as a lookout.

Merriweather was attacked and dragged to the cell furthest from the cellblock floor. He was then struck and kicked; his face pushed into a mixture of feces and urine in the cell's toilet bowl. The trio pulled Merriweather's pants down, dipped shower shoes in the toilet bowl, and used them to slap Merriweather's buttocks, sides, and abdomen.

One of the attackers inserted a pen into Merriweather's anus. Next, Ludy got a hot sauce bottle that had been stashed from lunch, inserted it into Merriweather's anus, pulled it out, and shoved it under Merriweather's nose and forced him to smell it. Childs and Ludy each pulled

down their pants and took turns inserting their penises inside Merriweather's buttocks; neither juvenile achieved full penetration.

When a guard entered the cellblock, Skipper shouted a warning. Merriweather was pulled back into his cell, and Arnold, Childs, Ludy, and Skipper acted as if they were socially conversing with Merriweather and obstructed the guards' view of Merriweather's beaten and partially unclothed body. Fearing for his life because the attackers were brandishing shanks, Merriweather remain silent. The next morning Merriweather went to Juvenile Court and advised a bailiff of the attack.

A few weeks later, despite a no contact order, Merriweather found himself in MCJ's recreation area with his previous attackers. He was swung at by Ludy and punched repeatedly by Childs before guards intervened. Subsequently, the attackers were convicted of rape and battery, receiving sentences of eighteen and nineteen years.

Merriweather filed a 42 U.S.C. § 1983 action, claiming violation of his due process rights from being victimized; and a state law claim of negligence. The Sheriff moved for summary judgment.

The district court found the Sheriff possessed four reports of assaults on other detainee's by the attackers, which was sufficient to establish direct knowledge of the risks they posed to other detainees. Additionally, affidavits showed a level of violence exceeding the level of inevitable, unavoidable prisoner-on-prisoner brutality, and sexual aggression, documenting

instead a situation where assaults occurred so frequently they were pervasive. Moreover, MCJ conditions have been the subject of repeated federal litigation over the past 30 years. Finally, the Sheriff failed

to adhere to policies to segregate violent prisoners.

Based upon these factors the court denied the Sheriff's motion for summary judgment. See: *Merriweather v. Marion*

County Sheriff, 368 F.Supp.2d 875 (S.D. Ind. 2005). On July 27, 2005, Merriweather settled the suit for \$150,000 in damages. He was represented by attorney Richard Waples. ■

Sixth Circuit Reverses Judgment for EMSA Physician, Remands for Trial

The Sixth Circuit Court of Appeals has reversed a grant of summary judgment to a physician employed by EMSA Correctional Care, Inc (EMSA) in an Ohio pretrial detainee's inadequate medical care claim.

On October 5th or 6th, 1998, James Johnson II "severely cut his hand after tripping on a concrete stoop and falling ... through a glass door... [B]oth an ambulance and a police car were dispatched to the scene ... while the medical personnel were caring for him, the police discovered that there was an outstanding [domestic violence] warrant for Johnson's arrest."

Johnson was taken to a hospital emergency room where a physician told him "that his tendons had been completely severed, that he was to return for surgery in [7-10] days (because the tendons needed some time to harden before surgery was performed), and that if he did not return in the appropriate time period, he would probably ... lose the use of [his] hand permanently."

Johnson was then held in the Franklin County, Ohio jail on the outstanding warrant. "All the time ... medical services at the jail were contracted out to EMSA. Dr. [Vincent Anthony] Spagna, [M.D.] an EMSA employee, served as medical director of the Franklin County jail and workhouse."

On October 13, 1998, Johnson submitted a kite complaining of "extreme pain in right hand" and reminding medical staff that he needed surgery to reconnect the tendons. But he received no response.

On October 23, 1998, jail staff prepared a "social services call card" indicating that Johnson urgently needed surgery to avoid permanently losing the use of his hand. Again, Johnson was not seen by a physician or given surgery.

Johnson sent a second kite on October 28, 1998 but again received no response. In fact, during his 31 days in the jail, Johnson did not receive surgery, his bandages were changed only once, nurses did not check the wound regularly, he was not given any pain medication and

"he had the opportunity to speak with a doctor only once."

Johnson was discharged from the facility on November 5, 1998. He immediately sought surgery, but the initial operation was unsuccessful. A second surgery was successful in reconnecting the tendons, but did not restore Johnson to anything near full use of his right hand. As a result, he "can no longer make a fist" and "his use of each of the four fingers on his right hand is severely impaired. He can no longer write normally with his right hand, which was his dominant hand prior to these events. He could type prior to his injury, but he can now only 'peck' with the injured hand. Although once very athletic, he can no longer lift weights or participate in sports."

Johnson brought suit in federal court against Franklin County Sheriff Jim Karnes, the Franklin County Board of Commissioners, EMSA and Dr. Spagna, alleging that they deprived him of his constitutional right to adequate medical care. The district court granted summary judgment to all defendants.

The Sixth Circuit reversed the grant of summary judgment to Spagna, concluding that "Johnson has established a genuine issue of material fact as to whether Dr. Spagna deprived him of a constitutional right and Dr. Spagna acted under color of state law."

The appellate court affirmed the grant of summary judgment in favor of the county defendants and EMSA, concluding that "Johnson has not introduced sufficient evidence to demonstrate a genuine issue of material fact as to whether his injury was the result of an actual policy or custom, either of the County Defen-

dants or EMSA." See: *Johnson v. Karnes*, 398 F.3d 868 (6th Cir. 2005). ■

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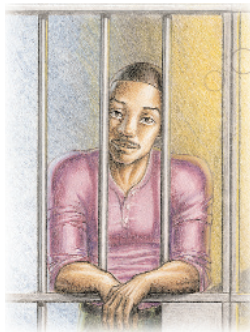
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BOP Sexually Explicit Materials Ban Requires Factual Development

The Third Circuit Court of Appeals Reversed a district court's dismissal of a federal prisoner's challenge to the Ensign Amendment, which prohibits federal prisoners from receiving sexually explicit materials.

The Ensign Amendment was first passed by Congress in 1997 and "prohibits the use of funds appropriated for the United States Bureau of Prisons (BOP) to 'distribute or make available any commercially published information or material to a prisoner...[when] such information or material is sexually explicit or features nudity.'" 28 U.S.C. § 530C(b)(6).

The BOP promulgated 28 CFR § 540.72(b) to implement the amendment and define its key terms. Prior to passage of the amendment, 28 CFR § 540.71(b)(7) governed the distribution of sexually explicit materials. That rule still controls material falling outside the scope of § 540.72(b). "The regulations are clearly targeted to the receipt... of softcore and hard-core pornography."

BOP prisoner Marc Ramirez brought suit challenging "the constitutionality of the Ensign Amendment and its implementing regulation on First Amendment grounds." Applying the "Reasonable Relationship Test" of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987), the district court granted the government's motion to dismiss.

The Third Circuit noted that "[t]o date, the United States Court of Appeals for the D.C. Circuit is the only federal appellate court to have considered the mere act of a First Amendment challenge to the Ensign Amendment and its implementing regulation." See: *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998).

The court addressed Ramirez's argument that the lower court "erred in finding a rational connection between a ban on pornography and rehabilitation in the absence of any factual record, and in failing to engage in a 'contextual, record-sensitive analysis' before determining the ban's overall reasonableness under *Turner*." In doing so, it noted that in *Wolf v. Ashcroft*, 297 F.3d 305 (3rd Cir. 2002), it "addressed whether their requisite rationale connection... can be found on the basis of 'common sense' alone[.]" Finding that "a 'brief, conclusory statement' is insufficient for evaluating the application of *Turner's* first prong."

The court then found "that the District Court erred in evaluating the Ensign Amendment and its implementing

regulation under *Turner's* first prong on a motion to dismiss, without any analysis or inquiry into the interests involved in the connection between those interests and the restriction at issue."

"[A]lthough the District Court correctly identified rehabilitation as a legitimate penological interest,... it did so without adequately describing the specific rehabilitative goal or goals furthered by the restriction of sexually explicit materials." Additionally, the court found that "the connection between the Ensign Amendment and the government's rehabilitative interest [is not] obvious upon consideration of the entire federal inmate population, including those prisoners not incarcerated for sex-related crimes." Therefore, "*Wolf* necessitates the development of a factual record."

While the obvious interest of rehabilitation is the prevention of further law-breaking once offenders are released from prison, the scope of the interest itself has never been defined by the Supreme Court. Furthermore, "to say... that rehabilitation legitimately includes the promotion of 'values,' broadly defined, with no particularized identification of an existing harm towards which the rehabilitative efforts are addressed, would essentially be to acknowledge that prisoners' First Amendment rights are subject to

the pleasure of their custodians."

The court explained that "determining whether there is a rational link between sexually explicit material and the forms toward which the government's overall rehabilitative efforts are directed requires more than a conclusory assertion that the 'consumption of [sexually explicit] publications implicitly elevate[s] the value of the viewer's immediate sexual gratification over the values of respect and consideration for others and a generalized statement that sexual self-control is irrelevant to the entire class of federal prisoners."

The court also agreed with Ramirez "that the third and fourth *Turner* factors cannot be adequately assessed in the absence of an evidentiary foundation." It found the "District Court's apparent factual conclusion that accommodation 'would increase the risks of sexual crimes in this conduct within the prison walls,' is speculative and unsupported." Rather, "[t]he existence of a possible 'ripple effect' on the rehabilitation of prisoners legitimately targeted by the Ensign Amendment could reasonably be disputed." See: *Ramirez v. Pugh*, 379 F.3d 122 (3^d Cir. 2004). Readers should note that to date all federal and state courts to consider prison and jail bans on sexually explicit materials have, on the merits, upheld the censorship. ■

Conviction Rates Low After DNA Match

For years now, the U.S. government and individual states have been pushing for wider DNA testing and bigger databases to make matches with crime scene evidence. The Bush administration proposed to spend \$1 billion to expand testing. The question now is how effective is DNA testing in obtaining convictions?

A report from Virginia's Department of Forensic Science has found it's not very effective at all.

The FBI maintains a system of state and federal computers, known as the Combined DNA Index System (CODIS), to compare the genetic profiles of known offenders to DNA found in blood, semen, and other biological material found at crime scenes. CODIS has the DNA profiles of 2.7 million offenders, scoring nearly 28,000 matches nationwide since 1982.

Virginia, New York, and Florida have each scored over 3,000 matches between

crime-scene DNA and profiles in the state's databases. Since 1988, Virginia has collected about 246,000 DNA samples on file.

Of those samples, Virginia had 2,744 cases that matched a specific offender in the state's database. In 278 other cases, a match was made to an out-of-state offender or an unsolved crime.

Of the in-state matches, only 597—less than 22%—led to convictions by trial or plea. 1,760 cases still remain pending investigation. Interestingly, 424 cases had no charges pressed by prosecutors for reasons varying from evidence problems to victims being reluctant to testify or unable to be found.

That begs the question is DNA testing a cost-effective crime fighting tool or just another governmental invasion of privacy? ■

Source: *USA Today*.

Montana Awards New Prison Phone Contract

The State of Montana has contracted with Public Communications Services (PCS), Inc. to provide phone services to prisoners in the Department of Corrections, according to a January 3, 2006 press release.

PCS holds itself out as a bargain for both the DOC and prisoner families, providing modern call-monitoring equipment--calls will be recorded digitally and prison officials will have the option of blocking individual phone numbers--new phones, and "rational calling rates."

Citing the high number of complaints under the previous plan, DOC contract manager Gary Willems said the new system "provides a fairer and cheaper phone service for inmate families."

Prisoner families were being gouged under the old system, paying \$31.54 for a 30 minute call to anywhere in the continental United States. PCS will reportedly charge \$8.75 plus tax for the same call.

The rate is less than it was previously but still significantly higher than outside rates, providing a comfortable profit margin for the company and its prison clients

at the expense of prisoners' families.

The release notes that PCS, which focuses on prisoner calling services exclusively, recently acquired all of Verizon's

prison and jail accounts. It remains to be seen whether PCS's rates will remain "rational" if the company corners the market on prison phone services. ■

Jury Awards \$858,200 in California Jail Suicide

On February 22, 2006, a federal jury sitting in Sacramento found San Joaquin County, and Dr. Robert Hart, MD., liable for the death of Maurice Shaw in August of 2000. Shaw, who suffered from schizophrenia, was arrested on a minor drug charge in May of 2000 and kept in solitary confinement in the County Jail for three months without treatment where he ultimately committed suicide by hanging. In a two-phase trial, the jury awarded Shaw's mother, Verdella \$858,200 in damages. \$100,000 of which was in punitive damages awarded against the county's psychiatrist for his oppression, malice, and reckless disregard to the boy's serious medical need. Cases involving jails and prisons require the plaintiff to prove the equivalent of criminal recklessness, a degree

of proof far in excess of the ordinary medical malpractice or negligence claims. That was proven here, a total breakdown in medical care, a systemic and complete indifference.

Counsel for the Plaintiff, Geri Lynn Green said: "Today, it is jails and prisons that represent the bulk of the facilities housing those suffering from severe mental illness. This verdict has sweeping social significance because this jury heard what actually happens behind those walls and was outraged." See: *Shaw v. San Joaquin County*, USDC ED CA, Case No. 2:01-CV-1668-MCE-PAN. ■

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Former Illinois Death Row Prisoner's Malicious Prosecution Claim Rejected

A Chicago jury has rejected former death row prisoner Anthony Porter's claim that Chicago police conspired to frame him for a double murder he did not commit. Porter was sentenced to death for the 1982 murders of Jerry Hillard and Marilyn Green. In 1999, Porter was freed after proving his innocence.

For his 16 years on death row, the State of Illinois gave him a restitution check of \$145,875 in 2000. In March, 2000, Porter filed a \$24 million lawsuit against the detectives, arguing they forced

a witness to identify him as the killer, they ignored information that would have led to the real killer, and they dismissed evidence showing he wasn't in the park when the shootings occurred.

The jury held the detectives were not malicious and had reason to focus on him as a suspect. Porter's loss is a bitter pill for someone, who came within 50 hours and 22 minutes from a lethal injection, to swallow. The state's restitution check is negligible for spending 16 years on death row.

Chicago's attorney, Walter Jones, declared the jury's verdict was correct. "The killer has been sitting in that room right there all day," pointing to Porter's seat during the trial. The actual, now convicted killer, however, is sitting in prison after giving a confession to a group of Northwestern students, which resulted in Porter's release.

Porter is now considering a defamation suit against the city lawyer. ■

Source: *Associated Press*

Los Angeles County Jail Continues To Over-Incarcerate

by John E. Dannenberg

After paying \$27 million (up to \$5,000 per plaintiff) to settle class action lawsuits in 1991 for failing to timely release prisoners from county jail (see *PLN*, Jan. 2003, p.14), Los Angeles (L.A.) County is still making similar mistakes and paying penalties. In the twelve month period ending in June 2005, records of the L.A. County Sheriff's Department showed that they jailed 66 prisoners who either had never been charged with crimes or who had been court-ordered to be released.

Juan Avalos, a Mexican immigrant living in Orange County with his wife and four children, used to have two jobs. But he lost them when L.A. Sheriff's deputies arrested him in 2004 on an Orange County probation violation warrant and held him for 73 days without any due

process. When L.A. County Jail officials realized he had never been taken to Orange County to face a judge, they gave him a check for \$500 conditioned upon his signing a waiver to his right to sue for false imprisonment.

Not speaking English, Avalos signed the dotted line and took the money.

While L.A. County Sheriff Lee Baca said that no illegal incarceration is acceptable, he opined that only 66 mistakes among 200,000 arrestees in twelve months is not indicative of a major problem. And the clerk in Avalos' case who failed to alert Orange County was reprimanded and transferred, he added. It is doubtful he would say the same thing if 66 prisoners were mistakenly released during this period as well.

Noted prisoners' rights attorney Stephen Yagman, who is representing other L.A. County Jail prisoners in false incarceration suits, believes it is wrong for the County to "negotiate" with prisoners for their freedom, when it is statutorily owed them. Thus, Avalos, after eleven weeks of false imprisonment, was wrongfully induced into accepting \$7/day as a condition against further illegal incarceration.

After all the past lawsuits, and with more pending, L.A. County Jail still relies upon a manual system for tracking such releases. As long as Jail officials can find takers for their \$500 get-out-of-jail-now extortion, the problem, it appears, will not go away. ■

Source: *Los Angeles Times*.

New York Prisoner Awarded \$2,760 for Improper Confinement/Denial Medical Care

The New York Court of Claims in Rochester has awarded prisoner Patrick Vaughn \$2,760 on his claim that he was unlawfully confined and that his medical condition was not properly addressed.

After a guard called him a rapist in front of other prisoners, Vaughn wrote a letter to the captain threatening the guard, hoping he would be transferred. Vaughn, instead, was issued a disciplinary report, which the captain presided over, sentencing Vaughn to 84 days of special-housing-unit (SHU) confinement. The acting director affirmed the captain's

decision. The director, however, administratively reversed the decision after Vaughn's sentence was over, agreeing with Vaughn that policy prohibited the captain to preside over the hearing.

When placed in SHU at Lakeview Shock Incarceration Correctional Facility, he was placed in a top bunk. Vaughn suffered a chronic back condition that was evidenced by a doctor's report and permanent medical restriction. Despite being shown that restriction coupled with Vaughn's complaints of back pain, guards refused to move him to a low bunk and his grievances requesting same were denied.

On March 29, 2005, the Court of Claims found the State violated its own rules and regulations when the captain presided over the disciplinary hearing. As such, the state lost its absolute immunity. Vaughn was awarded \$1,250 for his 84 days of improper confinement or \$15 for each day. Because the state violated Vaughn's medical restriction without further medical examination, Vaughn was awarded \$1,500 for pain and suffering experienced getting in and out of his upper bunk.

See: *Vaughn v. New York*, Court of Claims, Rochester, Case No: 108937. ■

Reproductive Rights in Theory and Practice: The Meaning of *Roe v. Wade* for Women in Prison

by Rachel Roth

In 1973, when the Supreme Court handed down its decision in *Roe v. Wade*, there were about 14,000 women incarcerated in the United States; today, there are over 180,000. If the ultimate legacy of *Roe* is that women have the freedom to make decisions about pregnancy and motherhood, then what does this anniversary mean to women who are literally not free, those in jails, prisons, and immigration detention centers? Because prisons are shielded from public scrutiny, and the women in them are “out of sight and out of mind,” their concerns rarely enter the debate about reproductive rights and health.

Although “reproductive freedom in prison” may sound like a contradiction in terms, courts have been clear that women do not automatically lose their reproductive rights simply because they are incarcerated. Moreover, prisoners are the only group in the United States with a constitutional right to medical care. Yet the difference between having a right in theory and being able to exercise that right in practice is particularly stark for women in prison.

The “war on drugs” and mandatory sentencing policies have been major forces driving up the numbers of women in prison and have had a disproportionate impact on women of color and poor women. Consequently, the health problems of incarcerated women are those that commonly affect these groups, including high rates of such chronic illnesses as hypertension, asthma, and diabetes, as well as Hepatitis C and HIV. Histories of drug addiction and physical abuse add to women’s medical and mental health needs. Incarceration poses unique threats to women, because access to medical care is frequently arbitrary, discouraging, and difficult to navigate, with few effective mechanisms to redress grievances.

A recent survey of women jailed in the nation’s capitol, for example, found that the sick-call system does not meet the needs of women with ongoing health problems. Women with chronic, infectious, and mental health conditions reported having to submit 10-15 requests before being seen. Women also reported disruptions in their HIV medications, a

situation which endangers their health by leading to drug resistance.

Another recent study of a California prison highlights problems with access to life-saving preventive care. The study found that the entire process of scheduling, having, and learning the results of Pap tests to detect cervical cancer was unpredictable. Some women were called in for exams while others had to pay a fee and file medical requests—competing with the emergencies of the day for a doctor’s attention. Women also reported negative experiences during the exam itself, especially with male physicians insensitive to their histories of sexual trauma and abuse.

Given the difficulties that women have obtaining basic health care within jails and prisons, what happens when they need abortion services, which are only available in outside clinics or hospitals?

Beyond the restrictions on access that all women face, such as the mandatory 24-hour delays in place in 21 states, women in prison must deal with an additional, literal barrier—the prison itself, and whether they can get a guard to take them from the prison to a clinic.

This was the problem a young woman in a rural Missouri prison confronted recently, when prison staff told her that they would not take her to a clinic—effectively telling her that she could not have an abortion. Although she ultimately prevailed, thanks to a federal lawsuit brought by the ACLU, she obtained an abortion far later than she would have if prison officials had simply respected her rights at the outset. The protracted struggle caused weeks of anxiety and necessitated raising even more money from family and friends to pay for the procedure. Her story is not unique: women in at least 15 other states have experienced similar conflicts with sheriffs and prison authorities over access to abortion.

Perhaps the most widely shared reproductive concern among women inside prison is maintaining relationships with their children. The majority of women in prison are mothers who hope to be reunited with their children when they finish their sentences. Once released, their hopes strain under the weight of policies

that deny them, as people with felony convictions, access to the things they need to rebuild their lives and care for their children, such as public housing, food stamps, student loans, and jobs.

The experiences of imprisoned women stand as a vivid reminder that there is no such thing as having a right or a choice without access to the resources needed to carry out that choice. A reproductive justice agenda for imprisoned women therefore includes not only the ability to make decisions about pregnancy, but also the protection of family ties and access to basic medical care to preserve health and fertility, in order to ensure real reproductive choices in the present and the future.

When judges and juries send women to prison, they do not sentence them to a term of medical neglect or to continue a pregnancy against their will, but these are often the consequences of doing time. These excessive punishments call for greater accountability from the government, and for a broader agenda for the reproductive rights movement. ■

Rachel Roth, a Research Fellow at Ibis Reproductive Health, is the author of several articles on women’s rights in prison and the book Making Women Pay: The Hidden Costs of Fetal Rights. She is also co-author of the report Abortion Funding: A Matter of Justice and a contributor to Defending Justice: An Activist Research Kit. This article originally appeared in Defending Justice. It is reprinted here with permission.

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Neglected New York Prisoner Dies At Jail Following Heart Surgery

by Michael Rigby

Laura Woolsey's biggest fear was dying in jail. But thanks to the inept care provided her at New York's Schenectady County Jail, that fear was tragically realized.

Woolsey, 39, died at the jail on August 3, 2005, three hours after complaining of chest pain. She had been returned to the jail the day before, five days after undergoing surgery to replace a defective heart valve.

A report by Sheriff Harry Buffardi put the blame squarely on Schenectady Family Health Services (SFHS), the jail's not-for-profit health care provider. According to the report, a guard notified the jail's on-call nurse that Woolsey was complaining of chest pains at 7:45 a.m. Twenty minutes later the nurse was told that Woolsey's condition appeared to be worsening. A second nurse then administered medication.

Woolsey was in total cardiac arrest by 10:20 a.m. When paramedics arrived, however, SFHS nurse Lorraine Walker told them not to administer CPR because of Woolsey's recent open heart surgery. Walker falsely asserted the instructions had been issued by a doctor. The advice was contrary to sound medical procedure and common sense.

Buffardi said paramedics and several doctors told him that the need to stimulate blood flow far outweighed any risk of re-injury. "When you have somebody in coronary distress, you use extraordinary procedures involving CPR to save life, which is what the firefighters would have done," said Buffardi. The sheriff subsequently banned Walker from working at the jail.

The county pays SFHS \$909,038 a year to provide medical services to the jail, which has no infirmary. The company says the sheriff should not have allowed Woolsey back to the jail so soon after undergoing open heart surgery. "While the SFHS staff provides excellent care to the inmates, expecting primary care nurses to provide cardiac aftercare is not sound judgment," said John M. Silva, SFHS's president and chief executive.

Buffardi says he is only trying to expose problems with the jail's health care. "I am responsible for the total care of the inmates," said Buffardi. "I was responsible for this death. I am attached

to it. I'm not trying to get away from the responsibility. I'm only trying to outline the problems here."

SFHS was hired in 2004 after the county severed ties with its former for-profit health care provider, Prison Health Services (PHS), after the company was faulted in the death of another prisoner at the jail, Brian Tetrault [see *PLN*, May 2005]. Tetrault, 44, died on November 20, 2001, a week after PHS stopped providing him with medication to control his Parkinson's disease. State investigators called the care provided by PHS "medically reckless" and "flagrantly inadequate."

In mid-July 2005, a U.S. District

Court awarded \$789,988 to Bryan Lake, 59, after finding PHS, Schenectady County, and Schoharie County negligent in failing to treat him for an August 1998 heart attack that left him disabled.

Woolsey's attorney, Mark Sacco, and her family say they begged Ellis Hospital not to release Woolsey so soon after major surgery. "Dying in jail--that was her biggest concern," said Woolsey's uncle, Michael Maher. Unfortunately, those in charge of her well being had no such trepidation. ■

Source: *Timesunion.com*, *theempirejournal.com*, *wnyt.com*

Arizona Prisoner's Mortality Report Confidentiality Not Federally Protected

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals declined Maricopa County, Arizona's invitation to keep mortality reports on prisoners confidential.

Charles Agster was arrested and booked into the Maricopa County Jail in Phoenix, Arizona on August 6, 2001, where he was placed in a restraint chair. There, his breathing slowed and his heartbeat became irregular. After CPR attempts he was taken to a hospital and placed on life support. He died three days later. The county healthcare division undertook the required Standard J-10 mortality review between August 7 and November 8, 2001. It did so with the understanding that the report was to be kept confidential.

Agster's survivors sued Maricopa County in state court to gain discovery of the report. County defendants removed the action to federal district court, but this proved to be a fatal error. While Arizona state law provides for such confidentiality, no federal "peer review" standard has been adopted in the Ninth Circuit. The district court accordingly overruled defendants' claim of privilege and ordered production of the report.

The Ninth Circuit affirmed. It found that it had jurisdiction under 28 U.S.C. § 1291 to review a "final judgment" below even though it had the appearance of an otherwise unavailable interlocutory appeal. The defendants' reliance on Ariz.

Rev. Stat. §§ 36-445 and 36-445.01 was not binding on the federal courts, the Ninth Circuit held. The appellate court declined to "create a new privilege as a matter of federal common law." The court further observed that Congress had declined to enact such a privilege.

High on the appeals court's list of reasons was that the instant case was the death of a prisoner. "In these circumstances, it is peculiarly important that the public have access to the assessment by peers of the care provided ... for public accountability." Defendants' defense that exposure would have a chilling effect on future such reports was rejected by the Ninth Circuit. "Given the demands for public accountability, which seem likely to guarantee that such review take place whether they are privileged or not, we are not convinced by the County's argument that such reviews will cease unless kept confidential by a federal peer review privilege. Accordingly, we are unwilling to create the privilege in this case." See: *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 473 (2005) (withdrawing and superseding original opinion published at 406 F.3d 1091 (9th Cir. 2005)).

A jury subsequently ruled in favor of Agster's estate, finding he had been murdered by jailers and awarding the plaintiffs over \$9 million in damages. ■

STATE OF INDIANA)
)
) SS: IN THE MARION CIRCUIT COURT
) CAUSE NO. 49C01-0006-CT-1217
COUNTY OF MARION)

CHANELLE LINET ALEXANDER, et. al., Plaintiffs,

v. THE INDIANA DEPARTMENT OF ADMINISTRATION, THE STATE OF INDIANA, AND THE MARION COUNTY INDIANA SHERIFF,
Defendants.

NOTICE OF CLASS ACTION

TO: All persons who paid for collect telephone calls from June 16, 1998 to the present from inmates incarcerated in either Indiana State correctional facilities or Marion County Indiana correctional facilities.

This Notice is given pursuant to Rule 23 of the Indiana Rules of Trial Procedure and pursuant to an Order of the Marion Circuit Court entered on December 28, 2004. This Notice is to inform you that there is pending in this Court a lawsuit in which the Plaintiffs seek to recover money they paid to, or were charged by, telephone companies under the terms of contracts between the telephone companies and the State of Indiana or the Marion County, Indiana, Sheriff for access to prisoners making collect telephone calls.

- You are not being sued. You do not need to respond to this Notice unless you wish to be excluded from this lawsuit.
- If you are a member of Class A or Class B, as defined below, you do not have to take any action.
- The fact that you have received this Notice does not assure that you are a member of one of the two classes. You may be a member of one or both or neither.
- If you are a member of either Class A or Class B, this Notice does not mean you are necessarily entitled to recover any money. The lawsuit is contested. The Court has, as yet, made no decision as to whether the State of Indiana and/or the Marion County, Indiana, Sheriff is liable and, if so, whether the State of Indiana and/or the Marion County, Indiana, Sheriff must repay the monies claimed by the members of the Classes.
- If you have any bills showing collect telephone charges from State of Indiana and/or Marion County, Indiana correctional facilities from June 16, 1998 to the present, you should keep them to establish what, if any, claim you may have. If you have no such bills, it does not affect your status as a class member.
- For more information about the case, go onto: www.indianainmatetelephoneclassaction.com

DESCRIPTION OF THE PLAINTIFF CLASSES

By Order dated December 28, 2004, the Marion Circuit Court certified this lawsuit as a class action. There are two classes in this lawsuit. The classes are:

Class A: all persons who, from June 16, 1998 to the present, have been charged for and/or who have paid for collect telephone calls from inmates in the correctional facilities of the State of Indiana.

Class B: all persons who, from June 16, 1998 to the present, have been charged for and/or who have paid for collect telephone calls from inmates in Marion County, Indiana, correctional facilities.

THE LITIGATION

The Plaintiffs filed this lawsuit on June 16, 2000. The Complaint alleges that the State of Indiana and the Marion County, Indiana, Sheriff entered into contracts with telephone companies which illegally required the telephone companies to pay the State of Indiana and/or the Marion County, Indiana, Sheriff for access to prisoners, charges which the telephone companies pass on to class members in the form of higher rates for collect telephone calls from inmates.

The State of Indiana and the Marion County, Indiana, Sheriff deny that they have done anything illegal, and contend that the class members are not entitled to any relief.

The Plaintiffs seek to require the State of Indiana and/or the Marion County, Indiana, Sheriff to turn over to the Court the money paid to the State of Indiana and/or the Marion County, Indiana, Sheriff under the disputed contracts with the telephone companies, for distribution to class members, less costs and attorneys' fees incurred on behalf of the Plaintiff classes.

This Notice is to inform class members of this action and determine the identity of those who do not wish to be included in the classes.

ELECTION BY CLASS MEMBERS

TO REMAIN A MEMBER OF A CLASS DO NOTHING: If you believe you are a member of either or both classes and you wish to remain a member, you do not have to do anything.

TO RECEIVE INFORMATION ABOUT THE PROCEEDINGS YOU SHOULD PROVIDE CONTACT INFORMATION FOR YOURSELF: If you believe you are a member of either or both classes and you wish to be kept informed of the proceedings then: send your name, email address, street address, and telephone number to "Inmate Telephone Class, P.O. Box 44285, Indianapolis, Indiana 46244-0285." The easiest way to submit your information is to log on to "www.indianainmatetelephoneclassaction.com." There are forms there for you to complete to submit your information. You may also write to: Inmate Telephone Class, P.O. Box 44285 Indianapolis, Indiana 46244-0285, and provide your name, address, phone number, email address, and which class to which you believe you belong. You should also keep class counsel aware of any changes to your current identifying information.

TO EXCLUDE YOURSELF FROM A CLASS YOU MUST CONTACT US AND LET US KNOW THAT YOU WISH TO EXCLUDE YOURSELF: If you believe you are a member of either or both classes and you wish to be excluded from this lawsuit, you must mail a written request for exclusion from the class from which you wish to be excluded. The request must be postmarked no later than June 25, 2006, addressed to "Inmate Telephone Class, P.O. Box 44285, Indianapolis, Indiana 46244-0285." In order to be effective, a request for exclusion must state the name and address of the person or entity requesting exclusion, must state that each person or entity requests exclusion from a class certified in this action, and must be signed by the person or entity. The request for exclusion shall not be effective unless it provides the required information and is made within the time stated above, or the Court otherwise accepts the exclusion. By excluding yourself from this class action, you would preserve your right to file a separate lawsuit for any damages you believe you may have incurred. You do not need to state the reason for exclusion from the class; excluding yourself from the class is voluntary. If you request exclusion, you will not be entitled to share in the benefits, if any, of any recovery or settlement obtained by plaintiffs in this action, nor will you be bound by any judgment.

A JUDGMENT IN THE CASE, WHETHER FAVORABLE OR NOT FAVORABLE TO THE CLASS, WILL INCLUDE ALL MEMBERS WHO DO NOT REQUEST EXCLUSION.

ANY MEMBER WHO DOES NOT REQUEST EXCLUSION MAY, IF HE OR SHE DESIRES, ENTER AN APPEARANCE THROUGH HIS OR HER OWN COUNSEL.

The pleadings and other records in this litigation may be examined and downloaded by accessing www.indianainmatetelephoneclassaction.com. Do Not Call the Court or Class Counsel Regarding Questions about this Lawsuit. Please contact Class Counsel by accessing this webpage or in writing.

For further information, log onto www.indianainmatetelephoneclassaction.com. You may also write to counsel for the Plaintiff Class at the following addresses:

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/s/ Theodore Sosin, Judge
Dated: April 25, 2006
BY ORDER OF THE COURT:
MARION CIRCUIT COURT

U.S. Prison Population Hits Nearly 2.3 Million In 2004

by Michael Rigby

The U.S. reached a new milestone in 2004: the imprisonment of nearly 2.3 million citizens, according to a report by the Bureau of Justice Statistics (BJS) released in October 2005.

On December 31, 2004, 2,267,787 men, women, and children were held in the nation's prisons and jails. The number represents an increase of 54,321, or 2.6% over the previous year--slightly less than the average annual growth of 3.4% since 1995. Prisons held 1,421,911 prisoners, while another 713,990 were in jail. Territorial, military, immigration, Indian, and juvenile prisons held the rest.

Increases were seen across the board, according to the report. State prison populations grew by 1.6%, or 20,759 new prisoners during 2004, while the federal system grew 4.2% (7,269). Private prisons grew by 3.3%, from 95,707 prisoners at yearend 2003 to 98,901 at yearend 2004.

Ten states increased their prison populations by at least 10% during 2004. Minnesota led with an 11.4% increase, followed by Idaho (11.1%), and Georgia (8.3%). Modest decreases were seen in 11 states, including Alabama (-7.3%), Rhode Island (-2.8%), and New York (-2.2%).

Overall, state prisons were packed, operating at between 1% below capacity and 15% above. Alabama was the most egregious example, operating at 205% of design capacity, followed by California (203%), and Illinois (161%). Federal prisons were running at 140% of capacity.

Not surprisingly, 6.6% of state and federal prisoners were held in private, for profit prisons. Six states had at least one-fourth of their prison population in private prisons: New Mexico (42%), Alaska (31%), Montana (30%), Wyoming and Hawaii (both 28%), and Oklahoma (25%). In absolute numbers, the federal system had the most prisoners in rented beds (24,768), followed by Texas (16,668), and Oklahoma (5,905).

Another 5% of state and federal prisoners were held in local jails. Louisiana, the worst example, warehoused 47% of its state prison population in local jails, the report noted.

At yearend 2004, federal prisons housed 180,328 prisoners. The majority were imprisoned for drugs (55%) or weapons charges (10%).

Also at yearend 2004, 104,848 women, were in prison. The number represents an increase of 4.0% over the previous year--more than double the 1.8% increase among men. However, the percentage of imprisoned women has remained fairly constant to that of men.

Sixty percent of state and federal prisoners were black or Hispanic at yearend 2004. In fact, blacks represented an estimated 41% of all prisoners sentenced to 1 year or more, while white prisoners accounted for 34% and Hispanic prisoners 19%. About 1 in 12 black males between ages 25 and 29 were in prison, compared

to 1 in 40 Hispanics and 1 in 83 whites.

It's worth noting that prison systems self-report much of the statistical data. Thus, numbers relating to such things as overcrowding and leased bed space may be skewed to promote their own agendas. Likewise, racial minorities may be under reported as some systems do not have a separate racial category for Hispanic prisoners and count them as "white."

Get a free copy of the report, *Prisoners In 2004*, NCJ 210677, on the Web at www.prisonlegalnews.org or by writing NCJRS, P.O. Box 6000, Rockville, Maryland 20849-6000. ■

BOP Prohibition Against Stock Selling and Receipt of Book Infringes Constitutional Rights

The Seventh Circuit Court of Appeals has held that a federal prisoner's suit seeking damages for the refusal to allow him to contact his stockbroker and buy a book on computer programming state a claim. Federal Bureau of Prisons (BOP) prisoner Anthony King brought this *Bivens* claim in an Illinois federal district court. That court screened the suit under 28 U.S.C. § 1915A, dismissing the suit as frivolous.

King is the lawful owner of some stocks that he wanted to instruct his broker to sell if their prices fell below specified levels. BOP says he is forbidden to telephone his broker because a prisoner is not allowed to conduct a business. King received a disciplinary citation for misusing his telephone privileges by making one call to his stockbroker, which has discouraged him from future attempts.

The Seventh Circuit said that "unless the one is engaged in a financial business, ordering one's broker to sell stock (whether immediately or, as here, contingent in a price change) is no more the conduct of a business than asking a real estate broker to sell one's house." The Court said that King's freedom of speech claim is absurd, but the refusal to allow him to contact his broker could be a deprivation of property that is arbitrary, denying him due process.

"Forbidding one to sell property eliminates a liquidity, which is one of the most important sticks in the bundle of rights that constitute ownership," said

the Court. King's complaint alleged he was prevented from contacting his lawyer, which included telephone and correspondence. While the BOP may have justifiable security concerns to limit King to correspondence only. That is not clear from the record and the claim was prematurely dismissed.

The Court then turned to King's claim that the refusal to allow him to obtain a book on computer programming presented a substantial First Amendment issue. The Court held that freedom of speech is not merely freedom to speak; it is also freedom to read. "Forbid a person to read and you shoot him out of the marketplace of ideas and opinions that it is the purpose of the free-speech clause to protect," the Court said.

The Court acknowledged that prisoners may be prohibited certain types of books. The BOP asserted it prohibited King the computer programming book out of fear he "might write a program that contained a virus, put it on a diskette, and then break into a room in which there is a computer used by prison employees connected to the prison network, insert the disk and infect the network." The Court said this seems far-fetched, but at this stage, it does not defeat King's claim.

The Seventh Circuit held King's claims were prematurely dismissed and reversed and remanded his suit for further proceedings. See: *King v. Federal Bureau of Prisons*, 415 F.3d 634 (7th Cir. 2005). ■

Laundry Slip and Fall Injury Reaps New York Prisoner \$95,000

A New York Court of Claims has awarded state prisoner Laurie Kellogg \$95,000 for injuries sustained from a slip and fall accident in a laundry room at Bedford Hills Correctional Facility on November 7, 1999.

Kellogg was working and drying her clothes, using the laundry rooms' automated washing machine, which had a pump-and-tube apparatus that injected detergent into the machine's bucket upon commencement of the wash cycle. As she was walking near the machine, Kellogg slipped on a puddle that had leaked from the dispenser. She fell and sustained multiple injuries.

At a prior liability trial, the court found the state was 100% liable for Kellogg's injuries, which were caused by negligent maintenance of the dispenser, causing a dangerous condition.

After the fall, Kellogg experienced sharp arm, chest, and shoulder pain after she fell. She had no right-hand strength and could not lift her arm higher than her

shoulder, making dressing difficult.

An orthopedic surgeon diagnosed Kellogg with scapular-muscle weakness, rotor-cuff tendonitis, and arthritic changes in her acromioclavicular joint. She had arthroscopic surgery to correct her tendonitis with impingement syndrome. Later, she had surgery again to remove thickened tissue and shave the bone.

Because her stitches were not removed within 7-10 days as recommended, Kellogg removed them herself. She was in a sling for 30 days rather than the two weeks the doctor prescribed. Rather than start physical therapy after three days, she was given none until three months later. This prolonged her recovery period and caused a frozen shoulder.

For her past pain and suffering, the court awarded Kellogg \$95,000, on March 3, 2005. She was represented by Joseph Monaco of New York. See: *Kellogg v. New York*, Court of Claims, White Plains, Case No. 101872. ■

PLRA Exhaustion Requirement Inapplicable to Suit Filed When Plaintiff Not Incarcerated

The Eighth Circuit Court of Appeals has upheld an Iowa District Court's order denying a plaintiff in forma pauperis status, but reversed its order dismissing the 42 U.S.C. § 1983 action for failure to exhaust administrative remedies.

Proceeding pro se, Steven R. Nerness filed a civil rights action against guards at an undisclosed Iowa jail, alleging they were deliberately indifferent to his urgent medical needs during his arrest and ensuing seven-hour confinement at the jail.

In denying Nerness' request to proceed in forma pauperis, the court cited Nerness' failure to include an affidavit containing his assets as required by 28 U.S.C. § 1915(a)(1). Because Nerness' only attempt to comply with § 1915 was to attach his 2002 federal tax returns rather than an affidavit detailing his assets, the Eighth Circuit held the district court did not abuse its discretion in denying in forma pauperis status. Nerness, however, was to be allowed to comply

with § 1915 or pay the filing fee, the appellate court held.

The Eighth Circuit's focus then turned to the dismissal for failure to exhaust administrative remedies. The appeals court said it had previously held the Prison Litigation Reform Act's exhaustion requirement was an affirmative defense that the defendant has the burden to plead and prove. The failure to exhaust administrative remedies does not deprive a federal court of subject matter jurisdiction. There is no requirement that a plaintiff plead exhaustion, and dismissal on that basis was improper.

Additionally, the Eighth Circuit found Nerness was not incarcerated when he filed his complaint. The appellate court held the exhaustion requirement does not apply to plaintiffs who file § 1983 cases after being released from incarceration. The district court's dismissal order was reversed. Accordingly, this action was affirmed in part and reversed in part. See: *Nerness v. Johnson*, 401 F.3d 874 (8th Cir. 2005). ■

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Seventh Circuit Reverses Dismissal of Retaliation Claim

The Seventh Circuit Court of Appeals reversed a district court's dismissal of an Illinois prisoner's retaliation claim.

On January 17, 2003, Illinois prisoner Robert Hoskins worked in the Dixon Correctional Center (Dixon) cafeteria when Food Services Supervisor Connie Lenear "called him a racial epithet because he could not help relocate cartons of chocolate milk." Hoskins reported the incident and filed a grievance.

On January 20, 2003, Lenear approached Hoskins and he told her "that he was not speaking to her." Another prisoner later told "Hoskins that Lenear... said she intended to get Hoskins transferred out of Dixon." Shift Supervisor Captain Schott was also overheard telling Lenear to issue Hoskins a disciplinary ticket for "insolence." She did so, and "on Schott's instructions, Hoskins was placed on 'investigative status' and taken to segregation."

On January 21, 2003, Hoskins filed grievances against Lenear and Schott, alleging that they issued the falsified "insolence" disciplinary report in retaliation for his January 17, 2003 grievance.

On January 28, 2003, Hoskins was found guilty of insolence and sanctioned to loss of his job. Although he was not sanctioned to serve a segregation term, he remained there on investigative status.

On February 17, 2003, Schott saw Hoskins and "promised to 'make things go away' if Hoskins would do the same." Hoskins refused and Schott threatened to have Internal Affairs Officer Robert Bock "write up" a disciplinary case that would get Hoskins "sent out of the prison."

The next day "Hoskins received a disciplinary report, written by Bock and dated that same day, charging him with making 'possible verbal threats toward staff.'" Bock claimed that unnamed informants reported witnessing "Hoskins make 'an inference of physical harm' towards Lenear." There was no indication, however, of what Hoskins allegedly said.

On February 24, 2003, Hoskins was found guilty and sanctioned to loss of privileges, two months in segregation and a recommendation for transfer. This resulted in Hoskins' transfer to Lawrence Correctional Center.

Hoskins challenged the disciplinary order and the charge was reversed and remanded to the Dixon Warden on June

30, 2003. No further action was taken and, on September 10, 2003, the disciplinary conviction was expunged and "the reduction in status in two months in segregation" was reversed, but Hoskins was not returned to Dixon.

Hoskins brought suit against Lenear, Schott, Bock, members of the adjustment committee and the Dixon Warden. The district court construed Hoskins' claims as alleging a due process violation and dismissed the complaint prior to service, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), for failure to state a claim.

The Seventh Circuit agreed that

Hoskins failed to state a cognizable due process claim. The court disagreed, however, "with the district court's analysis of Hoskins' retaliation claim" explaining that "due process and retaliation claims are analyzed differently." The court then vacated the dismissal of the retaliation claims against Lenear, Schott and Bock but upheld the dismissal of the claims against members of the adjustment committee and the warden because "by Hoskins' account of events," they "did not participate in acts of retaliation." See: *Hoskins v. Lenear*, 395 F.3d 372 (7th Cir. 2005). ■

Buddhist Prisoner Properly Denied Vegan Diet Under First Amendment; Case Remanded for RLUIPA Claim

by David Reutter

The Third Circuit Court of Appeals has held that a prisoner's First Amendment religious exercise right to practice Mahayana Buddhism was not violated by prison officials' refusal to provide a vegan diet. The appellate court, however, reversed for consideration of the prisoner's claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA).

While a prisoner at Pennsylvania's SCI-Greene prison, Robert Perry DeHart filed a 42 U.S.C. § 1983 suit alleging that he began practicing Mahayana Buddhism in 1990. DeHart meditates and recites mantras for up to five hours a day. According to DeHart's self-taught understanding of Buddhist religious texts, he is not permitted to eat any meat or dairy products, nor can he have foods containing "pungent vegetables" such as onions, garlic, leeks, shallots and chives. As a result, DeHart became a vegetarian in 1993, declining food trays containing meat.

When he does accept food trays, DeHart eats only fruit, certain cereals, salads when served without dressing, and vegetables served with margarine. DeHart supplements his meals with items purchased from the commissary, including peanut butter, peanuts, pretzels, potato chips, caramel popcorn and trail mix. His requests that SCI-Greene provide him with a diet free of meat, dairy products and pungent vegetables were denied.

The current appeal marked DeHart's

third appearance before the Third Circuit. His first appeal resulted in affirmance of the district court's denial of preliminary injunctive relief. See: *DeHart v. Horn*, 127 F.3d 1094 (3d Cir. 1997). In the second appeal, the Third Circuit reversed the district courts' grant of summary judgment to prison officials, requiring reconsideration of the second, third and fourth factors set forth in *Turner v. Safely* 107 S.Ct. 2254 (1987). See: *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000) (en banc).

On remand, the district court once again granted summary judgment to prison officials on DeHart's First Amendment claim and dismissal of a RLUIPA claim. The district court concluded that *Turner's* second factor weighed against DeHart.

The district court held that DeHart had more than adequate alternative means of expressing his religious beliefs; he was permitted to meditate, recite Sutras (Buddhist religious texts), correspond with the City of Ten Thousand Buddhists, purchase canvas sneakers instead of leather ones, have Buddhist materials sent to him from outside the prison, and have a Buddhist religious advisor visit him in prison.

With regard to *Turner's* third factor, the district court found DeHart's proposed dietary accommodation was more burdensome than what was provided to Jewish and Muslim prisoners because his diet would require individualized preparation of meals and special ordering of food

items not on the master menu. Finally, the district court concluded DeHart's dietary request could not be accommodated without imposing more than a de minimus cost to SCI-Greene.

The Third Circuit agreed with and upheld the rationale to deny DeHart's First Amendment claim. The appeals court, however, reversed the dismissal of DeHart's RLUIPA claim, which was included in an amended complaint after the second remand. The district court reasoned the RLUIPA claim must be dismissed for not being administratively exhausted, as required by the Prison Litigation Reform Act (PLRA).

Because DeHart's complaint pre-dated the PLRA, the Third Circuit held "he is not required to exhaust all remedies under the PLRA's stringent standard." The appellate court also noted that DeHart's original complaint and his administrative grievances raised a claim under the Religious Freedom Restoration Act (RFRA). The RFRA claim was barred because that act was subsequently found unconstitutional by the U.S. Supreme Court.

The Third Circuit said it must determine "whether RLUIPA and RFRA are sufficiently different as to justify requiring DeHart to present his claim for a second time to the prison grievance process."

They held he did not have to, for RLUIPA did not enact a new substantive standard of review for prisoner religious claims. Both RLUIPA and the RFRA sought to preserve the traditional compelling interest/least restrictive means test applied to institutionalized persons. As such, the appeals court held the RLUIPA claim must be heard on its merits.

Accordingly, the summary judgment entered for prison officials on DeHart's First Amendment claim was affirmed and the dismissal of the RLUIPA claim was reversed and remanded for further proceedings. See: *DeHart v. Horn*, 390 F.3d 262 (3rd Cir. 2004). ■

Dismissal of Failure to Protect Claim Reversed; No "Showing" Necessary to Survive Rule 12(b)(6) Dismissal

The Seventh Circuit Court of Appeals reversed a district court's dismissal of a civil committee's failure to protect and equal protection claims, for failure to state a claim under Fed.R.Civ.P. 12(b)(6).

David Brown was a prisoner of the Illinois Sexually Violent Persons and Detention Facility (Facility), awaiting a civil commitment trial under the Illinois Sexually Violent Persons Commitment Act.

On May 4, 2001, Brown, a Caucasian, was playing cards in an unsupervised day room when "G.B., an African American prisoner who had attacked other Caucasian facility prisoners at other locations ... attacked and severely beat Brown several times in succession, causing Brown to suffer physical injuries."

Prior to the assault, Facility staff "personally knew of G.B.'s propensity for violence and history of attacking Caucasian residents ... and were aware of a pattern of attacks by African-American residents in general against Caucasian residents at the Facility." Yet, they "failed to take adequate measures to prevent such attacks from taking place."

Brown brought suit in federal court, alleging "that Facility employees failed to protect him in violation of his due process rights by allowing [a] fellow resident with ... violent propensities to roam Facility common areas unsupervised." He also alleged that several Facility employees violated his right to equal protection by intentionally treating him and other Caucasian residents differently from similarly situated African American residents. But the district court dismissed both claims upon the Defendants' FRCP 12(b)(6) motion to dismiss

for failure to state a claim.

Beginning with Brown's Failure to Protect Claim, the Seventh Circuit explained that since Brown was awaiting a civil commitment trial, but not yet convicted of a crime when the assault occurred, his "status was comparable to that of a pretrial detainee." Therefore, his claim arose under the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment. Even so, "there is 'little practical difference between the two standards,'" and "claims brought under the Fourteenth Amendment are to be analyzed under the Eighth Amendment Test" set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994).

Applying this two-prong test, the appeals court found that "having alleged ... exposure to a heightened risk of assault, posed by a specific individual with allegedly known violent propensities, Brown ... alleged sufficiently substantial risk" to his safety. The appellate court then found that "Brown's complaint, by asserting that the defendants 'had knowledge' of G.B.'s violent propensities as evidenced by his alleged history of attacking Caucasians, sufficiently alleges that defendants were aware of an excessive risk posed to Brown." Additionally, Brown sufficiently alleged that defendants disregarded those risks, thereby sufficiently stating a failure to protect claim.

In reaching this result, the Seventh Circuit observed that "the district court's findings misstate plaintiff's burden going forward... [T]o survive a motion to dismiss under Rule 12(b)(6), he needed only allege ... And Brown has sufficiently alleged an

equal protection violation."

Finally, the appeals court upheld the dismissal of Brown's claims against individual defendants for failure to train, because those claims may be maintained only against a municipality. It also upheld the dismissal of Brown's damages claims against the defendants in their official capacities. See: *Brown v. Budz*, 398 F.3d 904 (7th Cir. 2005). ■

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California Guards Lose Appeals On Federal Conspiracy Conviction, Bail; Still Free

Two former California prison guards, who were convicted in federal court of conspiracy to violate the constitutional rights (18 U.S.C. § 241) of Pelican Bay State Prison (PBSP) prisoners, lost both the appeals of their convictions of denial of bail pending appeal. Despite having been convicted in 2002 and losing their appeals in June, 2005, both men remain free.

Jose Ramon Garcia and Edward Michael Powers, guards at PBSP, were convicted of conspiring with other guards to organize stabbings, assaults and intimidation of selected prisoners by other prisoners. Garcia was sentenced to 76 months in federal prison and Powers received 84 months. They were imprisoned in June 2003 (see: *PLN*, Apr. 2003, p.21). While appealing their convictions they applied for bail pending appeal (18 U.S.C. § 3143 et seq.), first in the district court. That court denied bail after finding the two did not show “exceptional reasons” per 18 U.S.C. § 3145(c).

In the bail appeal, the former guards argued that § 3145(c)’s “exceptional reasons,” including the fact that they were former state employees, excused them from immediate incarceration. In a case of first impression interpreting § 3145(c), the Ninth Circuit Court of Appeals harmonized the eligibility for such bail (under § 3143(b)) with the lately added hurdle of § 3145(c) to demonstrate “exceptional reasons” to grant bail. There was no disagreement that both defendants met the eligibility requirements of § 3143(b). The Ninth Circuit reviewed the district court’s denial de novo.

The primary “exceptional reason” presented by Garcia and Powell was the district court’s finding that they posed no danger to the community outside the prison context. That is, their propensity for violence attached only when acting as prison guards. Next, they argued that they should be coddled under “federal-

ism” concerns – that their conviction as state officers by the federal government “improperly strained the federal-state relationship.” Third, Garcia pled that because he was subsequently diagnosed with lymphoma and was undergoing chemotherapy, he should be excused from imprisonment.

The Ninth Circuit analyzed several factors it thought might be considered in interpreting “exceptional reasons.” One such factor could be if the defendant’s recent criminal behavior had been aberrant, i.e., he no prior history or he had been unusually provoked. A record of a prior exemplary life might thus argue for a finding of “exceptional reasons.” The crime itself could be parsed for mitigating factors such as mitigating intent. Likewise, the length of the sentence, and the proportion already served in relation to any time remaining, could be a factor considered for bail pending an appeal. The Ninth Circuit opined that the hardships of prison might be unusually difficult for a particular defendant, such as a serious illness or injury for which treatment within prison might not be compatible. The appellate court even allowed that the effect of such incarceration on the physical or mental well-being of the convicted felon might be considered. From a legal standpoint, if the appellant had an unusually strong case for reversal on appeal, this could be weighed as an “exceptional reason.” Of course, the court may consider whether the defendant was “unusually cooperative” with the government – i.e., an informant – which could expose the appellant to injury in prison.

As to the “federalism” argument, the Ninth Circuit rejected it out of hand by noting that this “would create a special dispensation available only to state-employed criminals.” The fact that the defendants were no longer prison guards did not equate to their not being dangerous. The appeals court observed that Garcia and Powell demonstrated a pattern of “carefully planned [violence] ... repeated over a period of years,” the epitome of having a violent nature. As to the remaining factors, the Ninth Circuit, having defined “exceptional reasons” for the district court, vacated and remanded the application for bail pending appeal

for consideration under its newly announced guidelines. See: *United States v. Garcia*, 340 F. 3d 1013 (9th Cir. 2003). The district court then released the ex guards on bail.

On October 29, 2004, Garcia’s and Powers’ freedom concerns became moot when, in a brief unpublished opinion, the Ninth Circuit affirmed both convictions. A major contention on appeal had been the complaint of a conflict of interest when one defendant’s attorney was disqualified in pre-trial motions because he had previously represented numerous other prison guards before a grand jury who might have been called as witnesses.

Other appellate issues centered on evidentiary concerns regarding testimony gained from one defendant (who had waived his *Miranda* rights) giving information in an interview that implicated the other, and hence the conspiracy they were both convicted of. The bottom line was that Garcia and Powers had unquestionably set up attacks on (falsely labeled) “child molesters” in the yard by other prisoners, planted weapons in their cells, filed false reports (or none at all) and abused their sworn peace officer status in both their crimes within PBSP and their lying about it under oath later. See: *United States v. Garcia*, 114 Fed.Appx. 292 (9th Cir. 2004), *cert. denied*, 126 S.Ct. 396 (2005). (unpublished ruling). The Ninth Circuit subsequently remanded to the district court, without vacating, the sentences imposed on Garcia and Powers, to determine if their sentences would have been materially different under *Booker v. United States*, 543 U.S. 220 (2005) (also an unpublished ruling, at 137 Fed.Appx. 979 (2005)).

An article in the April 17, 2006, edition of the *National Law Journal* disclosed that as that issue went to press, neither Powers nor Garcia had been remanded to prison and were both free men with no deadline as to when they would begin serving their criminal sentences. The five year investigation that culminated in their convictions also led to the retirement of Edward Alameida, the CDC director who faced perjury charges for denying that he stopped civil rights and criminal investigations into the misconduct of prison guards. ■

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Native American California Prisoner Entitled to Religious Exception from Prison Hair Grooming Policy

by John E. Dannenberg

The Ninth Circuit Court of Appeals, applying the Religious Land Use and Institutionalized Person Act (RLUIPA) (42 U.S.C. § 2000cc, et seq.), held that the blanket three-inch hair length policy (for male prisoners only) imposed by the California Department of Corrections (CDC) was not the “least restrictive means necessary to achieve its compelling interest in prison safety and security,” and reversed and remanded for approval of the policy by the district court below.

Billy Warsoldier, a Cahuilla Native American incarcerated at CDC’s minimum security prison (ACCF) in Adelanto, California, had been repeatedly infractioned for not complying with CDC’s regulation 15 CCR § 3062(e), which requires male prisoners to cut their hair to no longer than three inches. CDC never forced Warsoldier to actually cut his hair; they just progressively punished him for not yielding his sincerely held religious beliefs [his faith prohibits hair cutting] to CDC’s inflexible policy. As a result, Warsoldier suffered cell confinement, added work duty, reclassification to a lower work credit-earning status, loss of phone privileges, expulsion from two vocational classes, removal from his position on the Inmate Advisory Council, exclusion from recreation in the main yard, reduction of his monthly draw at canteen from \$180 to \$45, and prohibition from making special purchases through the canteen. CDC’s reasons for such actions were that they were “necessary to make complying with the grooming standards more of an appealing choice to the inmate.”

After exhausting administrative remedies, Warsoldier sued under RLUIPA in U.S. District Court (C.D. Cal.), seeking injunctive and declaratory relief from CDC’s policy on the ground that it imposed a substantial burden on his religious exercise. The district court, noting that at the time Warsoldier had only 18 days left to serve, and that CDC had not actually injured him by making him cut his hair, denied his request for a preliminary injunction. Warsoldier appealed, represented by Los Angeles attorney Audrey Huang and by Ben Wizner of the ACLU Foundation of Southern California.

First, the Ninth Circuit found that

Warsoldier had made a showing of a “substantial burden” by being forced to “choose between following the precepts of [his] religion and forfeiting benefits, on the one hand, and abandoning one of [his] precepts ... on the other.”

The CDC then was required to identify compelling state interests in its defense. Predictably, it cited hiding contraband in the hair, claimed that short hair was easier to keep clean and helped reduce head lice infestations, that long hair was a safety hazard during the prisoner’s operation of heavy machinery, and that short hair frustrated attempts to disguise one’s hair during an escape. CDC offered case precedents that the Ninth Circuit quickly rejected, noting that they were based upon the abandoned former Religious Freedom Restoration Act (RFRA), which had unconstitutionally used the strict scrutiny standard of review. Under the recently approved RLUIPA [see *Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005),] CDC had the burden of demonstrating not only that its policy served a compelling interest, but also that it employed the least restrictive means to achieve that compelling interest. While the appeals court agreed that there was no controversy that CDC had a compelling interest in security issues, the question turned on whether CDC’s policy was the least restrictive alternative means of achieving that interest.

The appellate court noted that ACCF was a minimum security facility, and that CDC’s cited counterexamples were all from maximum security cases. The appeals court faulted CDC for not wavering on its policy of not considering religious exercise, no matter how low the facility’s security level. Moreover, the Ninth Circuit pointed to the Federal Bureau of Prisons and to state prisons in Oregon, Colorado and Nevada which permit “freedom in personal grooming,” apparently without ill consequences. CDC’s retort that they should not be limited by policies adopted by other jurisdictions fell flat when the Ninth Circuit observed that CDC couldn’t show why those prisons’ security concerns were any less compelling than CDC’s; the appellate court stated it found the comparisons useful. Most notably, however, was that CDC’s parallel policy for its women’s prisons (15 CCR § 3062(f)) allowed unrestricted hair

length, and CDC could offer no convincing reason why female prisoners were less likely to conceal weapons, have lice, be injured using machinery or change appearances during an escape. Accordingly, the Ninth Circuit found that CDC failed to meet its burden under 42 U.S.C. § 2000cc-2(b) of having adopted the least restrictive means of achieving its compelling governmental interests.

The appeals court also ruled that Warsoldier would suffer irreparable injury from CDC’s burden on his religious practice. CDC’s defense that he would be released in 18 days was rejected based upon *Elrod v. Burns*, 427 U.S. 347, 373 (1976), which stated, “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” The balance of hardships clearly tilted in Warsoldier’s favor, and the district court therefore had abused its discretion in denying preliminary injunctive relief.

Accordingly, the Ninth Circuit reversed the denial of Warsoldier’s request for a preliminary injunction and remanded for further proceedings not inconsistent with its opinion. Moreover, the appellate court ordered that the injunction it had granted enjoining CDC from enforcing its grooming policy pending the appeal would remain in effect pending entry of a final judgment in the district court. See: *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005). The CDC has since abandoned its grooming policy for male prisoners rather than be subjected to piecemeal litigation by religious adherents seeking exceptions. ■

CALIFORNIA HABEAS HANDBOOK Edition 4.04.1 (Revised May, 2005)

By: Kent Russell
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News in Brief:

Alabama: On January 8, 2006, Arthur Lee Scruggs, 38, a prisoner at the Donaldson Correctional Facility, was killed by unspecified means in a fight with prisoners Michael Barnes and Gerald Henderson.

Arizona: In August, 2005, a massive drug sting by the FBI led to 16 guilty pleas by US army soldiers, policemen and prison guards who agreed, usually while in uniform, to smuggle or transport 1,474 pounds of cocaine in exchange for bribes. Seven of the total arrested were Arizona Department of Corrections guards.

Arizona: On June 14, 2005, Gabriel Saucedo, 36, a guard at the Arizona State Prison Complex-Safford accidentally shot and killed himself while on perimeter guard duty at the prison.

Arkansas: On January 10, 2006, Janice Koontz, 30, a guard at the Civigenics run Bi-State Justice Building jail in Texarkana was indicted by a federal grand jury in Texarkana, Texas on 25 counts of tax fraud. Prosecutors charge that Koontz and Colleen Jordan, 44, a tax preparer, used prisoners' social security numbers Koontz obtained at her job to fraudulently file false income tax returns in the name of the prisoners and get \$50,000 in tax refunds for themselves. Koontz was employed by the Arkansas Department of Corrections between 1999 and 2003 when she was fired, and then promptly hired by Civigenics.

Arkansas: On January 24, 2006, Pulaski county jail guard Anthony Cole, 37, was sentenced to four years probation and a \$2,000 fine after pleading guilty to third degree sexual assault charges after he forced a woman prisoner he was guarding to perform oral sex on him in the courthouse's jail holding facility on July 22, 2005. Cole was arrested a week later after the victim filed a complaint. The victim had been in court for a probation violation hearing on a misdemeanor theft conviction.

Brazil: On January 24, 2006, three prisoners at the Ageron Martins de Carvalho prison in the Amazonian province of Ji-Parana attempted to escape using .38 caliber revolvers and shot and killed one guard before being shot and killed by other guards. In the ensuing commotion about half the prison's 300 prisoners tried to escape but were unable to due to heavily armed police and guards on

the prison perimeter. When the warden and security director tried to defuse the situation, prisoners took them hostage. The hostages were released when officials agreed to longer visiting hours and sentence reductions.

California: In January, 2006, the Monterey county jail became the first law enforcement agency in California to use iris scan technology on prisoners to ensure prisoners do not swap identities and escape or are mistakenly released. The change was prompted by the 2004 escape of a prisoner who swapped identities with another prisoner and was wrongly released.

El Salvador: On April 20, 2006, Lidia Alvarado, 44, was arrested while visiting two prisoners in the nation's main prison. Prison officials found a container ten inches long and four inches wide in her vagina which contained a live M-67 hand grenade and some marijuana.

Illinois: On January 22, 2006, the Cook county sheriff's office in Chicago removed its toll free hotline number which provided information on jail prisoners from its website after learning the number, which spelled the words "JAIL" had been taken over by a phone sex service who had purchased it when the sheriff's department let the number lapse due to budget cuts.

Indiana: In August, 2005, officials at the Clark county jail blamed homemade tattoos using staples for five prisoners who became sick with MRSA drug resistant bacterial skin infections. Punctures or skin lacerations allow the bacteria to enter the blood stream where it can cause death or serious injury.

Michigan: On March 14, 2006, Darick Heam, 42, a guard at the Thumb Correctional Facility, was charged with assault and weapons possession charges from the stabbing of an off duty policeman who was at his ex girlfriend's home. The officer wrestled the hunting knife away from Heam and stabbed him with it. The officer suffered multiple stab wounds to his chest but was not seriously injured.

Mississippi: On January 12, 2006, the Pike county sheriff's office fired jail administrator Willie Patterson, assistant jail administrator Eugene Bates and guard Joey Gunther after they allegedly beat an unidentified prisoner. Sheriff Mark Shepard told media he was ashamed at how the prisoner was

treated and said "I'm not going to tolerate anything here that is less than professional."

Missouri: On January 9, 2006, an unidentified guard at the Potosi Correctional Center was allegedly stabbed and critically injured by prisoner Roderick Nunley. Two other guards were injured when they came to the guard's assistance. No reason was given for the incident.

Montana: In December, 2005, Helena district court judge Thomas Honzel sentenced Brian Holliday to ten years in prison for escaping from a Transcor prison transport van at a Burger King. The sentence is to run consecutive to his 90 year sentence for murder which he was serving at the time of the escape. Honzel and three other prisoners removed the screen from the van and escaped in September, 2004.

New Jersey: On January 23, 2006, Leslie McMillon, a former guard at the Mercer County Correctional Center, pleaded guilty to first degree manslaughter stemming from her April 19, 2004, shooting murder of Paula Wilson, a former jail prisoner whom McMillon had sexually assaulted while Wilson was a prisoner. Wilson's body was found dangling from a fire escape on her home in Trenton. McMillon told the court: "I knocked the door in and shot her." The murder came shortly before Wilson was due to tell jail officials about her sexual assault by McMillon, who had already been suspended while being investigated for sexually assaulting other female prisoners. Wilson had been shot in the leg and in the back. As part of her plea agreement, prosecutors agreed to an 18 year sentence. In most jurisdictions a murder committed to silence a witness in an official investigation is grounds for aggravated murder charges. Apparently not when the victim is a former prisoner and the testimony is about a jailhouse sexual assault.

New Mexico: On January 10, 2005, John Lumsden, 42, a visitor to the Metropolitan Detention Center in Albuquerque was arrested when he went to the head of the visitor search line and gave startled guards a loaded semi automatic pistol, ammunition, mace and a half empty bottle of liquor. Jail officials said they believe Lumsden was drunk at the time and also has mental health issues.

Pennsylvania: On January 12, 2006,

Major Joseph Glynn Jr., 50, the deputy warden of the Alternative and Special Detention program of the Philadelphia prison system was suspended when it was discovered he had embezzled more than \$13,000.00 from the facility's Inmate Welfare Fund. Glynn would write checks to himself, forge the warden's signature and cash them. The 23 year jail veteran earned \$57,000 a year.

Russia: On December 11, 2005, at least three prisoners were killed and at least ten others injured when the roof of a pre trial detention center in Moscow collapsed under the weight of heavy snow.

South Carolina: On January 8, 2006, Albert Bellamy, 42, a guard at the J. Reuben Long Detention Center was arrested and charged with smuggling cigarettes and marijuana to jail prisoners in exchange for bribes.

Texas: In February, 2005, the State Bar of Texas suspended criminal defense attorney Ron Mock, 58, for 35 months because Mock took \$4,600 from a client to handle her sexual harassment case and did not tell her he had no experience in such cases. The case was quickly dismissed when Mock failed to respond to a preliminary motion. The Bar has reprimanded Mocked twice in the past ten years and placed him on probation three times. Mock is best known as the lawyer with the most clients on Texas's death row. Between 1986 and 2001 he represented 19 capital defendants, of whom 16 were given the death penalty and 10 of whom have already been executed. Defense attorney Brian Wice, who represented one of Mock's former clients observed: "For so many of the people whom Ron was appointed to represent, their death warrant was signed when the ink was dry on the appointment form." Mock stopped representing death penalty defendants when minimum competency standards were imposed in 2001.

Texas: On March 14, 2006, Curtis Hinson, 27, a guard at the Stiles Unit in Beaumont, was arrested at an inland border checkpoint and discovered to have 21 pounds of marijuana concealed in the tire of his truck. He was off duty but wearing his Texas Department of Criminal Justice uniform when arrested in a vehicle registered to Cheryl Arterburn, the wife of former Texas prisoner Charles Arterburn, who had been released from prison and was found dead in a field near Houston the month before. ■

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All women writing to me *must* be willing to have their words quoted in this book. Feel free to contact me whether you're on the inside or have been released. But if you need your words to be "off the record," please note that in the letter that you send me. Backing documentation for the situations you describe, including official complaint forms, are also encouraged.

I have been writing about girls and women in prison, the drug war, and battered women behind bars--among other topics--for over 10 years, and treat every inquiry and letter with due consideration. If you happen to have online access from your facility, feel free to visit: <http://www.well.com/user/sisu> for more about my background, or email sisu@well.com.

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Ninth Circuit Reverses Denial of IFP Status Under §1915(g); Defendants Bear Burden of Establishing IFP Disqualification

In a case of first impression, the Ninth Circuit Court of Appeals held that defendants bear the burden of proving disqualification for *in forma pauperis* (IFP) status under the “three strike” rule of 28 U.S.C. § 1915(g). “Once the defendant has made out a prima facie case, the burden shifts to the plaintiff to persuade the court that § 1915(g) does not apply.”

California prisoner Antolin Andrews brought suit in federal court challenging the grievance procedures of the California Department of Corrections (CDC) and the application thereof.

The district court initially granted Andrews’ request to precede IFP. However, defendants moved for summary judgment claiming “that Andrews had acquired three strikes” barring IFP status under § 1915(g). Defendants attached the docket sheets for 22 “actions in which Andrews was the plaintiff and the cases had been dismissed.” They “also attached an order from the Superior Court” which “deemed Andrews a vexatious litigant.” No actual dismissal orders or other evidence regarding the reasons for the dismissals was provided to the district court.

The court agreed with defendants that Andrews bore the burden of proving his qualification for IFP status but failed to do so. It also found that “the record shows sufficient strikes to warrant IFP disqualification.” Therefore, the district court dismissed the case without prejudice.

The Ninth Circuit rejected defendants’ argument that it lacked jurisdiction to review the district court’s order, noting that “[t]he denial of a motion to proceed IFP is appealable as a final judgment under 28 U.S.C. § 1291,”

citing *Roberts v. United States Dist. Ct. for the N. Dist.*, 339 U.S. 844, 845 (1950).

Next, the appellate court held “that if defendants challenge a prisoner-plaintiff’s IFP status, then the initial production burden rests with the defendants. Thus, when challenging a prisoner’s IFP status, the defendants must produce documentary evidence that allows the district court to conclude that the plaintiff has filed at least three prior actions that were dismissed because they were ‘frivolous, malicious or fail[ed] to state a claim.’ § 1915(g).” Defendants may not “simply rest on the fact of dismissal.” Rather, they must produce court records or other evidence establishing the basis of the dismissal(s).

“Once the defendants have met this burden,” the court held, “the burden then shifts to the prisoner, who must attempt to rebut the defendants’ showing by explaining why a prior dismissal should not

count as a strike.”

The Ninth Circuit reversed and remanded, finding that defendants “did not present sufficient evidence regarding the prior dismissals to establish a prima facie case of IFP disqualification under § 1915(g).”

As guidance on remand, the appeals court explained that “a case is frivolous if it is ‘of little weight or importance, having no basis in law or fact,’” and a “case is malicious if it was filed with the intention or desire to harm another.”

The appellate court agreed with Andrews “that dismissals of actions brought while plaintiff was in the custody of the INS do not count as ‘strikes’ within the meaning of § 1915(g), so long as the detainee did not also face criminal charges.”

Additionally, “dismissed habeas petitions do not count as strikes under § 1915(g).” See: *Andrews v. King*, 398 F.3d 1113 (9th Cir. 2005). ■

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ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 915 15th St. N.W., 7th Floor, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

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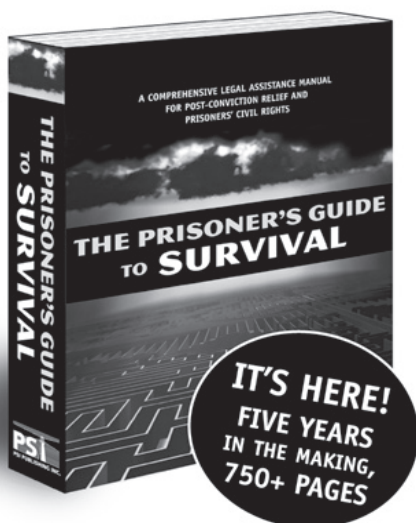
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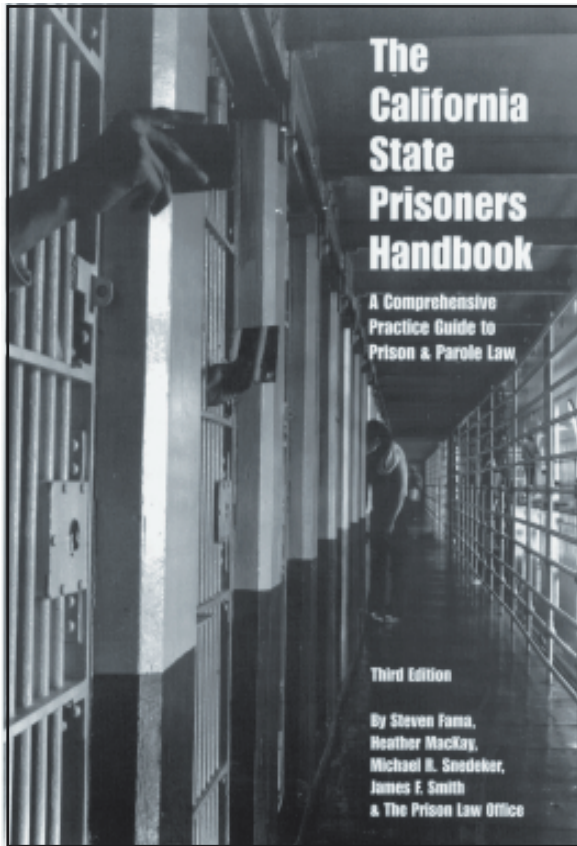
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June 2006

Torture in Maine's Prison

by Lance Tapley

"The mission of the Maine State Prison is to provide a safe, secure, and humane correctional environment for the incarcerated offender."

— prison Web page

Five hollering guards wearing helmets, face shields, and full body armor charge into a mentally ill man's cell. The first attacker smashes a big shield into him, knocking him down. The attackers jump on him, spray Mace into his face, push him onto his bed, and twist his arms to his back so they can handcuff him. They connect the cuffs by a chain to leg irons. Then they take him into the corridor, cut off all his clothes, and carry

him naked and screaming through the cellblock, continuing to Mace him. They put him in an observation room where they bind him to a restraint chair with straps. He remains there naked and cold for hours, yelling and mumbling.

To many people, this scene would look like torture. A scene like it might have taken place in the infamous Abu Ghraib prison near Baghdad, where American soldiers torment captured Iraqis. But as described to me independently by six prisoners, including some who have suffered this attack, it is business as usual — an "extraction" for disobedience — in the Special Management Unit, also known as the SMU or the "Supermax," a 100-cell, maximum-security, solitary-confinement facility inside the new 1,100-cell Maine State Prison in Warren. The Supermax's regulations say it is a place for prisoners who are threats to others, are escape risks, who are found with contraband, or who simply don't obey the rules.

For me to verify the prisoners' stories, a source who wished not to be identified — to preserve his relationship with the prison — gave the *Phoenix* a videotape of a cell extraction of a young man. He was not one of the men I interviewed. The prison tapes each extraction in order to prove, some people would say ironically, that the prisoner is not mistreated. The videotape I obtained, although dated to 2000, corroborates the stories I heard. In the end, the man is fully naked in the restraint chair, with no trace of human dignity. My source tells me that sometimes there are women guards present. According to the prisoners I interviewed, it gets a lot worse than what the video depicts.

After collecting this and other information that suggest the Supermax fits some classic definitions of torture, I went to interview Maine's corrections commissioner, Martin Magnusson, in his Augusta office beside the beautiful, smooth Kennebec River. He is, at 57, a plain-speaking, heavy-set, balding man and the former warden of the prison.

As I begin reading the notes that became the first paragraph of this story, he interrupts me halfway through, his demeanor gloomy.

He wants to "de-escalate use of the restraint chair," he says, and he is developing a plan to do it. Although he believes there are legitimate reasons for extractions, and he says more than 200 have already been done at the time of the interview last year, he has tried to tighten up the rules on them, he claims. And he has reduced use of the chair from 1,300 in 2003 to a rate that will see 900 uses by the end of 2005, he says.

While woman guards may be present when such discipline occurs, he says he ordered over a year ago that prisoners be clothed while in the chair, whenever practicable. He also claims that now "in no way is the chair being used for punishment," although the Supermax prisoners dispute this. Rather, he says, it is used when someone is a threat to others or himself. He adds: "That was always the way it was supposed to be," but he admits that in the past each case "wasn't being reviewed."

He also announces what appears to be a major turnaround: He wants to reform the way many things are done at the Supermax. "We need to look at the system

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Torture in Maine's Prison (cont.)

and see how we can do better," he says, suggesting that carrots (rewards) might be emphasized over sticks (punishment).

The treatment of prisoners at the Supermax has long been controversial. Prisoners, defense attorneys, and the few prison watchdog organizations tend to portray the extractions — and the entire Supermax system, which in the past 20 years has become widespread across the country — as part of a cruel, unnecessary, counterproductive, and expensive-to-the-taxpayer cycle of violence that has roughly shoved aside all pretense of "corrections."

They depict the worst part of this cycle in this way:

- First, a mentally ill or unstable prisoner is brought to the Supermax, often for a nonviolent violation like having contraband such as forbidden tools or illegal drugs (by numerous reports, heroin is prevalent in the prison).

- Next, the prisoner acts up under the pressure of weeks or months of confinement to his cell and under the stress of living with more-disturbed prisoners in his cellblock, some of whom throw their urine, feces, and blood at the guards, who become frightened and incensed.

- After he commits a violation of Supermax discipline, as punishment the guards extract the prisoner from his cell and put him in a restraint chair.

- After one or more of these harsh episodes, the prisoner becomes more mentally ill. He may become one of those who throw filth at the guards, creating an extremely hazardous situation for them, himself, and other prisoners. Each prisoner I interviewed complained vigorously that the SMU was not properly cleaned — in fact, that it reeked of excrement, urine, and blood.

- Once again, the prisoner is extracted and put in a restraint chair — possibly, many times more. This treatment drives him crazier. He likely will be prosecuted for assault on the guards and sentenced to five more years in prison, much of which time he may spend in the SMU.

- Finally, the prisoner shows all the symptoms of being totally insane, in despair, and suicidal — and suicidal threats lead to more extractions.

Magnusson, the corrections commissioner, says "there's some truth" to this cycle, though he feels "it doesn't happen

that much."

The truth is hard to verify precisely. Many prisoners have made their way in the world through deception. Two defense attorneys who are horrified by the Supermax nevertheless warned me against accepting everything I heard from prisoners at face value. But the prisoners' stories and those collected by prison critics hang together well.

And the prisoners seem more forthcoming than their keepers. The prison was at first uncooperative with my efforts to interview prisoners and continued to be uncooperative with my wish to interview prison personnel. I never was allowed to interview the warden, Jeffrey Merrill, who had been sick — but neither was I allowed to interview his deputies. The Supermax was off limits to me. It appears to be off limits to almost all independent observers.

After the intervention of the governor's office, however, I finally was allowed to see the six prisoners. I was separated from them by thick glass, and we spoke through tinny speakers. They were in handcuffs, leg irons, and orange prison jumpsuits.

And I finally obtained a lengthy interview with Commissioner Magnusson. Surprising me, he did not want to defend the Supermax as much as he wanted to convince me he was going to reform it.

Both he and prison critics have similar explanations of why these big, high-tech institutions were built across the country, with their restraint chairs, in the 1980s and 1990s. As America's incarceration rate, which became the highest in the world, went through the roof of the old state prisons, the population explosion threw the old and new prisons into turmoil; supermaxes segregated the most troublesome prisoners. According to the prison critics, supermaxes also were part of the mushrooming, profitable prison industry and something of a cruel fad.

Maine's Supermax, originally a freestanding facility, opened in 1992. In 2001, the new state prison, which replaced Thomaston's 1824 landmark, was built around it. Literally and metaphorically, it is at the core of the new prison system.

Prison critics say that supermaxes and the rest of our country's prison policies are failures, as irrefutably demonstrated by the high recidivism rate among prisoners — their return to crime — and by the continuing tumult roiling the many new prisons, including Maine's.

Torture in Maine's Prison (cont.)

Michael James

"They beat the shit out of you," says SMU prisoner Michael James, speaking hunched against the thick glass. He is talking about the extractions he's endured. "They push you, knee you, poke you." The guards' full roughness doesn't get captured on the videos, he says, because the camera gazes at the guards' backs.

"They slam your head against the wall and drop you on the floor while you are cuffed," James says, showing a scar on his chin — "They split it wide open."

"They're yelling 'Stop resisting! Stop resisting!' when you are not even moving," he says, although he admits he resists sometimes. He says he's been Maced countless times and has spent long periods in the restraint chair.

"There's a lot who shouldn't work here because they get a kick out of controlling people," he adds.

Then he says, his eyes brightening: "There's some [guards] that are absolutely awesome."

You know, instantly, something is wrong when you meet an otherwise handsome Michael James, 22. He has a small top of the head and a very prominent brow ridge over deep-set eyes. You notice the scars on his shaved head — including, when he bends over, a deep, horizontal gash on the top. He got this, he says, by scraping his head over and over on the metal slot in his cell door used for passing in food trays.

"They were messing with me," he explains. "I couldn't stand it no more."

He is referring to the guards, who he says taunt him.

"I've knocked myself out by running

full force into the [cell] wall" in frustration, he says.

James says a family member beat him as a child: "I got a broken nose. I was punched, kicked, slapped, bitten, thrown against the wall." He started seeing mental-health workers when he was four, he says, and getting medication for his mental problems when he was seven. He only made it through the second grade in regular school, he says, and he spent most of his childhood in the state's mental hospitals and homes for mentally disturbed children.

He's been diagnosed, he says, as being bipolar (manic depressive) and having an antisocial personality. He says his other diagnoses are attention deficit hyperactivity disorder, post-traumatic stress disorder, and oppositional defiance disorder. He is on several psychotropic medications, he says, but he claims he seldom gets to see a mental-health worker.

His lawyer, Joseph Steinberger of Rockland, is trying to get him admitted to the state's Riverview Psychiatric Center in Augusta, which has replaced the Augusta Mental Health Institute. But for the prison authorities "to admit that I need to be there would be to admit that they were wrong," James says.

He was in trouble with the law as a juvenile, he says, but his real problems began when he was taken off medications by one hospital when he was 18. He says he got into "selling drugs, robbing people, fighting, burglaries." His combination of offenses has resulted in his current 12-year sentence. Of the four years he has been in prison, all but five months have been spent in the SMU, he says.

James confirms a story I heard from another prisoner: He believes a guard asked a convicted murderer how much it would cost to have him killed. James made an internal prison complaint, but he says nothing was done because the guard said he was only joking.

He is facing a November 28 trial for assaulting a guard by throwing feces on him. His lawyer, he says, will plead insanity.

The SMU is "disgusting, filthy," he says. "The showers haven't been cleaned for months. There's slime and blood and shit on the walls. They just sweep it up."

Snow comes under the door of his cell in the winter, he says, and the food is insufficient. He says the doors to two prisoners' cells are chained so that if a fire begins they could not get out when the

doors are opened automatically.

"It's mental torture, even for people who are able to control themselves," he says.

But the worst thing about prison, he believes, beyond all that he describes, is "they deny me access to better myself."

Other Supermax prisoners confirm James's story and his complaints. All the others I talk with are worried about him. As I go through my interviews, I am struck by how concerned these criminals are for each other, how candid they seem about their crimes and psychological problems, and how articulate many of them are.

Deane Brown

One of the most articulate is Deane Brown, 41, a big man with long, dark hair, a Fu Manchu beard, and lively eyes. Sentenced to 59 years for a string of burglaries in the mid-'90s, he jokes that he was given a far longer sentence than the man who murdered his brother. He recently marked the point when he has spent the majority of his life in prisons.

He is worried that he will soon be transferred out of state — as several Supermax friends recently were — because of his complaints about conditions there. He has written letters posted on the Web site called the Maine Supermax Watch (<http://penbay.org/WRFR/prisonproject/deanebrown.html>) and has had his telephone calls played over WRFR, a small Rockland nonprofit radio station.

He was put in the Supermax in May for possessing contraband, he says — such things as a razor blade, a screwdriver, a soldering iron, and wire, all of which he claims he used for fixing other inmates' televisions and electronic devices. But the prison views him as an escape risk, he adds.

"They put you down here for any reason," he says. "There is no charge against me for trying to escape." He believes that, under a recent United States Supreme Court decision, Supermax prisoners are entitled to due process on their placement in such a restrictive setting. He says the prison gives him no idea what he has to do to be readmitted to the general prison population.

Since being put in the SMU he has become concerned about his teeth, which are visibly loose and coated with gray plaque. He isn't allowed a toothbrush or floss, he says. He shows me a tiny plastic device the prison gave him. It fits over the tip of

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a finger. It does not work well enough to keep his teeth clean, he says.

He is protesting the SMU by not taking his diabetic medicine, he says. He feels his health is more threatened by the SMU's lack of hygiene. The food cart is "dragged through feces," and "the ceiling is plastered with feces," he says.

"It's supposed to be an administrative program for correcting behavior, but it's creating animals," he says. "I saw a guy eat his own feces."

Seeing me wince, Brown half-apologizes: "I know it's distressing."

Of Michael James, he says: "I saw him bare-assed naked in chains being dragged through the cellblock." He believes James has spent more time in the restraint chair than anyone else.

Brown says he saw another prisoner after a cell extraction with his eye and nose bleeding.

He believes the SMU's 23-hour daily lockdown is psychological torture. It's a combination, he says, of sensory deprivation, a constant cellblock din with no diverting radio or TV allowed, and with lights on 24/7. For one hour, five days a week, he says, the prisoners are allowed to exercise in a 6-foot-wide, 30-foot-long cage that he calls a "kennel."

Although Brown refers to others in the SMU as mentally ill, he says he has been in a mental institution and a number of homes for troubled children and adolescents. He suffered early child abuse, he says, recounting how he was chained to the sink at home. He spent years at a boot-camp-type institution for drug abusers that he considers abusive, he says: "Three times they tied me up and buried me up to my neck in dirt overnight in the cold."

Obviously quite intelligent, he is teaching himself ancient Greek. He also is reading at the same time the Bible and philosopher Friedrich Nietzsche (of "God is dead" fame) and comparing them.

"Something inside of you that tells you something is wrong . . . that's God," he says.

Joseph Reeves

"I had my arm broken while handcuffed behind my back while face down on the floor and Maced so I couldn't see," recounts Joseph Reeves, 25, a narrow-faced man with a wispy, billy-goat beard and delicate tattoos on his pale skin.

Guards broke his arm during an extraction, he says: "They said I wouldn't open my hands, but I was handcuffed and

I blacked out. My hands were clenched."

When he came back to the unit from the hospital, he says, the prison staff, suspecting contraband in the cast, cut it off with dull scissors. As a result of the arm not healing properly, he has a piece of loose bone in it, he says.

He, too, is concerned about Michael James: "They constantly beat that kid." Such mentally troubled prisoners "would rather die than be here," he says. Lots of SMU prisoners have tried to kill themselves, he claims.

He has had mental problems. "I'm impulsive," he admits, a trait that leads him sometimes to resist the extractions. He has been in several mental institutions, he says, and he feels he doesn't get the care for his mental problems that he needs.

He also is upset with what he calls "sexual intimidation" in the form of strip searches and "butt searches."

The guards "at the drop of a hat will Mace you," he says. Like the other prisoners I interviewed, he says of the guards "there are good ones, but they are so outnumbered." The prisoners speak fondly of the "good" guards.

Reeves is serving a five-year term for robbery and gun possession, he says, and much of it so far has been spent in the SMU.

After my visit, he wrote me that he is in a 16-cell "pod" all by himself. He sent me pages from an Amnesty International publication on how isolation, degradation, threats, and "monopolization of perception" constitute torture.

Norman Kehling

Norman Kehling, 47, small, balding, seemingly a calm type, is the former head of the institution's "long timers" group, he says. He has been in the Maine State Prison since 1989, serving 40 years for arson — a record sentence, he believes, when no one was hurt in the blaze. He is in the SMU this time for trafficking in heroin, he says. There is "quite a bit" of heroin in the prison, he claims.

Also confirming the other descriptions of the extractions, Kehling tells of what happened to a young prisoner who pulled a sprinkler alarm: "They told him to cuff up. Then they rolled in on him with a team [in his cell]. They put it to him, plowed into him, took him down."

"A lot of people act up" in the Supermax, he says, because "It's easy to stir these people up," describing the guards as instigators. And part of the problem, he

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Torture in Maine's Prison (cont.)

says, is that the guards are scared: "I've seen them shaking."

He doesn't believe there is meaningful help for mental-health cases in the Supermax:

"One guy cut his testicle out of his sack . . . They shouldn't be here."

He adds: "This place breeds hate. What they're doing obviously isn't working."

Michael Chasse

"Conditions have been consistently filthy for the last eight years since I've been here," says Michael Chasse, a very tall, well-spoken, pleasant-seeming, 30-year-old man with slicked-down black hair.

He describes an SMU prisoner who constantly tried to cut himself because "he was so frustrated with the ways officers treated him. There's a lot of self-destructive behavior in here. A lot of these people are suicidal."

(In fact, despite supposedly overwhelming security, within the past six years one prisoner has killed himself in the Supermax and another in the adjacent 36-bed psychiatric unit — only half of which is used because of insufficient staff, prison authorities say.)

On Michael James, he comments: "That kid has gone nuts since he was put in here. I've seen him get beat up. I've seen two cops jamming his hands in a tray slot." ("Cops" is a term some prisoners use for their guards.)

He tells of the psychological effects of being locked into his cell for 23 hours a day: "There is a noise that comes from the air vents. The sounds start to seem like voices. I have built imaginary relationships with those white noises."

He admits he threw feces and urine at two guards. He says it was done in return for their exposing him to feces and urine in his cell: "My dignity was stripped."

Although he says that most of the people in the Supermax should not be there, he doesn't make that claim for himself: "I'm one of the bad apples."

Indeed, he seems proud of the notoriety of his crimes. He was involved in a bungled robbery, in which he was shot, at the Bangor home of the brother of former Senator and Defense Secretary William Cohen. During the trial for that crime, he escaped from his jailers, stabbing a couple of guards in the process, in an

episode caught partly on videotape by a television news crew who happened to be there — "front page of the *Bangor Daily News*," he notes. He is in the Supermax this time, he says, for having a "weight bar" in his cell.

Chasse is a classic jailhouse lawyer, able to reel off detailed legal citations from memory. He believes that many placements in the SMU are illegal because they are based on rumors of what a prisoner might do. "This place runs on confidential information," he says, but he believes court decisions require "an independent assessment" of the credibility of an informer.

Like the other prisoners, he has a sad story to tell of his youth. But now, he says, he is trying to make his life meaningful — though he expects to spend the rest of it behind bars — "trying to help people through the laws. I'm devoting myself to protecting prisoners' constitutional rights."

Charles Limanni

About a month previous, says Chuck Limanni, a prisoner threw a lunch tray back out the tray slot. The guards told him to come out and clean it up, and he refused:

"They instantly Maced him — behind a locked door! Then the extraction team came . . . He was put in the restraint chair because he refused to clean up" the food on the cellblock floor, Limanni says indignantly.

He is another prisoner who is concerned about Michael James: "That kid doesn't belong here. He never had a chance." The guards, he says, "antagonize him, call him names. It makes me sick. This place breeds hate. I hate cops. I hate the government."

He adds that the prison system "is set up to hurt you, to torture you."

Good-looking, longish brown hair, 33, he was put in prison for robbery — "not the first time" — and in the SMU in May, 2004, for, he says, "suspicion of drug trafficking." But, he says, no drugs were found.

He feels the real reason was "I'm a leader. I have a lot of willpower. I'm a political threat to them."

In the Supermax, "there's no program here. If [the inmates] had something to do, they wouldn't be doing this shit" — acting up.

Others — even the commissioner — agree

Recognition of the problems of Maine's Supermax and of supermaxes in general is by no means restricted to those confined in it.

The process by which people are put in the Supermax is "completely unconscionable," says Rockland attorney Joseph Steinberger, who has represented a number of SMU prisoners and now represents James. And once prisoners are there, "Basically they live like animals in cages," he says.

He is strongly opposed to keeping mentally ill people in such an environment:

"I had a client who was wildly delusional. He attacked a staff member. He had no idea what he had done. Because a judge insisted, he was brought to Riverview [the new state mental hospital]. He has made enormous progress there."

Riverview, he says, "is a fine place, but they have so few beds it's pathetic."

Behind this unpleasant scene, Steinberger says, "the real villain is the governor and the Legislature. It's cheaper politically to keep them in a cage" — but not cheaper financially, he adds.

He sees the entire prison system as largely a failure: "There's a heroin epidemic at the prison. Some people are getting addicted in prison who never used heroin before. I've defended at least a dozen people who've been accused of having heroin in prison."

Another Rockland attorney who also represents many prisoners, Barry Pretzel finds the Supermax "inhumane and unacceptable." Of the extractions, he says, "it appears its purpose is to humiliate."

Like Steinberger, he is especially concerned about what the Supermax does to its many mentally ill prisoners. "It's a circular pattern," he says. "It tends to make people who are mentally ill act up even more . . . A lot of the prisoners are in there for relatively minor offenses, but they end up serving 'a life sentence on the installment plan,' as I heard a judge say."

A retired lawyer in Damariscotta, Richard Gerrity, has been campaigning for some time to have Michael James dealt with in a humane way. Protesting that the SMU "is a drop-off for the mentally ill that no one, including the inmates, want to deal with," he pleads in a letter to Commissioner Magnusson that James "needs to be moved immediately to a psychiatric institution before he destroys himself."

Others who have protested Maine's Supermax include Carol Carothers, a

leader of the Maine chapter of the National Alliance for the Mentally Ill. In 2001, she was quoted in the *Bangor Daily News* as saying that the Supermax's practices "might have crossed into the realm of torture."

"State officials across the country are realizing what the ACLU has been saying all along, which is that Supermax conditions are neither a humane nor an effective type of confinement," writes MCLU director Shenna Bellows in an email to me.

In 2000, in a case involving an SMU inmate, a Maine Superior Court judge, Andrew Mead, commented in his decision: "It is difficult to imagine any person — mentally healthy or not — bearing up under months of such conditions."

In 2000, the United Nations questioned the United States government about torture, including housing mentally ill patients in supermaxes. The US responded, according to a UN press release, that in federal prisons: "Prisoners were screened and monitored for mental illness; and classification systems were in place so that confinement was not indefinite and that prisoners meeting certain criteria were transferred to less structured settings where appropriate." [Editor's Note: This also appears to be untrue given the practice of the Bureau of Prisons of indefinitely confining prisoners in its lock down prisons.] The US response did not deal with state prisons.

But the most significant critic of the Supermax, to me, may be Commissioner Magnusson. In our two-and-a-half-hour interview — and even before I lay out fully the condemnations I had of the Supermax — he agrees that much needs to be changed.

"We should be open to see if there are better ways to operate it," he says, and he talks of bringing in a national team of experts soon to see how this could be done.

When asked for comment on the Corrections Department's commitment to reform, Governor John Baldacci replies in a statement from his press office: "The governor is confident that the department led by Commissioner Marty Magnusson is not only open to constructive criticism, but embraces it — that's why we see improvements."

With the prison system as a whole, Magnusson says, his intention is "to go from a more punitive approach to more of a treatment approach."

He adds: "It will be a real struggle to get the staff to change." In a later telephone conversation, he comments: "I will piss off some of the staff by saying this."

Change may be a struggle for him, too, he admits: "I came up through a system where discipline is what you do."

In his law review article on the national Supermax scene, ACLU attorney David Fathi writes: "There are unmistakable signs that the bloom is off the Supermax experiment." Corrections Commissioner Magnusson's comments may indicate that this is the case in Maine, too.

Reforming the Supermax

Before the previous story was published, I recounted to several critics of the prison system what Magnusson, the former prison warden, had told me about Supermax reform. They were skeptical.

"Sometimes those in charge promise a fix, but five years later nothing has changed," said Barry Pretzel, a Rockland attorney whose clients have included a number of Supermax prisoners. "They're either out of office, or they're hoping no one will call them on an earlier promise."

"It's hard to imagine reprogramming that physical space," said Craig McEwen, a sociology professor, academic dean at Bowdoin College, and a long-time critic of Maine's prisons.

I myself became a little skeptical when John Baldacci's chief aide, Lee Umphrey, sent me an email expressing the governor's commitment to reform — and he mistakenly left on the bottom of the message his email correspondence with Denise Lord, the associate corrections commissioner. The correspondence suggested that the commitment hadn't directly come from Baldacci and that my questions were being dealt with perfunctorily.

"Give me two sentences and I will be all set," Umphrey told Lord in the email.

In our conversations, even Magnusson sometimes sounded skeptical of reform. "I don't know a more humane way to deal with the situation when they're hurting themselves," he said, describing the use of the restraint chair.

But he pledged to bring a group to Maine soon from the National Institute of Corrections (NIC) — "some of the top people in the country . . . to review all our practices."

The NIC is a think-tank on prison issues. It's a part of the United States

Department of Justice and was established after the 1971 Attica Prison riots in New York.

A top NIC official in Washington, DC, George Keiser, confirms that the Maine Department of Corrections had approached his agency for help in reforming the Supermax, but he says it is unlikely the NIC would send people to Maine, at least immediately. "We want to take three or four folks from Maine to the Colorado Department of Corrections," he says, to let them see an "effective" Supermax.

The timing of the department's vow to reform also inspires skepticism. Both Keiser and Denise Lord of the corrections department say the arrangements with NIC were made only in the first week of November, 2005 and I interviewed Magnusson, laying out for him my story of alleged torture at the Supermax, on the Monday of that week.

But Magnusson says his department's interest in reforming Supermax practices goes back a ways. For a long time "we've tried to figure out how to get them to stop throwing feces and cutting up," he says. Recently, he's been encouraged by the success he's seen at the Long Creek Youth Development Center, in South Portland.

There, the recidivism rate — the re-

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Torture in Maine's Prison (cont.)

turn to crime of released offenders — has plummeted from 50 percent to 10 percent in one year, he says. Magnusson guesses the state prison's recidivism rate is about 40 percent (he claims not to have hard numbers). The national recidivism rate is 55 to 60 percent, he says, and California's reaches 75 percent. The Warren prisoners have been in prison an average of three to five times, according to Magnusson.

The youth-center reform was accomplished, he believes, through "much improved programming" at the facility. And now "community resources are stronger" for the young prisoners. The staff did so much training in how to "de-escalate" use of the restraint chair — verbally calming down individuals instead of throwing them in the chair — that now the chair is "out in a warehouse getting cobwebs on it." At this institution, too, he says, a "progressive reward system" was successfully put in place.

The reforms at the youth center took place after years of intense public criticism. Amnesty International in the late 1990s accused the place of mistreating children. A former prisoner claimed, in a 2001 lawsuit, that he suffered excessive solitary confinement and use of the restraint chair; the state settled out of court for \$600,000. The youth center's superintendent was replaced in 2003.

Magnusson says he wants to bring in the NIC to help implement a rewards system at the Supermax and to create stages whereby prisoners can eventually be assimilated back to the general prison population. For example, a prisoner could earn more time outside the cell than the five hours a week now permitted.

The basic intent? "To go from a more punitive approach to more of a treatment approach," Magnusson says.

It Sounds Good, But . . .

If Magnusson is sincere in wanting to reform the current system — and he switches in conversation from the Supermax to the entire prison system when he talks about reforms — he faces enormous obstacles.

The 2001 creation of the new Warren prison, which was built around the Supermax, caused big problems, and not much money has been provided by the state Legislature to deal with them.

While waiting to interview Supermax

prisoners, I talked casually with several guards. They had little good to say about the new prison.

"Ninety-nine percent of the people here would go back to the old prison in a heartbeat," one tall, middle-aged guard told me, referring to both prisoners and guards. The old prison in Thomaston was "quiet," he said, unlike the new one: "There was a pecking order" among the prisoners. A woman guard nodded agreement.

"You're right," Magnusson responds when told of these complaints. The "much more comfortable" old prison had 430 beds, he says, and the new one quickly filled up to its 1,100-prisoner capacity, creating a host of adjustment problems, especially with the addition of hundreds of young prisoners from the Maine Correctional Center, in South Windham, and the overcrowded county jails. And the design of the new prison placed guards tensely "alone in a pod," or cellblock, with prisoners.

Assaults on guards and prisoners shot up, helping fill the Supermax, which is used to hold troublesome prisoners (according to state officials, the Supermax usually is at about 90 percent capacity). And so did the difficulty of recruiting and retaining personnel at the prison, which now has 428 employees. Magnusson noted that, while there are 600 more adult prisoners in the corrections system than there were in 1995, there are 100 fewer staff. Right now he is faced with a mandatory overtime pay problem because, he says, he can't understaff the prison.

The Legislature and the governor have been stingy in funding prisons (my characterization, not Magnusson's). The state prison budget has gone up in dollar figures, reflecting the increasing number of prisoners from \$21 million in 1998 to \$32 million in 2004. The total corrections budget is \$132 million this year. But Magnusson has been unable to hire more permanent staff for a long time, he says. (According to a printout he provided, it has been about four years.) He says the reforms he will undertake will not involve significant expenses.

Maine has the second-lowest crime rate in the nation, and the rate has been declining, as is happening nationally. The state also has the lowest incarceration rate. On the flip side, prison populations have been shooting up for years both in Maine and across the nation. Magnusson says he "never saw this coming" — the

huge increase in Maine's prison population and the resulting strains, including overcrowding in just about every facility. The incarceration rate in the state has more than doubled in the past 25 years. For the population increase, Magnusson largely blames mid-1990s changes in the sentencing laws and district attorneys who got plea bargains that sent prisoners to the state prison instead of to the congested county jails.

The Problems Run Deep

The obstacles to prison reform are hardly Maine-specific. Most profoundly, they lie in the human psyche on the battleground between revenge and forgiveness, between hope and pessimism. Global opinion condemns the US for capital punishment (though Maine doesn't have it), the nation's highest-in-the-world incarceration rate, and its supermaxes.

Many criminologists say the supermaxes and the prison system as a whole are demonstrably counterproductive, if one assumes the goal is to return prisoners who won't commit crimes again to society. The high recidivism rate proves this, they say; the exiting convicts are not being "corrected" or reformed.

Arguably, the prison system is a success on another level, suggests sociologist and Bowdoin dean Craig McEwen: the crime-rate may be going down in the US because 2.3 million of the most likely crime-doers are locked up — the number continues to climb each year — and the supermaxes "work" in a sense because they remove disruptive people from the general prison population.

But most citizens would prefer that the 90 percent of prisoners coming out of prison don't continue their criminal activity. And "there's a strong line of evidence and argument that punitive responses are not likely to be effective as deterrents" to the bad actions of prisoners or released prisoners, McEwen says.

Another penal expert in Maine concurs, and he has more than academic expertise with the prison system. Peter Lehman, who has a doctorate in sociology and who formerly taught criminology at the University of Southern Maine, is himself on probation after spending five years at the former Maine State Prison, in Thomaston, and the nearby prison farm. Lehman was convicted, in 1998, of taking sexual photographs of four girls, aged 12 to 15, and having sex with a 15-year-old.

Talking with Lehman on the phone, I

am struck by his extraordinary combination of practical and scholarly insights. I suggest we meet, which we do in an Augusta coffee shop.

He is a diminutive, bearded 60-year-old. He lives in the mid-coast and is trying to earn a living as an entrepreneur. The Internet-posted state registry of sex offenders makes earning a living difficult.

"I'll never get a job," he says.

He tends to become professorial when talking about his expertise.

"Most crimes are expressive, not instrumental," he asserts, using sociological terms. What he means is that it is an emotion, such as rage or fear, or the high of an addictive behavior, that drives many people to commit crimes, both outside of and within prison — and not the calculation of benefits, not the view of the crime as a means to an end.

"Have you ever slammed a door when you're angry or frustrated?" he asks. "It feels good. It's not instrumental, but expressive."

He calls the Supermax "simply one end of a continuum in the prison system." How to stop Supermax prisoners from throwing urine and feces? The "prison thinks the way to deal with that is punishment," Lehman says, "but this [the prisoner's action] is not a calculated, rational decision. This is an expression of rage."

Lehman believes prisons breed anti-social behavior: "Say an inmate borrows a magazine or a CD from someone else. One of the rules is 'no giving or receiving.' If person A is caught with B's CD and the officer wants to push it, both are subject to disciplinary action. People can actually lose [good] time for that. It could mean that you could lose privileges. You could actually lose your job or get sent to the Supermax."

He continues: "Now most of us as human beings would think it's a virtue to loan something to somebody to help them out." But in prison, this social behavior is penalized.

Despite these antisocial rules, Lehman says, "one of the most amazing things is how much [inmates] risk punishment to help each other. . . . But to be generous they have to lie, pretend, sneak around.

"Incarceration creates a situation where all of the kinds of issues that you have are very typically heightened — trauma, degradation, lack of a sense of self. I'm not sure that I met more than a handful of men in prison who didn't have

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Torture in Maine's Prison (cont.)

a trauma history. Prison deepens these kinds of issues and wounds.

"There is an arbitrariness about discipline. The rules are such that it is virtually impossible to avoid a situation where anybody can get busted at any time." Most guards mean well, he says, but they are stuck in a bad system.

McEwen agrees with Lehman's view that crime is mostly expressive. And he thinks Lehman's description of how the prison rewards antisocial behavior is "a great insight." The Supermax was basically designed to prevent cooperative behavior, McEwen says. By isolating people, supermaxes "don't socialize people to get along with each other."

Do We Want To Change Things?

The more cynical prisoners and civilians will tell you the prison "industry" is a big business that thrives on crime, recidivism, and severe, counterproductive punishment, as evidenced by the enormous prison building boom of the past 20 years, by the growth of large private prison corporations nationally (there are no private prisons in Maine), and by strong guard unions that contribute to politicians' campaign treasuries. There are many salaries and careers tied up in the caretaking of prisoners.

"Recidivism is money in the bank" for this industry, Supermax prisoner Deane Browne tells me.

Even the less cynical among political observers would tend to place government corrections budgets, like the budgets for the mentally ill, far down the funding-priority ladder.

And everyone to whom I asked the question agreed prisons are dumping grounds for the mentally ill.

"That's true of every [correctional] system," says Denise Lord, the associate corrections commissioner. Some estimates of the recidivism of mentally ill prisoners are as high as 80 percent. The state corrections department estimates that 85 percent of prisoners in its system have mental illness or substance-abuse problems. Lord says that 40 percent of the state prison's captives are on psychotropic drugs.

She also says Maine has a greater percentage of mentally ill prisoners than any other state. In chorus, both Commissioner Magnusson and Lord emphatically say they want to put more mentally ill pris-

oners into mental health facilities — but there is no room for them because the beds at these facilities are all full.

It is almost a given in political circles that the public and its legislators are callous about what happens in the prisons — though they are concerned about crime, especially when a notorious crime occurs and politicians can make hay over it.

"Society is ignorant of this stuff because they don't want to hear [about it]," says Chuck Limanni, a Supermax prisoner I interviewed, about prison abuse. "They don't realize this stuff is hurting them, too. The majority in here are getting out. Most of the time they're worse off than they were, and they create more harm. They learn to hate."

He adds: "While being punished, it would be good to learn a skill." Limanni says that the last time he was out of prison, he and his girlfriend had a \$1,300-a-day cocaine habit that needed to be fed, and for many addicts the only way to do it is to steal.

Bowdoin sociologist Craig McEwen comments on "the politicization of crime, fed by the media. We demonize certain types of criminal activity, reinforcing the notion that more punishment is better — the language of 'toughness on crime' ... it's politically profitable."

In analyzing "tough on crime" attitudes, both doctors McEwen and Lehman speak of "moral panics," which, according to one dictionary definition, is "a mass movement based on the false or exaggerated perception that some individual or group . . . is dangerously deviant and poses a menace to society. Moral panics are generally fueled by media coverage of social issues."

The relationship of legislation to moral panics is close, McEwen says. In the sociological community, "there is a good deal of agreement on the political momentum that builds from one or two well-publicized cases." He mentions the first President Bush's notorious "Willie Horton" TV ad from the 1988 presidential campaign that drove many state legislatures to wipe out parole for convicts. [Editor's Note: Al Gore first raised the Willie Horton issue in the Democratic primary.] After one little boy was raped and mutilated in Washington, states instituted sex-offender registries.

Even the Department of Corrections seems to agree, at least in part, with the moral-panic problem. Both Magnusson and Lord express concern about legis-

lators in the coming session leading a charge to invent new crimes or establish tougher penalties for crimes — arising, for example, from a trucker involved in a fatal accident while driving after license suspension. Or from national news about identity theft or methamphetamine manufacture.

But lack of concern may be a bigger obstacle to prison reform than panic is. Senator Bill Diamond, the Democrat from Windham who is chair of the Criminal Justice and Public Safety Committee, which oversees the state correctional system, has not had any problems expressed to him about mentally ill prisoners in the Supermax, he says in a phone interview.

There is a problem with funding, however, for the prison, he says. The Legislature required an extra \$1.5-million cut in the corrections budget in the last session, he explains, and "I suspect there are funding deficiencies in all their areas." His party controls the Legislature.

Diamond, who has worked as a lobbyist for the Elan School, the Poland Spring facility that puts troubled young people through controversial therapy (it was investigated by the state in 2002 for alleged abuse of its clients) agrees that "there is not a lot of support" from the public for prison funding: "People have other priorities" — such as, at the moment, he says, how to heat their homes when fuel-oil prices are sky-high. He did not seem terribly interested in the subject of Supermax abuse.

The Solution To The Supermax Problem?

There are lots of things critics of the correctional system, including Commissioner Magnusson, say could be done to end what some people see as abuse or torture at the Supermax, and many of these ideas could apply to reform of the entire prison system: have more therapy and less punishment; make corrections more community-based; provide more pay for better-trained guards; stop putting mentally ill people in prison; give prisoners incentive to work their way out of the Supermax.

To solve the prison "problem" and the worst part of it, the Supermax, Peter Lehman believes, "We have to accept the fact that these are also social issues, not just individual ones. . . . We are unique [in the world] in refusing healing and redemption."

Does punishment not work, I ask

Commissioner Magnusson point-blank?

"I would agree with that," he replies.

If Magnusson is right, the more therapeutic and compassionate practices at the Long Creek Youth Developmental Center show the way.

"If they re-thought, it would be a brilliant stroke," says McEwen of the state's corrections department — especially, he believes, if the Supermax could be shut down.

"They could take real leadership nationally."

So now we have Commissioner Martin Magnusson, prisoner Chuck Limanni, former sociologist and prisoner Peter Lehman, and Bowdoin College dean and sociologist Craig McEwen agreeing that punishment doesn't work.

Perhaps they ought to be on a committee to reform the Supermax.

Pressure Rising

Since the above articles were published in the *Portland Phoenix*, several important developments related to the Supermax have taken place:

-In December, 2005, the prison released Deane Brown into the general prisoner population. He was one of six Supermax prisoners interviewed for the November articles. But he is continuing a "medicine strike" — refusing drugs for his diabetes and other health problems — until Supermax conditions are improved. He says he is willing to die to bring attention to its abusive environment.

-In February, 2006, the Maine Civil Liberties Union threatened to sue the state to force improvement in the treatment of the mentally ill prisoners in the Supermax (officially, the Special Management Unit or SMU).

-State Corrections Commissioner Martin Magnusson recently told the Legislature's Criminal Justice and Public Safety Committee that he soon would take specific steps to reform the SMU. When interviewed last fall, Magnusson had promised sweeping reforms.

-The midcoast district attorney charged a former prison guard with assault on a prisoner being extracted from his Supermax cell. This was the first time in at least 25 years that a Maine State Prison guard was charged with using illegal force.

-Public reaction to the two articles, while generally positive, included protests that our presentation neglected the prison guards' viewpoint as well as pleas from

prisoners and their advocates for us to look into other cases of injustice involving prisoners.

Deane Brown's Protest

Although free from solitary confinement for three months, Deane Brown looks thinner and paler than when interviewed in October, 2005. His voice is weaker, he is less animated, and his loose teeth look worse.

Intelligent and articulate, Brown is in his early 40s. After an abusive childhood in Rockland and decades of treatment for mental problems, his activities in the mid-1990s resulted in a 59-year sentence for burglaries.

His doctor believes he will die if he continues to refuse to take his medication, he says. During a recent prison interview, he is asked if he is willing to die. Yes, "if there's no change," he responds. "I'm not going to be here with the treatment of people the way it is" in the Supermax.

He says he has not taken his medications for diabetes, high blood pressure, high cholesterol, and asthma since last spring, when he was put in the Supermax for possessing banned tools that prison authorities said could be used in an escape attempt, but which he said were for fixing prisoners' radios. His doctor could not be reached for comment.

Associate corrections commissioner Denise Lord says, "We have a responsibility to provide appropriate physical and mental care, but prisoners have the right to refuse care. Ultimately, it's their decision."

Sometimes Brown's words of complaint are broad: "That whole unit needs to be swept right out." Among his concerns is the arbitrariness of incarceration in the Supermax, which is supposed to confine escape risks, prisoners who are threats to themselves or others, and those who break rules by, for example, possessing contraband. Brown says a mere allegation by one prisoner can land another in the Supermax. Prison officials deny this.

Corrections Commissioner Magnusson, for his part, puts in a word of caution about Brown: "He hasn't shared everything with you about his behavior," but says the state law barring disclosure of information on specific prisoners prevents him from giving more details.

Sometimes Brown's demands are specific — and personal. He wants his prison job back. He wants authorities to return his stereo, confiscated when he was put in

the Supermax.

But usually Brown's complaints reflect on general conditions in the Supermax, which are more severe and restrictive than in the rest of the prison. The Supermax doesn't distinguish between prisoners who are mentally ill and those who are disciplinary cases: One set of rules governs both.

Some prisoners in the Supermax — motivated either by rage or protest — throw their feces. Brown worries that those who do not engage in this behavior may have their food contaminated by those who do. He is asking, in effect, if confinement to the Supermax means being sentenced to eating potentially contaminated food.

When Brown was confined to the Supermax his toothbrush — like that of others — was taken away. Toothbrushes, allowed in the prison's general population, are among the everyday implements that are sometimes turned into weapons. Brown says that his inability to properly clean his teeth has given him severe periodontal disease.

The corrections department says food servers use clean gloves to protect servers and prisoners alike from contamination. For prisoners' dental hygiene, the department also supplies Supermax prisoners with nubbled fingertip caps of the sort used for cleaning dogs' teeth.

"If the commissioner is seriously committed to reform, then he can do some small steps," Brown says.

But Brown also would like large steps to be taken. He has worked out a plan of how prisoners with challenging psychological conditions could be better separated from prisoners who are in solitary "because they have been busted for having cigarettes."

The only change in the Supermax in

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Torture in Maine's Prison (cont.)

four months — since the commissioner publicly promised reform — is its repainting, he says. He believes this was done because an American Correctional Association accreditation team was scheduled to visit.

Brown's descriptions of the SMU on the Maine Supermax Watch Web site sparked the *Phoenix's* stories. He has taken flak from some guards because of his outspokenness, he says, but he seems well regarded in the prison.

"Deane has been institutionalized all but three years since the age of six," a Rockland friend, Beth Berry, writes in an e-mail. "Although he has been brutally victimized, he has never lost compassion for others being victimized. ... When the lights went out [in a prison power failure], he ran to a female guard and was struck by other inmates while he protected her. She quit and sent him a letter of thanks."

Another prisoner, Michael James, who also was interviewed in the fall and re-interviewed recently, agrees that Supermax conditions are much the same, and he has remained within the unit. He echoes Brown that the only change is the repainting. Impressing the ACA accreditation team was such a big deal for the prison, he says, that the guards "threatened us up and down" to behave when the team visited. But "people still throw feces and all that," he says.

James, a man in his early 20s, is in the fifth year of a 12-year sentence for robbery, most of which time he has spent in the Supermax. His lawyer, Joseph Steinberger of Rockland, says, "He hasn't been able to conform himself to their demands for behavior," as the reason he has spent so much time in the Supermax. He is disobedient. He's mentally ill.

By many accounts including his own, James is very mentally disturbed. Possibly, he has spent more hours in the restraint chair than anyone else, though he says he has managed to stay out of it for four months. Steinberger says he's not sure why, but "I'd like to believe as a result of the attention he's gotten the guards are less cruel to him." James has cited his responses to guards' taunts in the past as one of the reasons he has ended up in the restraint chair.

James believes he should be treated at the state's mental hospital in Augusta — formerly called the Augusta Mental

Health Institute, now Riverview Psychiatric Center. For people with mental troubles, the SMU segregation "defeats its purpose," he says — it just makes them act up more.

He says he protested to the district attorney who handles prison cases about harassment by guards. But "nothing happened. I never heard nothing back from him."

The district attorney's office, however, is aware of James. He goes on trial in June in Rockland for six cases of felony assault against guards. Each conviction could result in up to five additional years in prison. His lawyer plans to present an insanity defense in an effort to have him committed to Riverview.

Of the other Supermax inmates interviewed in October, Charles Limanni and Norman Kehling are back in the regular prison, and Michael Chasse and Joseph Reeves are still "in the hole," as the prisoners say.

MCLU Threatens To Sue

Meanwhile, others are pressing for change, from the outside.

On February 3, 2006, Carol Carothers, director of the National Alliance for the Mentally Ill: Maine, sent a copy of the *Phoenix's* Supermax series to the chairmen of the Legislature's Criminal Justice Committee, asking for a meeting to discuss treatment of mentally ill people at the Supermax.

"Several states have enacted laws that prohibit placing inmates with mental illness in 23-hour lockdown because it exacerbates the illness and generally leads to increased time in prison," she said in an accompanying letter. (The prisoners have an hour for outdoor exercise five days a week, weather permitting.)

On February 9, 2006, representatives of the civil liberties union met with Magnusson, following up with a letter threatening a lawsuit if the Department of Corrections doesn't stop keeping mentally ill people in solitary confinement. "We are all hopeful that a satisfactory solution can be found that will not require litigation," the MCLU wrote.

The letter also stated: "The continued presence of any individuals with serious mental illness in the detention unit ... is inconsistent with evolving standards of decency in a civilized society. We are prepared to do whatever we can to help you bring this practice to an end, but end it must." The group's parent

organization, the American Civil Liberties Union, has successfully sued to improve supermax conditions in other states.

On March 10, NAMI's Carothers met with the legislative committee and, in Magnusson's presence, asked the department for data on solitary confinement, on the use of the restraint chair, and on the extent these practices involve mentally ill prisoners.

"We need some good thinking about what is a better way" than present Supermax practices, she told the committee. She felt the data would dictate what actions need to be taken. Magnusson said he would comply with her request.

The department already has said that, compared to other states, Maine has a high number of mentally ill people in the prison system. At the committee meeting, Magnusson estimated it was 40 percent. And the department has figures on restraint chair use. In 2003, 164 uses occurred; there were 205 in 2004 and 178 in 2005. In the first two months of 2006, however, the chair was used only five times, and only once in February (four of those five times by two prisoners).

Hovering in the background in the committee room was the MCLU's lawyer, Zachary Heiden. In an interview, he said his group believes solitary confinement of mentally ill prisoners constitutes "cruel and unusual punishment" prohibited by the United States Constitution. The prisoners should be "in an environment where their civil rights and dignity as human beings are respected," he said.

At this time the MCLU isn't in a "High Noon" showdown with the department, he said, and he was hopeful officials would be cooperative. Often, advocacy groups use the threat of a lawsuit to drive policy changes, reserving its filing as a last resort.

After the meeting, Senator John Nutting, a Democrat from Leeds, said the department's treatment of mentally ill people is "inexcusable. They've balanced their budget on the backs of the mentally ill" by not providing enough services for prisoners with mental problems. (But legislators for years have provided the Department of Corrections with tight budgets.)

"I and other legislators will keep intense pressure on them to try to keep them from being sued by the MCLU," Nutting said, referring to the department.

Specific Reforms Promised

Magnusson appears eager to be cooperative with Supermax critics. He was when

interviewed in October, and he appeared especially eager when he took the seat, immediately after Carothers, before the Criminal Justice Committee.

He told the legislators that, at a prison meeting on the preceding day, he had set up committees to report in 30 days on how to reform the Supermax by:

-Developing "progressive" rewards to obtain modifications of prisoner behavior, to move away from the present punitive approach. Magnusson mentioned the possible use of closed-circuit-television therapy programs in cells to help prisoners become cooperative. If they complete a course, they could be allowed, for example, to watch some sports programs.

-Training the staff in verbal ways to de-escalate confrontations with prisoners in an effort to reduce use of the restraint chair.

-Avoiding forced extractions from cells. He said this has been accomplished in Colorado through talk with prisoners and the threat of an irritant gas, OC, which he says is stronger than the pepper spray now used in the Supermax. [Editor's Note: In states such as Florida pepper spray has replaced beatings as a means of abuse.]

In an interview, Magnusson says he also is having a committee "look at the current culture in the Supermax" — to improve the working environment for the staff, their teamwork, and their communication with inmates.

A big step that could be taken, he says, sounds a lot like prisoner Deane Brown's idea: open up a 16-cell Supermax "pod" now vacant and turn it into a treatment unit for some mentally ill prisoners. In it, they would not have to be kept in solitary confinement 23 hours a day. But "we're very tight on money," Magnusson notes.

He says he has been working toward reforms for several months. His decisions partially implement recommendations of a National Institute of Corrections consultant who came to Maine in December from the Colorado prison system to evaluate the SMU, at the commissioner's invitation. National correctional officials hold up Colorado's Supermax as a model in which violence in dealing with prisoners has been greatly reduced. Magnusson also sent six of his prison staff to the Colorado State Penitentiary to study its practices. He will rely on them — they include two deputy wardens — to work up details of how to change the Supermax. He says

the staff is enthusiastic about making changes.

Guard Charged With Assault

One subtle change may have already occurred in the difficult prisoner-guard psychology of the Supermax. Guards could become more careful in their treatment of prisoners because, while prosecutions of prisoners for assaults on guards have been almost routine, for the first time in at least 25 years a guard is being prosecuted for an alleged assault on a prisoner.

In late December, after sitting on the case for over a year, Jeff Rushlau, the mid-coast counties' district attorney, charged former Supermax guard Darren Barbeau, of Benton, with using illegal force against prisoner Christopher Humphrey during a SMU extraction in November 2004. Rushlau also charged Barbeau and former guards Dennis Scott Plaisted, of Palermo, and Daniel Ross, of Woolwich, with "falsifying" evidence — attempting to destroy a videotape of the extraction. The cases are awaiting trial in Superior Court in Rockland.

Prison warden Jeffrey Merrill says that when the tape was recovered and he saw what had happened, he fired two of the three men and notified the DA. He suspended the third, Daniel Ross, for a week. Ross still works at the prison.

In over 25 years of employment in the district attorney's office, as DA and as an assistant, Rushlau says he had never seen a prison guard prosecuted for assault on a prisoner. (Nationally, there are no figures on guard assaults on prisoners, correctional officials and critics agree.)

His delay in bringing the charges, he says, occurred because of his heavy workload and because he had

to weigh the reality that guards are allowed under the law to use physical force on prisoners in certain circumstances.

Barbeau, in a telephone interview, admits taking the videotape cassette and pulling the ribbon out of it. He took the tape to an investigator two days later, he says, to defend himself against the prisoner's accusation of using excessive force.

"I made a mistake," he says of what he did with the tape. "It wasn't the right thing to do."

He had taken it because other guards felt it was possibly incriminating, he says, adding that he hadn't even looked at it. "It seemed like it was past practice," he says. "They've gotten rid of tapes in the past."

His defense to the charge of assault, he says, is that prison policy on the use

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Torture in Maine's Prison (cont.)

of force “wasn’t clear cut.” There was “no training at all in extractions,” he says. “They were throwing you to the wolves,” speaking of the prison administration.

“They tell you to go in and use what’s necessary,” he says, “but they don’t tell you how to do it.”

Commissioner Magnusson says that there is training in cell extractions and that he is not aware of any other tapes destroyed.

From Barbeau’s perspective, the episode that resulted in the assault charge was “a regular extraction,” he says, among the 40 to 50 in which he was involved during the year he worked at the Supermax.

Because of his size (six-foot-two and 270 pounds), he was often the man “put on the shield,” he says, the first of the six-man team to charge into a cell to subdue a prisoner. A former Augusta policeman, he was once a state arm-wrestling champion.

If convicted of assault, Barbeau could spend up to a year in the prison system where he once worked. He is charged with misdemeanor assault, which is why his potential sentence is less than the felony-assault sentences possible for prisoner Michael James. But a maximum one-year sentence is also possible if he is convicted of falsifying physical evidence.

Responses To The Articles

“A lot of the staff was very upset” about the previous Supermax articles, says Warden Merrill.

Indeed, guards past and present and their family members, wrote letters to the editor or in other ways expressed in detail how difficult it is for guards in their dangerous, low-paid jobs — a subject they felt our series neglected. Most of the feedback received, however, was positive. Several prisoners, family members, and advocates for prisoners called and wrote pleading for coverage of injustices they believed had been done to prisoners other than those mentioned in the articles.

Yet as part of its accreditation process national ACA officials recently issued statements highly praising the prison. The Department of Corrections and Governor John Baldacci trumpeted them loudly in a press release — it received a good deal of attention in the daily papers — even though the prison still has another hoop of evaluation to go through before it actually receives accreditation.

“I don’t see how the facility can be accredited while this is going on,” Senator Nutting says, referring to the Supermax’s treatment of mentally ill prisoners.

Skepticism exists in other quarters about ACA accreditation. *PLN* has reported extensively on the public relations

nature of ACA accreditation. ■

Lance Tapley can be reached at ltapley@prexar.com. This article was originally published as a three part series in the Portland Phoenix. It is reprinted here with permission.

From the Editor

by Paul Wright

This month’s cover story highlights abuse in the Maine prison system which consists mostly of one prison. While a lot of *PLN*’s news and legal coverage focuses on states such as Texas and California and the federal Bureau of Prisons, in large part because their sheer size and number of prisoners means that there is more news happening, that is not to say that all is well in the smaller prison systems. In some respects the smaller systems have larger problems because they enjoy even less critical scrutiny than the larger prison systems do.

One thing that can pretty much be said of all prison systems in the United States, as well as the concentration camps operated by the US military and the Central Intelligence Agency overseas, is that they routinely rely on abuse and force as essential management tools and that medical neglect is an inherent part of how prisons and jails are run.

Upcoming issues of *PLN* will have more coverage of systemic issues involving the abuse and neglect of prisoners in prisons and jails around the country. One thing we have been trying to do with our news coverage is to be able to do longer, in depth pieces that can focus on overall, systemic conditions. All too often media coverage of prison and jail issues refers to them as mere “isolated incidents,” a “few bad apples”, etc. Yet all too often this ignores the fact that these “isolated incidents” occur on a daily basis, that the whole apple orchard is rotten to the core, etc.

We welcome story ideas and suggestions from our readers on these topics. While we receive more mail than we can respond to all reader letters are read. When writing *PLN* it is a huge help to be brief and to the point and try to stick to one topic per letter. We get a huge volume of mail and it is very difficult when we get ten page letters covering everything from a change of address, to story suggestions and more. I would like to thank those

readers who send us news and information about the cases they won or settled, news clips on prison and jail issues they have won, etc. please keep sending it even though we can’t acknowledge every piece of mail we receive.

We are continuing with our subscription drive. If you have a group or criminal justice event that can use bulk issues of *PLN* for distribution to attendees or members please contact us and let us know how many copies you can use and we will send them along. Our subscription madness campaign is also in full swing so consider getting gift subscriptions of *PLN* for potential subscribers!

PLN’s expansion has historically been underwritten by advertising. We are committed to maintaining a ratio of 75% news content to 25% ad content. Which means that every full page of ads allows us to add three pages of editorial content. If you patronize or know of any businesses who deal with prisoners or people in the criminal justice system who might be interested in advertising in *PLN* please let them know about *PLN* and how they can both help their business and help us bring people still more news and information. And more importantly, send *PLN* the name and address of these businesses and we can send them sample copies, ad rates and more information about us. One of our goals for the next year is to expand to 52 pages.

PLN’s website has received more than 100,000 subscribers in the past year since we revamped it. We are continuing to add new information, cases and updates on an almost daily basis. We also have a free *PLN* e mail list where we send out news about court cases, litigation, news and *PLN* on a daily basis. Let folks know about this and encourage them to sign up for it on *PLN*’s website at www.prisonlegalnews.org, it is absolutely free.

Enjoy this issue of *PLN* and encourage others to subscribe. ■

Maquiladoras Expanding in Mexico; Global System of Prison Factories Envisioned

by Michael Rigby

U.S. businessman Joe Robertson has a dream: A global system of foreign-owned factories employing prisoners and their families for low wages and with few benefits. But for now his sights are set on Mexico, where he hopes to establish maquiladoras both inside and outside the prison gates.

Maquiladoras--foreign-owned companies that assemble products for export--are already operating in Mexican prisons (see *PLN*, October 2002 and 2003). But Robertson, a nationalized Mexican citizen originally from North Carolina, has a two-pronged approach to fully exploit cheap Mexican labor. The idea is to build a twin plant just outside the prison gates to employ prisoners' wives as well as the prisoners themselves upon release.

Robertson, a former textile worker, began manufacturing hotel products in Las Vegas in 1975. He later operated plants in Dallas and Orlando before moving to Mexico in 1997, laying off 600 workers in the process.

Robertson is associated with two Mexican companies, Ceinre and JoeVilla. In November 2005, negotiations were underway with Tijuana-based Ceinre to establish maquiladoras in Chihuahua state prisons. Officials were reviewing initial plans to employ 500 prisoners in Chihuahua City, Parral, and Ciudad Juarez. The prisoners would make room

furnishings for the international hotel industry.

Robertson's companies already run maquiladoras, or plan to, in Quintana Roo, Baja California, Yucatan, and Chihuahua. In September 2005 a factory began operating at the Quintana Roo state prison, where about 50 prisoners are assembling blankets and other hotel furnishings. Robertson's Mexican sweatshops have also been awarded the exclusive supplier contract for Marriott's Latin American hotels.

In a recent interview with the Mexican media (reported by newspapertree.com on November 14, 2005), Robertson outlined his plans to put factories in virtually every Mexican prison, employing tens of thousands of prisoners. Robertson and prison officials claim that employing prisoners helps rehabilitate them. "We want to motivate the prisoner to help his family and reintegrate into society with honor and integrity so he can recover his self-esteem, which is one of the biggest problems inmates have," said Robertson. "We want prisoners who are close to release not to return."

While these sentiments are certainly laudable, they paint a misleading picture. Employers also seek out prison labor for a variety of less charitable reasons. For one, prisoners are unable to unionize or change jobs, while benefits such as health insurance and retirement are virtually

nonexistent. What's more, companies face little regulation, and mistreatment is routinely overlooked--especially in countries like Mexico which has little governmental oversight and a record of human rights abuses in its prisons. And finally, labor costs are low for companies employing prisoners, who typically work long hours for a nominal wage.

Prisoners employed by Robertson's concern, for example, will be paid just \$4 a day, a third of which will go to the prison administration. The remainder will be divided equally between the prisoner and his family. This is a little lower than Mexico's minimum daily wage.

For Robertson and company, Mexico is just a stepping stone on the way to world domination of the prison slave labor market: Investors currently have plans to open prison sweatshops in Canada, Spain, Latin America, and Indonesia. While about 2,700 United States prisoners are employed by private companies manufacturing a variety of low skill, labor intensive products, some of which are exported to other countries; the United States criminalizes the importation of prisoner made goods from other countries. With no sense of irony or hypocrisy, the United States routinely criticizes governments such as that of China for using prison labor in exported goods. ■

Source: newspapertree.com

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North Carolina Prison Audit Finds Industry Excesses, Overpaid Guards, More

by Michael Rigby

The North Carolina Department of Correction's prison industries program routinely violates state purchasing guidelines and lacks adequate internal controls, a state audit has confirmed. The audit, released on October 19, 2005, also found that guards were sometimes overpaid, disbursement procedures were defective, prisoner work hours weren't properly recorded, and prison cellphones and cellphone service contracts were poorly managed.

In March 2005, the *Charlotte Observer* reported that Correctional Enterprises (CE), a division of the DOC that operates prison farms and factories, was wasting taxpayer money by circumventing state purchasing rules. [See *PLN*, Oct. 2005 for more on CE.] Under the rules, state agencies are required to seek competitive bids on orders above \$5,000. But what the *Observer* found--and auditors confirmed--is that CE regularly split large orders for fabric and other raw materials into multiple smaller orders to avoid bidding. Many orders for the same material--some placed only minutes apart--fell just below the \$5,000 threshold.

The audit cited several "of the many instances" in which purchase requisitions were improperly split. On August 11, 2004, for instance, a CE plant placed two orders "for the same product for \$4,310 and \$4,175 within 11 minutes of each other,"

the audit said.

CE personnel told auditors they had been splitting orders to avoid bidding for more than 9 years. CE managers further said they weren't even aware, or only vaguely aware, of the purchasing guidelines and thought splitting orders was an allowable practice. Auditors weren't able to determine how much the DOC may have overpaid for materials, but its failure to consolidate on large orders likely meant the prison system was paying a premium.

The audit reported that the DOC's purchasing department "largely echoed" CE's habit of splitting orders and that different agents often requisitioned the same products. The audit notes one example on January 24, 2005, where a purchasing agent "issued two purchase orders and another agent issued a third purchase order for split requisitions from a plant for the same product." All three bids--placed within 9 minutes of each other--were within \$500 of the of the \$5,000 limit.

Audit agency spokesman Dennis Patterson first said the audit covered the DOC's overall purchasing. After DOC objections, however, Patterson said he was mistaken. What auditors really meant, he said, was that the prison system's purchasing department, which places orders based on requisitions from CE, merely

allowed the violations. Even so, based on the audit's other findings, Patterson was probably right the first time.

Not only does the prison system lose money through faulty purchasing practices, but it routinely over pays guards and other employees as well--money that may never be recovered due to the high turnover rate, the audit found. "We're doing a lot better job of collecting," said Barbara Baker, the DOC's head of procurement and finance. "But I don't know if we'll ever catch up."

During the 7 month audit period, which ended January 31, 2005, the DOC overpaid 377 people, or an average of 54 overpayments a month. What's more, less than half (48%) of the \$242,000 in excess payments had been recouped, the audit reported. Prison officials say the high turnover rate--more than 300 prison employees quit every month--makes it difficult to recover excess payments.

The problem was first noted in a 2000 audit, said Patterson. As of January 31, 2005, \$516,000 in overpayments was still outstanding. With 20,000 employees and a \$54 million monthly payroll, Baker contends the rate of overpayments is relatively low. One wonders if North Carolina taxpayers, many of whom are unlikely to ever even see half a million dollars, would agree.

The audit also noted that the 2,300

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prisoners who work for CE may have also been "overpaid." Of the 18 prison manufacturing plants tested by auditors, supervisors at 11 did not sign and retain attendance sheets, making it difficult to verify prisoner work hours, and consequently, their wages. Top pay for prisoners is a miserly \$3 a day. An argument can be made that since the paltry slave wages are so low as to be nominal, that it is more expensive to track the prisoners' work time than to simply pay them.

The DOC's disbursement process was also prone to error, the audit found. Because payments were not adequately documented, the DOC risked paying for goods or services it did not receive or paying too much.

A test of the 17 largest medical expenditures, for example, found that at least 7 were paid without approval. Although the payments were deemed proper, one invoice for \$17,500 was paid 5 times. In another instance, "a provider was paid \$35,000 from an invoice for \$17,500, and then paid again from the same invoice for a total of \$70,000." Tests of disbursements in other categories showed they were similarly flawed.

The DOC was no better at managing its cellphone database, making it difficult to detect inaccurate billing, overcharges, or even unauthorized use.

In theory, cellphones are assigned to contact persons or users among the state's 78 prisons. Of the 769 phones in the database, however, 462 were not assigned to a specific person. Auditors also found that the DOC was billed for 14 phones not in the database, and that the database still contained data for 36 cellphones that had been cancelled or returned. The audit further noted that of the 40 cellphone expenditures tested, 12 had not been reviewed or validated.

The auditors made a number of uninspired recommendations. Among them, the DOC should: ensure employees are familiar with purchasing rules; seek term contracts where economically advantageous and get permission to split bids when necessary by obtaining a "waiver of competition"; review policies and procedures regarding payroll overpayments; inform supervisors of the importance of verifying hours worked by prisoners; and regularly maintain the cellphone database and institute measures to verify cellphone expenditures.

PLN has long maintained that

prison slave labor is a government subsidized boondoggle that loses far more money than it ever hopes to generate or recoup, despite the fact that prisoners are paid slave wages. Every independent audit to be done of prison industries around the country has confirmed this thesis.

The DOC agreed with the audits findings and promised to do better. Readers can decide for themselves how that is

likely to turn out. Get a copy of the report on the Web at www.ncauditor.net, www.prisonlegalnews.org, or by writing Office of the State Auditor, State of North Carolina, 2 South Salisbury Street, 20601 Mail Service Center, Raleigh, North Carolina 27699-0601. 📧

Additional sources: *Associated Press*, myrtlebeachonline.com, news-record.com, charlotte.com

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Rampant Sexual Favoritism By California Prison Warden Is Actionable Under Hostile Work Environment Theory

A unanimous California State Supreme Court held that non involved female employees could sue the Department of Corrections (CDC) for sexual harassment under a hostile work environment theory, when they suffered job stress from the prison warden having concurrent sexual affairs with three of his other subordinate employees for eight years wherein he granted them preferential employment consideration in return for sex. The lower courts had ruled contra on summary judgment, holding that "third party" sexual harassment of the complainants was not adequately demonstrated on a record of job-related sexual trysts by others.

Former CDC Warden Lewis Kuykendall maintained concurrent sexual affairs with multiple female employees from 1991 until his retirement in 1999 (after an "internal affairs" investigation). Kuykendall's management style over the years resembled that of a harem, where the women were playthings who competed for his sexual favors, all the while subservient to him for pay, promotion and preferential job placement.

Plaintiff Edna Miller began working for CDC as a guard in 1983. In 1994, she learned that Central California Women's Facility's (CCWF) then-Chief Deputy Warden Kuykendall was having simultaneous affairs with his secretary Kathy Bibb, Associate Warden Debbie Patrick and Lt. Cagie Brown. When informed, Warden Tina Farmon essentially swept the issue under the rug. In 1995, Miller was transferred to Valley State Prison for Women (VPSW) where Kuykendall was now warden. Bibb was subsequently promoted to Correctional Counselor, over more qualified applicants, based upon Kuykendall's influence. Patrick was also passed over at the time, but was later pacified with a transfer by Kuykendall to VPSW where she enjoyed preferential treatment. In July, Brown and Miller competed for a captain's post at VPSW. Brown told Miller that she (Brown) would get the job because if not, she said she "would take Kuykendall down" with her knowledge "of every scar on his body." Brown got the job, even though the review panel had recommended Miller. Brown swiftly rose to associate warden, again with Kuykendall's "influence."

Miller was afraid of complaining of this preference, because Kuykendall had earlier fired two other female employees, Frances Gantong and Sandra Tripp, after they had voiced their concerns. The affairs were common knowledge among prison staff. In her subsequent deposition to Internal Affairs investigators, Brown "acknowledged that sexual affairs between subordinates and their superior officers were 'common practice in the Department of Corrections.'" It was so transparent that CDC employees regularly secured promotions this way, Brown reported, that other "employees were saying things like, what do I have to do, 'F' my way to the top?" Patrick, Bibb and Brown often squabbled over Kuykendall in emotional scenes witnessed by other employees. They alleged that even Kuykendall's secretary Bibb got her promotion for sex. Later, when Bibb was arrested for DUI in 1998 in Kuykendall's presence, he "failed to initiate an internal affairs investigation concerning the incident or report his own involvement." The plot thickened when prison employees alleged that Chief Deputy Warden Vicky Yamamoto became involved with Brown in a lesbian relationship.

Miller complained in 1997 to CDC Internal Affairs that the relationship between Brown and Yamamoto was interfering with her duties. Following her complaint, Miller reported that the two superiors "made her life miserable." In a later telephone conversation from Miller to Brown protesting this mistreatment, Brown again threatened to expose Kuykendall. The next day, suspecting that the conversation had been taped, Brown entered Miller's office, ordered (co-plaintiff) Mackey (Miller's assistant) to leave, and then allegedly proceeded to physically assault Miller and hold her captive for two hours. Kuykendall failed to investigate the assault and false imprisonment complaint, a failure Internal Affairs later used to unseat Kuykendall. After enduring another year of retaliatory abuse, Miller resigned under stress on August 5, 1998. She filed a government tort claim in November 1998, a complaint with the Department of Fair Employment and Housing in March 1999 and, finally, a complaint in superior court in June, 1999, alleging, inter alia, sexual discrimination and retaliation in

violation of California's Fair Employment and Housing Act (FEHA) (Government Code § 12940 et seq.).

Co-plaintiff Frances Mackey, employed with CDC since 1975, transferred to VPSW in 1996. She became a witness for Internal Affairs to the sexual harassment in the office. She believed that she had been denied a promotion because she did not have a sexual relationship with Kuykendall. Stress led to health problems, and Mackey was unable to work from August 1998 to January 1999. Upon her return, Kuykendall demoted her in retaliation for her testimony and, after a few months of humiliation, she resigned. Mackey then filed similar claims, complaints and suit along with Miller.

The trial (Superior) court granted the defendants' motion for summary judgment in August, 2001; Miller and Mackey appealed. The California Court of Appeal affirmed, concluding that although widespread sexual favoritism could support a claim for sexual harassment, Miller and Mackey had failed to make an adequate showing in this respect in the absence of any evidence that they had been sexually propositioned or that the sexual affairs were nonconsensual. The California Supreme Court reversed on petition for review, ruling that this was not the correct standard.

The Supreme Court held that plaintiffs may establish the existence of a hostile work environment even when they themselves have not been sexually propositioned. Moreover, "widespread favoritism based upon consensual sexual affairs may imbue the workplace with an atmosphere that is demeaning to women because a message is conveyed that managers view women as 'sexual playthings' or that the way required to secure advancement is to engage in sexual conduct with managers." The court flatly rejected Kuykendall's defense that he was insulated from suit because there was no evidence that he flaunted his sexual affairs, coerced or sought to gain advantage from other employees in connection with them, or engaged in "open sexual conduct, sexual discussions, or other indiscreet behavior in the workplace." The court wryly observed that his defense appeared to be simply untrue. While the presence of mere office gossip would be

insufficient to support plaintiffs' claims, the record here showing evidence of sexual favoritism including admissions by the participants, eyewitness accounts of public fondling, boasting by the favored women, and Kuykendall's statement to Internal Affairs that he could not control Brown because of the sexual relationship he had with her. Thus, the court found defendants' position unpersuasive "that a jury should not be permitted to consider evidence of widespread sexual favoritism that the Department itself found convincing."

Finally, the Supreme Court had little

difficulty finding that the retaliation allegation was a proper cause of action under FEHA. The court remanded the case to the Court of Appeal to consider this question consistent with the Supreme Court's opinion. See: *Miller v. Department of Corrections*, 36 Cal. 4th 446, 115 P.3d 77 (2005).

In an unrelated case, guard Lawana Porter complained of being repeatedly sexually propositioned by her supervisors, one of whom, when spurned, retorted that he "owned her," and threatened her that "nobody walks away from me." CDC's and the guard union's unwillingness to

resolve Porter's ten years of harassment and retaliation complaints through official channels have forced the matter to be resolved in the courts. See: *Porter v. California Department of Corrections*, 419 F.3d 885 (9th Cir. 2005).

Note: In the past, CDC has paid over 1/3 of all Department liability claims (annually budgeted for approximately \$40 million) to its own employees in settlement for on-the-job sexual harassment suits. But even that is small potatoes compared to the cost to the taxpayers from the loss of productivity engendered by this chronic, inbred licentious state of affairs. ■

Illinois DOC Seeks to Block Ex-Warden's Benefits

by Matthew T. Clarke

On September 13, 2005, the Illinois Department of Corrections (DOC) filed an appeal of a workers' compensation arbitrator's decision to grant ex-prison warden William Barham permanent total disabilities benefits. Barham's injuries stem from a fatal one-vehicle accident for which he was convicted of reckless homicide and aggravated DUI and sentenced to four years in prison. Killed in the wreck was prison employee Jerry Isom. After Barham had served about 15 months of prison time, a state appellate court overturned the conviction. [*PLN*, Aug. 2004, p. 18]. Barham, 52, then filed for the disability payments of \$863.45 per week for the rest of his life.

The disability case went to arbitration. The arbitrator ruled that the intoxicated Barham was performing a "work-related activity" when he wrecked the car on October 14, 2000. In addition to the \$863.45 per week for life, Illinois was ordered to pay \$42,000 in medical expenses and \$863.45 per week for the 158 weeks from the day following the accident until Barham achieved "maximum medical improvement" for a total back payment of \$178,425.

Prior to the accident, Barham had used a state vehicle to travel from Shawnee Correctional Center to Harrisburg to pick up then DOC director Donald Snyder at the airport. Barham and Isom drove Snyder to a one-hour appearance at a political fundraiser at Southeastern Illinois College, then returned him to the airport. Barham and Isom then drove the Lakeside Bar and Grill in Johnson County, where they stayed for over four hours. The accident occurred on the return trip to the prison from Lakeside when Barham missed a curve and hit a tree

on Illinois 147 about a half-mile north of Simpson. The state's position had been that the trip to Lakeside was a deviation from state's business that disqualified Barham from receiving benefits. Apparently chauffeuring prison bosses around the state to political fundraisers is "state business."

Arbitrator John Dibble disagreed, writing that Barham had been on the job all evening and, even if the detour to Lakeside was a deviation from state's business, the deviation ended when Barham began his journey back to the prison. Dibble held that there was no conclusive evidence about who was driving. However, Michael Henshaw, the district judge who convicted Barham, said claims that Isom was driving were "preposterous."

Isom's widow, Lori Isom, said, "I don't understand why the arbitrator didn't find any evidence that showed clearly that Bill Barham was driving the car. Either they didn't submit the state police reconstructionist report or the arbitrator chose not to read it. In that report was the testimony of first responders and witnesses on the scene that showed Bill Barham was behind the wheel at the time of the accident. It seems like the only evidence the arbitrator looked at was Barham's version of what happened."

Henshaw said that believing there was a possibility that Isom was driving "goes beyond all scientific belief and it goes beyond all common belief."

The appeal will be decided by a three-commissioner panel of the Illinois Workers' Compensation Commission. Until they make a decision, all of Barham's benefits are on hold.

Lori Isom also filed for benefits, but

has yet to receive any after eighteen months of waiting. She has also filed a wrongful death suit against Barham and Illinois. It is scheduled for trial in the Saline County Circuit Court. Maybe she'll get justice there because, apparently when it comes to wardens, the Illinois appellate courts and arbitrators won't give it to her. ■

Sources: www.southernillinoisan.com.

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The Decline and Fall of the Prison Press

by Leah Caldwell

It was a melee, a riot, a simmering dispute. Despite the nomenclature, coverage of the August 9, 2005, prisoner “incident” at San Quentin prison was hardly diversified. 39 prisoners were injured in one of the largest riots since 1982 at California’s oldest prison, with newspapers citing tensions between Latino and white prisoners as the root cause.

There were a few differences, though, between this riot and the last – demonstrating the changing nature of America’s prison system. In 1982, guards fired shotguns in the air to quell the disturbance; in 2005, tear gas was the agent of choice. In the 80s, the prisoner newspaper, the *San Quentin News* would’ve covered the riots; in 2005, this newspaper no longer exists.

One of the most dramatic changes within American prisons is the near extinction of the penal press. Award-winning prison newspapers that once reached thousands— even outside of prison walls—no longer exist, and their underground counterparts are few and far between. The situation has become so dire that, according to the author of *Jailhouse Journalism*, James McGrath Morris, “If you talked to a prisoner today, they wouldn’t even know these things existed.”

The death of the prison press can’t be attributed to one law or one warden; instead, it can be traced through shifting attitudes on prisons and their function in society. “There was a period in American history when we really thought we could send somebody to [prison] and make a new person out of them,” Morris said. “That’s gone.” In a country that imprisons over 2 million people—despite a decade-long drop in crime—rehabilitation is an outmoded concept.

The prison newspaper was once seen as a practical tool for rehabilitation. It was viewed as a way for prisoners to occupy themselves on the inside, but more importantly, to gain marketable skills for use on the outside. This led to prison newspaper booms in the 30s and 50s, when over 250 prisoner-run publications flourished.

The prison press also thrived in the 1970s when, according to Jim Danky,

Librarian of the Wisconsin Historical Society, which is home to the nation’s largest collection of prison newspapers, highly politicized prisoners brought “the ethos of the 1960s inside with them” and cranked out enough radical rags to fill a library. Among these were *The Iced Pig* edited by Weatherman and Attica political prisoner Sam Melville and the *San Quentin News*, known for its censored report on bird excrement in the prison cafeteria. The most notable paper of this decade, and perhaps the entire history of the government sponsored prison press, was *The Angolite*. Under Wilbert Rideau’s editorship, the paper won a Polk award for its intensive coverage of prison rape. Unlike other papers, *The Angolite* skirted official censorship by obtaining the support of the warden, who hoped that the presence of an independent prison newspaper would bring prestige and stability to the Louisiana prison.

But this hands-off approach was unique to Angola. As *The Angolite* was publishing groundbreaking pieces, prisoner-journalists throughout the country were encountering the “Son of Sam” laws which were designed to keep them from publishing their work in outside publications if they were paid. In addition, administrative rules clamped down on prisoner writing, such as a Bureau of Prisons rule which states that, “The inmate may not act as reporter or publish under a byline.” Though the law did not directly affect prison newspapers, it sent a message to officials that contrarian prisoner opinions needed to be heavily censored.

Rutgers professor of English H. Bruce Franklin, author of *Prison Writings in 20th-Century America*, [This title is distributed by PLN] believes this sudden crackdown on prison journalism was a reaction to the success of newspapers in unifying prisoners and engaging outsiders. Ultimately, the goal was (and still is) information control, according to Franklin: “The worse the conditions in prison, the more necessary it is to keep people from knowing how bad the conditions are.” Franklin believes that prison officials take measures to prevent prison newspapers from covering routine abuses and, in some cases, torture. “They will do everything

in their power to make sure people are unaware of this,” he says.

For the most part, efforts to silence prisoners have been successful. Yet, some prisoners would rather face continuous torment than have their voices muffled. Through hand-written newsletters and freelance articles, prisoners continue to act as journalists even though their writings make them targets for harassment by prison staff.

Until his 1997 execution, Bobby West published news briefs from his death row cell in Huntsville, Texas, sometimes delaying print dates because guards destroyed his research material. Dannie Martin’s article on the prison AIDS epidemic in the late 80s for the *San Francisco Chronicle* led to numerous legal battles and time in solitary confinement. But this retaliation against Martin only further demonstrated the relevance of his *Chronicle* pieces, eventually leading to the publication of his articles in the book *Committing Journalism: The Prison Writings of Red Hog* co-authored by then-*Chronicle* editor Peter Sussman.

Paul Wright faced numerous censorship attempts when his then-fledgling monthly *Prison Legal News (PLN)* spoke bluntly on labor exploitation in American prisons, among other issues, detailing the usage of low-paid prisoners to bolster the profits of private corporations like Starbucks and Victoria’s Secret. Wright completed his sentence and now edits the paper from the outside, making it easier to challenge the frequent bans of *PLN*. With 16 years and 193 issues behind it, *PLN* is the longest running, independent prison newspaper in the country’s history.

Even as prisoners find ways to report, their resources are slim and, in stark contrast to the past, they don’t have a large outsider audience; the demand to know what happens inside American prisons is scarce. This lack of communication might be welcome to some, but it creates further tension between communities that must eventually reunite in the free world. “If you deprive some people of the right to speak freely, who are the real victims of this? Who are the real losers?” Franklin asked. “Not so much the people that don’t have the right to speak...The real losers are the people who could potentially hear what these people have to say.”

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Audit of California's "Failed" Intermediate-Parole-Sanctions Program Blames Lack of Benchmarks And Data Analysis

The California State Auditor issued a stinging 58 page report in November 2005 that squarely fixed the blame for the purported "failure" of the recent parole violator's alternatives-to-reincarceration program on the California Department of Corrections and Rehabilitation (CDCR) for its failure to establish any performance benchmarks or to analyze available data. The Auditor found that the program's result of saving only \$14.5 million of the projected \$50.2 million for the first year was tied to delays in the program's implementation.

Not stated by the Auditor was the real reason for the program's "failure," that the powerful prison guards' union, the California Correctional Peace Officers Association, (CCPOA) wanted it to fail because the concept of having fewer of California's 128,000 parolees returned to prison meant less pay for its members. The CCPOA made a weak attempt at distancing itself from its self-serving opposition to the state's saving hundreds of millions of dollars currently wasted on reincarcerating "technical" parole violators. It first created a six-figure trust fund for its puppet victims' rights organization (Crime Victims United (CVU)) and then had CVU publicly decry the program by using that money for anti-program TV ads and mobile billboards circling the State Capitol. Indeed, the CCPOA, via its parole agent members, controls the very valves that regulate this return-to-custody cash cow, the paycheck-fattening artifact of "bed-vacancy-driven recidivism."

The "hot button" question as to the program's efficacy was whether keeping "technical" parole violators off the streets by paying for their reincarceration outweighed the cost to the Community of having some of these same parolees commit more crimes while attending non-incarceration alternatives. CDCR itself projected that the program would save \$50.2 million in year one and \$100.2 million in year two. But before it was "evaluated" by CDCR and formally terminated, the program was earlier summarily branded a failure and closed by then CDCR Secretary Roderick Hickman [a CCPOA member]. However, the *Valdivia v. Schwarzenegger* federal court [see *PLN*, Apr. 2004, p.24] later forced CDCR to reinstate most of it; whereupon

the first year's effort was evaluated by the Auditor.

The program's political detractors advertised that for the approximately 2,500 parolees diverted from reincarceration, there was an equal number of new commitments refilling their beds who had committed new crimes. CDCR correctly reported that some of these new crimes came from program parolees, but then drew the tautological conclusion that it was only the program parolees committing new crimes who refilled all the beds. Not so. Most of the returnees to prison were simply other parole violators who were reincarcerated at the pleasure of the union-member parole agents to keep all prison beds occupied. The job of the Auditor was to sort through the data to determine how the program really measured up to its projected cost-saving billing.

And there the audit was frustrated to a halt. The Auditor determined first that CDCR simply had never established any benchmarks to measure the program's success (or failure). It further found that the data available to CDCR was never properly analyzed. Finally, the Auditor concluded that CDCR "had no basis for determining whether the benefits of using intermediate sanctions [the program] outweighed the risk to public safety."

The Auditor observed that CDCR unrealistically projected that the program, scheduled to commence January 1, 2004, would be filled to capacity on its first day and continue at capacity. Specifically, CDCR projected that 12,000 participating violators would be processed annually, whereas in reality, after long delays in starting the programs, only 5,742 entered by December 31, 2004. Of these, 2,567 were placed in Substance Abuse Treatment Control Units and 3,175 went into the Halfway Back program. Five percent of the 5,742 were returned to prison for new crimes during their program participation. An additional 1,732 in these programs were returned to prison for new parole violations in that period.

However, CDCR had no benchmark measuring standards in place to determine if the results achieved were any improvement, given the average annual cost of a parolee in 2004 at \$3,364 and an incarcerated prisoner at \$30,929. The Auditor massaged available CDCR data on the

78,000 parolee returns-to-custody in 2004. Twenty percent returned with new crimes while the remaining 80 percent had only parole violations. Based upon the above costs, it would appear that the lower program "failure" rate still outperformed the no-program rate, hands down. CDCR had contracted with the University of California at Irvine to analyze the program between December 2004 and June 2007, but Irvine was never able to gain useful data because the program was unilaterally canceled after only one year.

CDCR agreed with the Auditor's findings, but escaped the consequences by simply terminating the alternative sanctions program permanently and replacing it with its new In-Custody Drug Treatment Program and Electronic In-Home Detention Program. Recognizing the need for performance benchmarks, CDCR announced that it would "define the benchmark and will explore a system of collecting data to verify program success" by April 30, 2006.

Meanwhile, parole violators will continue to fill every open prison bed and no accountability of new programs will even be possible, pending the indefinite "exploration" of a data collection system.

In other words, the CCPOA won; parolees, their families and taxpayers lost. See: *CDCR: The Intermediate Sanctions Programs Lacked Performance Benchmarks and Were Plagued with Implementation Problems*, California State Auditor Report No. 2005-ill (Nov. 2005). (Single copies free from Bureau of State Audits, 555 Capitol Mall, Suite 300, Sacramento, CA 95814; also at www.bsa.ca.gov and www.prisonlegalnews.org.)

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California Auditor: Prison Industries Loses Money and Fails to Demonstrate Rehabilitative Success

by Marvin Mentor

The California Department of Corrections and Rehabilitation's (CDCR) Prison Industry Authority (PIA) loses money in 20 of 28 enterprises it operates in CDCR prisons, provides rehabilitative work for a declining number of prisoners in spite of a meteoric climb in prison population, and lacks a marketing plan, according to the 67 page December 2004 report on PIA by the California State Auditor. PIA lost \$10.2 million in 2002-03 and \$5.5 million in 2003-2004, even though it sold nearly 97% of its \$144 million annual output to state agencies, 47% of that to itself (i.e., CDCR).

The audit was initiated by California State Senator Dean Florez when he learned that PIA charged \$7.30 for PIA-made prisoner canvas slip-on shoes when private industry offered similar shoes for \$1.05. He called for a reorganization of PIA on grounds that it competes unfairly with the private sector.

PIA, controlled by an 11-member state Board, operates 60 factories and farms in 22 of California's 34 prisons. Twelve years ago PIA employed 6,295 prisoners, when the prisoner population was only two thirds of the current 168,000. Today, PIA employs only 5,669. Its intended benefits were to provide job skills to prisoners to prepare them for release. Of the 60.9% of CDCR prisoners who are assigned to prison work or educational programs, only 3.6% are in PIA.

PIA claims that it saves CDCR \$14 million per year by "employing inmates who would otherwise have had to go to educational or vocational programs." Auditors questioned these savings, trimming the estimate to \$9.9 million at best by counting only the reduced incarceration attributable to work-time credits earned by the PIA prisoners. The Auditor opined that with newly enacted tougher sentencing and recidivist punishment schemes (replacing time credits with only 20% or 15% rates), PIA's ability to make these potential savings claims "is impaired significantly."

Still, the Auditor recognized the long-range benefits of reducing recidivism by training future parolees with good job skills and work ethics. However, the Auditor was quick to note that CDCR has no system for tracking paroled PIA workers and has

developed no proof that any benefit has ever actually accrued. This writer notes that this is symptomatic of a larger problem in CDCR -- it has no legislative directive to reduce prison populations via rehabilitation, no definition of either "correction" or "rehabilitation" in its charter and no incentive to either "correct" or "rehabilitate" so much as one prisoner. Thus, that CDCR (and hence the Auditor) cannot measure remedial results is no oversight. It is inherent in CDCR's very structure. (See, e.g., *PLN*, Mar. '05, p.1, California Corrections System Officially Declared Dysfunctional Redemption Doubtful.)

PIA's 1,800 products are varied, from license plates (\$20 million annually) to prisoner commodities (e.g., milk, bread, clothes, shoes, mattresses, laundry, printing and eyeglasses), to furniture for CDCR offices, Department of Motor Vehicle offices and even Governor Schwarzenegger's office. The prisoner workers earned approximately \$8 million (30 to 95 cents per hour) in 2003-2004. In addition, PIA employed 662 full-time-equivalent state civil service employees, who earned an estimated \$40 million. Added to the PIA Board's \$1.2 million salary compensation, direct labor charges against PIA's income approached \$50 million.

PIA has not always generated a net loss. In 1995, for instance, it showed a \$10 million profit. Between 1996 and 2000, profit averaged about \$2 million. Part of the \$10 million loss in 2003-2004 (the base year of the Auditor's study) was an \$11 million "impairment" from disposal of property following facility closures. By enterprise, some units were yet quite profitable. For example, optical products made \$6.1 million then and \$6.3 million the year earlier, but these profits were offset by losses in the furniture industry of \$7.4 million and \$4.4 million, respectively. Indeed, 98 % of PIA profits were generated in optical, license plate, fabric products and printing. The biggest losers, in declining order, were furniture, dairy, laundry, general fabrication, metal products and meat cutting. Furniture's \$7.4 million loss was based upon 739 prisoners' work, and its per-prisoner enterprise loss was \$10,000. Cleaning products, with fewer workers, had a per-prisoner loss of \$18,700.

The Auditor criticized PIA for not have standardized pricing or discount policies. In a sample of 19 PIA products, its prices were below market in 3 cases and above market in the other 16. For eyeglasses made for CDCR, PIA charged \$27 but could charge only \$12.06 to Medi-Cal-constrained Department of Health Services customers.

As to rehabilitative benefits for prisoners, the Auditor found that CDCR had not established prisoner participation targets. That is, CDCR had no data whatever to determine if PIA training aided prisoners' return to society, had no goals in setting the number of participants and had no objectives in trimming per-prisoner enterprise losses. As such, PIA's impact on CDCR was at best uncertain. It was not lost on state Senator Romero that of the prisoners employed by PIA, only 21% are eligible for time work credits (i.e., can cut incarceration costs by working). The balance are credit-ineligible lifers or other violent offenders. And if term-reduction through credits is a PIA goal, it was upstaged by the recent CDCR mandatory education program which grants (eligible) participants time credits at a lower "enterprise cost" than PIA's.

Even putting cost benefits and profitability aside, the Auditor concluded that CDCR was simply in no position to evaluate its PIA program without having a yardstick to evaluate performance. To that end, the Auditor proposed an audit tool, by PIA industry, measuring employment retention rate, comparison with outside industry's retention for that enterprise, and one, two and three year recidivism rates for all former PIA prisoner workers. Only with such data, and with target employment goals as well as business goals, could future audits reveal what value PIA is providing to CDCR. As reported often in *PLN*, prison industry programs worldwide have historically lost money, exploited prison labor and unfairly "competed" with private industry. ■

See: Bureau of State Audits Report No. 2004-101 (December 2004), *Prison Industry Authority*. (available from 555 Capitol Mall, Sacramento CA, 95814; www.bsa.ca.gov/bsa and www.prisonlegalnews.org)

Nevada's "Son of Sam" Statute Violates First Amendment

by Mark Wilson

The Nevada Supreme Court held that the State's "Son of Sam" law violates the First Amendment.

In 1977, New York enacted the nation's first "Son of Sam" law, "in response to the possibility that David Berkowitz, a serial killer popularly known as the Son of Sam, might sell the publication rights to his memoirs. The measure was calculated to ensure that moneys received by criminals in connection with published storytelling about their criminal activities be made available to compensate victims" and to prevent criminals from profiting from their criminal wrongdoing.

Following New York's lead, the federal government and approximately 40 states enacted similar Son of Sam statutes. Nevada first enacted a statute in 1981. NRS 217.265 (repealed 1993).

In 1991, the United States Supreme Court issued its decision in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 112 S.Ct. 501 (1991), voiding New York's Son of Sam law as violating the First Amendment. "In 1993, the Nevada Legislature revised its Son of Sam statute, recodified as NRS 217.007, in an attempt 'to address the constitutional issues raised in [*Simon & Schuster*].'"

In 1998, Jimmy Lerner was convicted of manslaughter and sentenced to a term of 2 to 12 years in the Nevada State Prison for killing Mark Slavin. While in prison, "Lerner wrote a book entitled, *You Got Nothing Coming: Notes from a Prison Fish*, which was published by Broadway Books and Random House in 1999. This book detailed Lerner's imprisonment and contains descriptions of the events surrounding the killing of Mr. Slavin." Lerner received a \$100,000.00 advance for the book.

Slavin's sister, Donna Seres, then sued Lerner pursuant to NRS 217.007, seeking recovery of his book proceeds. The District Court granted Lerner's motion to dismiss under *Simon & Schuster*, holding that "NRS 217.007... cannot survive the strict scrutiny analysis" and, therefore, violates the First Amendment.

Although NRS 217.007 was "a comprehensive piece of legislation enacted with the most salutary purpose," the Nevada Supreme Court agreed with Lerner and the district court in overturning it.

The Court first determined "that NRS

217.007 is a statute of general applicability, implicating state action," because judicial enforcement of state legislation is both state action restricting speech implicating the First Amendment. Thus, "in line with *Simon & Schuster*," the court concluded that NRS 217.007 "is a content-based statute" because it "explicitly and exclusively applied to income received from speech concerning the crime committed."

"Because NRS 217.007 is a content-based restriction on speech," the Court held that it "must pass a strict scrutiny level of review." While "the measure addresses compelling state interests in compensating victims and prevention of criminal profiteering, it suffers from over inclusiveness because it regulates more speech than is necessary to serve the state's interest. Clearly, NRS 217.007 allows recovery of proceeds from works that include expression both related and unrelated to the crime, imposing a disincentive to engage in public discourse and non-exploitive discussion of it." This "violates the First Amendment." See: *Seres v. Lerner*, 120 Nev. Adv. Rep. 95, 102 P.3d 91 (Nev. 2004).

Notes from a Prison Fish is a "fictionalized" memoir, which intentionally "devoted only a few pages to his crime, portraying it as self-defense." Broadway Books agreed to publish the book "on the condition that Lerner recast his mostly true story as genuine nonfiction." Lerner subsequently claimed, "that he had disguised some identities in places but otherwise removed the fiction."

Broadway inserted "a short description of Lerner's reluctant manslaughter plea" near the front of a book, but "only after 300 pages does the narrative" shift to Lerner's crime. He portrayed his victim as "6-foot-3 and rippling with muscle and unstable hot-tempered drug" addicted "Monster." While he was actually just

"5-foot-4 and 133 pounds, 8 inches shorter and 40 pounds lighter than Lerner." He also described the circumstances of the crime much differently than he described to police the day after the killing. "At first, Lerner denied there was any major discrepancy... 'it jibes,' he said, slowly listing the details that matched up." He later backed off that claim, stating: "I saw what I was doing not as a journalistic piece. What I was doing was a literary genre known as a memoir. It is 90 percent accurate." Prosecutors and Slavin's family disagree, as many of Lerner's fellow prisoners portrayed in the book probably due too. ■

Additional Sources: *The Talented Mr. Lerner*, by David D. Kirkpatrick; *The New York Times*, (Section 6, column 1) (March 31, 2002).

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California Legislature “Reorganizes” DOC To Add “Rehabilitation”

by Marvin Mentor

Via legislative enactment (SB 737) effective July 1, 2005, the California DOC (formerly CDC) was renamed the Department of Corrections and Rehabilitation (CDCR), the Board of Prison Terms (BPT) was replaced with the Board of Parole Hearings (BPH), and numerous previous correctional boards and organizations were reorganized and placed under the direct supervision of the governor's Secretary of Corrections.

The advertised effect of this reorganization was to accommodate the glaring deficiencies in CDC that were roundly criticized in former Governor Deukmejian's 359 page June 2004 report to Governor Schwarzenegger, *Reforming Corrections*. (See: *PLN*, Mar. 2005, p.1, *California Corrections System Officially Declared “Dysfunctional” - Redemption Doubtful*.) The somber forewarning of the Deukmejian report was that without a civilian oversight board, any reformulation of CDC would fail.

Nonetheless, in enacting SB 737, the California Legislature omitted such oversight and instead left the reorganized prior bureaucracy to continue to run itself. On the hopeful side, the new name reincorporates the word “rehabilitation,” a term tabooed in the Legislature's last sweeping tough-on-crime reform in 1977 (Senate Bill 42).

Prior to SB 737, the Secretary of Corrections was largely a titular position, with the true operating power of CDC vested in the Director of Corrections. Similarly, the BPT was autonomous, as were the Youth Authority, the Commission on Peace Officer Standards and Training (now, the Corrections Standards Authority), the Board of Corrections and the Narcotic Addict Evaluation Authority. CDCR replaces the heads of many of these organizations with new titles (undersecretaries) and calls the organizations “divisions.” For example, the Division of Adult Institutions consists of Adult Operations (i.e., the prison system) and Adult Parole Operations (the BPH). Similar division levels include Community Partnerships; Correctional Health Care Services; and Education, Vocations and Offender Programs. The latter gives recognition to models of such programs at San Quentin State Prison (where former CDCR Undersecretary Jeanne Woodford

was formerly Warden) which benefited from highly successful college programs, victim-offender groups, youth-at risk intervention programs and outside-facilitator sponsored prisoner activity groups. Finally, Youth Operations is a separate directorate that is assigned its own five BPH commissioners.

Importantly for California's 27,000 life prisoners, the BPH enlarged the number of parole commissioners from nine to twelve, accommodating the vastly increased number of hearings due, and increased the efficiency of hearing management so harshly criticized by the California State Auditor. While much of the backlog in parole hearings was due to the Governor's failure to keep more than six of the prior nine positions filled, recent data shows that about nine of the twelve available positions are currently staffed. In arrears by over 4,000 lifer parole hearings, and with the *In re Rutherford* court order to “catch up” staffing the newly enlarged BPH could double the BPT's performance.

But visibly lacking in the new CDCR (other than civilian oversight) is the absence of any measurable goals in actually achieving “correction” or “rehabilitation” of prisoners.

Indeed, SB 737 does not even announce a legislative intent for such a result. As this writer has opined (*PLN*, Mar. 2005, *supra*), the financial incentive for all CDC (and now CDCR) staff is to increase the prison population. Not one employee of CDCR gets rewarded for the (otherwise unlikely) event of prisoners actually being “corrected” or “rehabilitated.” There isn't even a definition of “correction” or “rehabilitation” to be found in either SB 737 or in CDCR's mission statement. Indeed, “correction,” under the newly formulated CDCR, remains the same cynical oxymoron of yore, literally for want of any measurable goals or incentives. Somewhere, somehow, society needs to take the proactive steps to reduce prison populations. Sadly, CDCR is thus no closer to such a return on the taxpayer's investment in social renewal than was its predecessor CDC. Nonetheless, Harriet Solarno, leader of Crime Victims United, a prison guard's union (CCPOA) sponsored political action group shill, condemned SB 737, saying

the governor is “letting us down” after promising to “stand with victims.”

An admittedly strong statement was made by making health care a separate directorate. It is long understood that doctors, not custody staff, must make health care decisions. But when custody intersects with health care, custody normally “wins” based upon a “safety and security of the institution” mantra. With CDCR's health care now under federal court receivership (see *PLN*, March, 2006, p.), the necessary teeth to give health care priority may finally be forced upon the entrenched doctrine of unilateral custody control.

A little recognized procedure in SB 737 is that key appointments within CDCR shall be reviewed by the State Inspector General, who is charged with weeding out candidates who might not pass the smell test for integrity and reputation, but whose jobs might be insulated from challenge once they are hired

One of the ultimate measures of success of CDCR will be whether it can change its ways from the old cronyism that the Deukmejian report recognized was the signature of CDC. Since CDCR was announced, the corrections budget has grown from \$6 billion to a proposed \$8 billion for fiscal year 2006-2007. In addition, the Governor's January 2006 State of the State address proposed \$223 billion in new state bonds (over ten years) for infrastructure, including the construction of two new prisons in the first wave. Thus, the Deukmejian report's complaint of “out of control costs” (determined 18 months ago with “just” a \$6 billion corrections budget) seems to have fallen on deaf ears already.

As state Senator Gloria Romero commented, SB 737 “is truly reorganization, not reform.” Indeed, with a present population of 168,000 prisoners (plus 120,000 parolees) and growing, of whom 20% are lifers (only rarely getting out), with health care costs growing from the aging population and from federal court oversight, “reorganizing” with no objective to either “correct” or “rehabilitate” its gargantuan prison population leaves the new CDCR in grave doubt of bringing about needed systemic change. To use the old metaphor, this is rearranging the deck chairs of the *Titanic*. ■

\$40,000 Default Judgment Reversed for Determination of Service of Process Validity

In a case of unusual circumstances, the Seventh Circuit Court of Appeals has reversed a default judgment of \$40,000 in favor of a prisoner against a prison nurse for failure to serve process, but ordered the district court to make evidentiary findings that could reinstate the judgment.

Before the Seventh Circuit was the appeal of Lisa Homer, a former nurse at the Indiana Maximum Control Facility, challenging the default judgment against her. That judgment came on prisoner Nathaniel Jones-Bey's claim that Homer and two other defendants were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment.

The matter went to jury trial on February 25, 2002, at trial, the district court granted both Homer's co-defendants judgment as a matter of law, and granted Jones-Bey's motion for default judgment against Homer. The jury awarded \$40,000 in damages against Homer on March 7, 2002.

Homer was then served with a summons that identified her as the "Judgment Debtor" and instructed her to appear in federal court "to answer concerning the judgment debtor's property, income, and profile." After multiple continuances, the court granted Jones-Bey's motion to initiate a garnishment hearing against Homer on July 1, 2004. Homer then moved, pursuant to Fed.R.Civ.P. 60(b) to set aside the default judgment against her for lack of personal jurisdiction, being on her contention that she was never properly served with process on "10/30/99" as the record shows.

The Seventh Circuit found that all methods of service specifically described in Fed.R.Civ.P. 4 involved hand delivery. That rule allows service to be effected pursuant to the law of the state where the district court is located. As such, the Marshall's Service made service by Certified Return Receipt Mail.

That return, however, was noted with the district court as required by Indiana law, and according to the Marshall's Service policy of destroying documents after three years, it no longer exists. The summons also stated Homer's name as Hommer. Moreover, it did not state the address service was made at because of security concerns about a prisoner having a prison employee's address.

The Seventh Circuit, because the record is so "murky", could not determine if the deficiencies in the attempted service of Homer were merely technical (and thus curable under Rule 4.15(f)), or whether a complete failure of service occurred. Thus, the matter can best be resolved by the district court holding evidentiary hearings.

Relevant to the inquiry would be who

received and signed for Homer's summons at the exact mailing address. Evidence that Homer's address has not changed between the two service accounts, or that the same address was used for both accounts would suggest the 1999 service was successful. Accordingly, the matter was reversed and remanded. See: *Homer vs. Jones-Bey*, 415 F.3d 748 (7th Cir. 2005). ■

Aramark to Pay \$65,000 for Overbilling Pennsylvania Prison

Pennsylvania's Dauphin County Prison (DCP) will receive \$65,000 from its food service vendor from overbilling. The settlement comes on the heels of a several-month grand jury investigation started in 2004 to examine allegations of watered-down food and overcharging.

The agreement, which was reached in September 2005, concludes there was no criminal intent on the part of the vendor, Philadelphia-based Aramark Corp. to overbill the county, said the county's District Attorney Edward M. Marsico, Jr.

Aramark has served food to DCP's prisoners for the last 11 years. Its contract paid for each meal served. Instead, Aramark had been charging a flat amount for meals instead of tracking the ups and downs of the jail's population. "I'm very pleased with the amount of money we received," Marsico said. "I believed it more than covers any loss the county may have had."

In 2004, Aramark was awarded a five-year contract, which could be worth as much as \$4.2 million. The investigation was

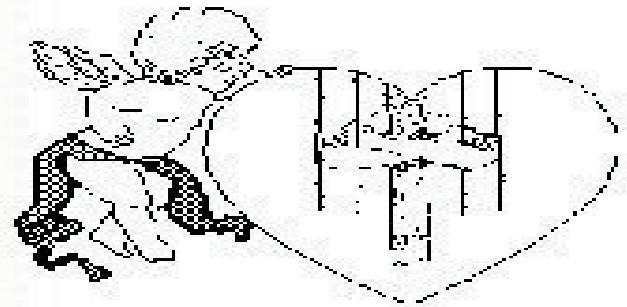
spurred by prisoner complaints.

The probe concluded Aramark was providing the required meal content. Complaints by prisoners were dismissed as individual tastes adverse to institutional food.

PLN has previously reported on Aramark's history of cooking unsanitary food in shorting entrée items of their requested agreements. ■

Additional Sources: *The Patriot News*; *Times Leader*

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\$20,500 New Hampshire Jail Award Upheld for False Disciplinary Charges

The First Circuit Court of Appeals has upheld a jury's award of \$20,500 to a pretrial detainee in a civil rights action, alleging denial of due process from the filing of false disciplinary charges.

Jason Surprenant was a pretrial detainee at New Hampshire's Hillsborough County Jail on the evening of July 14, 2002. While the detainees of Unit 2D were enjoying out-of-cell time, guard Caesar Rivas radioed an emergency request for assistance by other guards and activated his body alarm. Respondent guards then locked down the unit and removed nine detainees, including Surprenant to "the hole."

Rivas claimed that prior to his alert, twenty to twenty-five belligerent detainees, including Surprenant and other detainees surrounded him and threatened his life. Surprenant and his witnesses said the incident never happened; that Rivas called in the alert without any provocation; and that, at the critical time, Surprenant was lifting weights with other detainees in a different location. After trial in this case, Surprenant attributed Rivas' trumped-up call to his antipathy for a clique of detainees who resided in one corner of Unit 2D. Rivas' story was concocted to have those detainees "lugged to the hole."

In the hole, Surprenant was allowed only a mattress, sheet, pillow, and a prison uniform. All other items, including legal materials and personal hygiene items were forbidden. The in cell water supply was shut off. A guard had to turn it on to flush the toilet. Frequently, no guard was in the vicinity, and if one was, the detainee ran the risk the guard would choose either to ignore the request to flush or the guard would dawdle in fulfilling it. Detainees in the hole were subjected to five in-cell strip searches each day. The guards often orchestrated the searches so a detainee would have to manipulate his armpits, groin, and buttocks before manipulating his cheeks in turn. Because of the in-cell water restrictions, a detainee ordinarily could not wash his hands prior to a search, and he would have to eat his meals with the same unclean hands.

Eight days after placement in the hole, Surprenant was taken to a disciplinary hearing, without notice, for participating in an attempt to take Rivas hostage. Surprenant was found guilty and subjected to thirty-days segregation.

Suprenant filed suit and at trial a New Hampshire jury ruled in his favor. On appeal, the First circuit affirmed the verdict.

The First Circuit found that sufficient evidence existed to support the jury's conclusion "that Rivas wrongfully engineered Surprenant's punishment by fabricating a serious charge knowing that the falsehood would lead to his placement in the hole without any intervening hearing. The Court held that kind of unprincipled manipulation of legitimate prison regulations, to the detriment of a pretrial detainee, can constitute arbitrary punishment by a guard, even if the response by other (unwitting) prison officials is legitimate and non-punitive. As a result, the \$5,500 award against Rivas was upheld.

The Court further affirmed the \$15,000 award against Teresa Pendleton, the jail's

disciplinary officer. The evidence shows she was not an impartial decision maker. First, she proceeded to conduct the hearing without notice to Surprenant. She testified "that she declined to interview an alibi witness based on her preconceived (and wholly subjective) believe that the witness would lie and her rush to impose sanction despite having been asked by prison officials to withhold judgment until they had completed a parallel investigation into the "incident."

Finally, the Court upheld a one dollar award against jail Superintendent James O'Mara on the basis that the conditions of Surprenant's confinement violated the Eighth Amendment.

Accordingly, the Court affirmed the jury's award of \$20,501 as well as the district court's evidentiary rulings and jury instructions. See: *Surprenant v. Rivas*, 424 F.3d 5 (1st Cir. 2005). ■

Unpaid Prisoners Clean Up Rita Ravaged Southeast Texas

With few federal funds headed for areas of Southeast Texas devastated by Hurricane Rita, state officials are using the free labor of Texas prisoners to augment clean up efforts.

As of January 30, 2006, prisoners from the Larry Gist State Jail had already cleaned areas of Sabine Pass, Nederland, and Fort Author, according to Warden Dawn Williamson. Plans were also underway for prisoners to help in Orange and at a Beaumont cemetery.

Those performing the clean up work are "trusties," prisoners convicted of non violent crimes who are allowed to work in the community without armed guards. Like all Texas prisoners, trustees earn nothing for their labor.

Even more such efforts could be underway. In January federal officials announced that the entire state of Texas would receive only \$74.5 million for clean up efforts related to the September 2005 hurricane, a relative pittance according to media reports.

One city counting on the free labor is Orange, which is still littered with crumbling buildings, tree damaged homes, and branch filled ditches. City Manager Shawn Oubre had asked for \$10.35 million in federal funds, an amount now out of the

question. Oubre said two groups of 10 prisoners each began working in March to clear debris from drainage ditches, demolish homes, and clean some private properties owned by the elderly and disabled. The properties are a health and safety hazard where police and firefighters could injure themselves climbing over debris, said Oubre.

Texas has used free prison labor in the community for decades. When slaves were freed after the Civil War many prisoners worked in the fields as sharecroppers, said Jim Willet, director of the Texas Prison Museum in Huntsville. The state rented prisoners out from about 1867 to 1912, he said. Many labored to build railroads. Prisoners were often mistreated and some died on the job. Sometimes a dead mule was more costly than a dead prisoner, said Willet.

Most of the 106 prisons in Texas have trustees, though it's unclear how many actually work in the community. But one thing is certain--all that untapped free labor is attractive to cash-strapped city governments. "We want to develop a long-term relationship with the warden and inmates," said Oubre. Imagine that. ■

Source: *The Beaumont Enterprise*

Estate of Pennsylvania Prisoner Killed By Wexford Health Sources Settles Suit for \$2.15 Million

by Michael Rigby

Wexford Health Sources and the Commonwealth of Pennsylvania have agreed to pay \$2.15 million to the family of an asthmatic prisoner who died after her medication was denied at the State Correctional Institution (SCI) in Muncy.

Erin Finley, 26, was transferred to SCI-Muncy on July 2, 2002, to serve out a 2 to 4-year sentence for theft. A lifelong asthmatic, Finley was dependent on the steroid drug Prednisone for her survival. Inexplicably, Doctor Craig Bardell, a Wexford employee, decided that Finley was "faking" her symptoms. Without even examining her, Bardell discontinued Finley's medication on July 15.

Over the next month Finley made several trips to the infirmary, but medical personnel ignored her pleas for help. That indifference was documented in at least three sick call requests in which Finley begged medical personnel to overturn doctor Bardell's decision..

"I really feel like I am going to die if nothing is done," Finley wrote to prison nurse Kathryn McCarty on July 24. "I'm begging you to please help me." No help was forthcoming.

In desperation, Finley filed an Official Inmate Grievance on July 28, 2002, complaining that she suffered day and night because Bardell refused to prescribe her appropriate medications. Her grievance was returned with the ruling that it was "frivolous with no arguable facts." Finley continued to suffer.

On the morning of her death, August 29, 2002, Finley placed a frantic call home. She couldn't breathe, she wailed to her mother, nearly hysterical. At around noon Finley was caught with an unauthorized inhaler in her cell. She was taken to the prison infirmary for observation.

A physician's assistant informed Bardell that Finley needed to be hospitalized. He refused to see her, however, and left the prison at 2:40 p.m. At the infirmary, Joan Cicchiello, a registered nurse, decided that filling out a disciplinary report against Finley for the inhaler was more important than monitoring her medical condition.

At around 3:00 p.m. Finley lost consciousness and stopped breathing. An

ambulance was called and, after being delayed at the gate while guards argued over who would follow in the chase car, transported Finley to the hospital where she was pronounced dead at 4:11 p.m.

Under the settlement agreement, approved by a U.S. magistrate judge on May 11, 2005, the Commonwealth of Pennsylvania will pay \$700,000 to settle the claims against McCarty, Cicchiello, and Sheila Hagemeyer--a prison guard who refused to help Finley when she passed out in the medication line, and then refused to transport her to the infirmary when she couldn't breathe, and repeatedly threatened her with disciplinary action for "playing" them. Wexford's insurance carrier, Admiral Insurance Company, will pay the remaining \$1,450,000 on behalf of Bardell, physician's assistant Susan Day, and Wexford.

Dan Brier, the family's Scranton attorney, called Finley's death a tragic loss. "Our civil rights laws and our federal

judicial system empowered the family to seek relief in Erin's memory," he said. "At the end of the day, however, it is still a tragedy."

In her last letter home, Finley promised her mother she was through with drugs and anticipated the future. "I look forward to getting out and you and I going shopping and out to eat and all those normal mother and daughter things," she wrote. "That's one thing that keeps me going, is looking forward to the future."

It's unclear whether any of those responsible for Finley's death were disciplined or fired. See: *Thomas v. Bardell*, USDC MD PA, Case No. 03-CV-0989. ■

Additional source: www.timesleader.com

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Michigan Youth Prison Closed But Problems Continue

by Michael Rigby

During its six years of operation, the Michigan Youth Correctional Facility has been criticized over abuse, suicide attempts, and a policy of filling beds at the maximum-security prison with low level offenders. But even after its closure, the privately run prison continues to poison the community and divide the government.

When the Geo Group (formerly Wackenhut) opened the 480-bed prison in 1999, it was seen as an economic panacea for one of the state's poorest areas. State and local officials had banked their hopes on a wave of young, violent "superpredators." But the wave never materialized. Now local taxpayers are stuck paying for capital improvements, like new water and sewer systems, that were made to accommodate the hulking prison.

Tracy Huling, a New York consultant who has researched the economies of communities around prisons, says the situation in Baldwin, where the prison is located, is the result of short-sighted planning. "States have been creating penal colonies for years and there are consequences," Huling said. "It's understandable to see how folks get into this situation, but someone has to take the leadership role and say there's got to be a better way."

To fill beds meant for the elusive superpredators, the Department of Corrections (DOC) began housing low level offenders in the expensive Level V prison. Some even alleged prison officials fabricated or trumped up disciplinary charges to justify the placements [see *PLN*, June 2004].

With the DOC currently housing 49,000 prisoners and not expected to reach capacity until March 2008, Governor Jennifer Granholm decided to save the state \$20 million a year--\$13.4 million for Geo's management contract and \$5.4 million for the building lease--by moving the prisoners to cheaper state-operated prisons. The move was accomplished in October 2005 with a line-item veto of MYCF's funding.

But because Granholm neglected to get approval from the Republican dominated state Legislature, her veto sparked a bipartisan battle and a lawsuit. Geo filed suit on November 3, 2005, claiming that only the Legislature could end the state's 20-year building lease.

The lawsuit could be rendered moot,

says DOC spokesman Russ Marlan, if the Legislature would amend the DOC's budget to exclude funding for Geo. But lawmakers refused. "We have no plans to save the governor from herself," Ari Adler, spokesperson for Senate Majority Leader Ken Sikkema, a Republican, reportedly said.

"To me that means they have no intention of saving the taxpayers \$5.4 million," Marlan retorted. "We're making payments through December 3. After that, we're through."

Another lawsuit--this one against Geo for neglecting the mental and physical health of the child prisoners at MYCF--has been filed by an advocates group.

"Even though we anticipated that the facility was to be closed regardless, we went ahead and filed the suit because [staff] were not providing the proper services to the kids," said Tom Masseau, a public policy specialist with the Michigan Protection and Advocacy Service.

"Sixty-one suicide attempts were reported between October 2004 and March 2005," said Masseau. "This is a significant increase, because for all of 2003, there were only 18 suicide attempts."

The Boca Raton, Florida-based Geo Group is facing problems in other

communities as well. At the George Hill Correctional Facility in Concord, Pennsylvania--where Geo has already been criticized for its skeletal mental health services--Geo guard Joseph Franklin Henderson, 47, was arrested by detectives on November 9, 2005. Charged with sexually assaulting a female county jail prisoner, Henderson was being held in lieu of \$100,000 bail.

In Virginia, Jeffrey Bruce Shortal, 37, a state prisoner housed at the Geo-operated Lawrenceville Correctional Center, escaped from the Emporia medical center after hitting an unidentified Geo guard in the head with a hand weight and stealing his pistol. Shortal, who managed to commandeer a Ford Explorer, was recaptured after a short police chase that reached speeds of 110 mph.

As for the 220 otherwise unemployable MYCF guards, 190 were hired at state prisons in a humane effort to keep them working. Now if only prisoners were seen as people rather than commodities. ■

Sources: *fredricksburg.com*, *delcotimes.com*, *ludingtondailynews.com*, *mlive.com*, *AP*, *Psychiatry News*, *cadillacnews.com*, *sun-sentinel.com*

Love Letter Mail Scam Nets Ten Prisoners \$221,000 and Fed Time

On October 4, 2005, Karen Ann Erdely, 40, a Pennsylvania state prisoner, was sentenced to the maximum term of five years in federal prison for conspiracy to commit mail fraud. The federal court found that she was the ringleader of a love letter scam that involved over a dozen female prisoners and defrauded 224 men of over \$221,000. Erdely personally defrauded her victims of \$106,261, which she was ordered to repay in restitution.

The scam involved the women placing pen pal ads in magazines and on the internet. When men responded, they would start a pen pal relationship and send the men a photo of an attractive woman they falsely claimed was them. Inevitably the women would ask the men for money. Various reasons would be given for needing the money such as needing to pay a lawyer or court costs. Often the women, who were not near being released, prom-

ised to live with or marry the men after release and said that they only needed the costs of their fine or relocation costs to be released. After receiving that money, they would then claim that new charges had been filed and continue the fraud.

Other prisoners sentenced to federal prison time and required to repay the amounts defrauded in the scheme include: Anna Connely who defrauded nine men of \$11,600 received over two years; Yvette Stewart, 37, who received three months for defrauding men of \$7,240; and Michelle Bradford, 39, who received 84 days and three years of supervised release for defrauding men of \$9,919. The scheme was first started in March 1996, and ran until December 2003. All of the women indicted in the scheme were from Erie, Crawford and Lycoming counties. ■

Source: *www.phillyburbs.com*.

Michigan DOC's Visitation Ban for Substance Abuse Upheld

The Sixth Circuit Court of Appeals has held that a Michigan federal district court erred in refusing to dissolve its injunction ordering the Michigan Department of Corrections' (MDOC) visitation limitations of violated due process rights of prisoners.

This case has a 10-year history. In 1995 MDOC implemented a regulation that allowed the MDOC Director to permanently restrict all visits for a prisoner who is found guilty administratively of "two or more violations of the major misconduct charge of substance abuse." Prisoners sanctioned under this regulation could still receive visits from attorneys or their representatives, qualified clergy, and staff for the Office of the Legislative Ombudsman. They also could request that the visitation ban be lifted after six months or two years, depending on the underlying infractions.

In August 1995, the plaintiffs, a class of prisoners incarcerated by MDOC, and their prospective visitors, challenged the substance abuse regulation on its face. The district court found the permanent visitation ban infringed on a liberty interest, holding "the inconsistency and uncertainty of enforcement, the absence of any criteria for reinstatement, and the failure to provide any opportunity to be heard are all procedural deprivations of constitutional dimension." See: *Bazzetta v. McGinnis*, 148 F.Supp. 2d 813 (E.D. Mich. 2001); *PLN*, June 2002. The Sixth Circuit affirmed the judgment. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002); *PLN*, May 2003.

MDOC then moved for certiorari review, which was limited to "whether the regulations violate the substantive due process mandate of the Fourteenth Amendment, or the First or Eighth Amendments." The Supreme Court, however, did not grant review of whether the regulations of violated the prisoners' procedural due process rights.

That Court held that the withdrawal of visitation privileges did not "fall below the standards mandated by the Eighth Amendment." Additionally, "the withdrawal of visitation privileges for a limited period, as a regular means of effecting prison discipline...is not a dramatic departure from accepted standards for conditions of confinement." However, if "the withdrawal of all visitation privileges or permanent or for a much longer period,

or if it were applied in an arbitrary manner to a particular inmate, the case would present different conditions." See: *Overton v. Bazzetta*, 539 U.S. 126 (2003).

The Sixth Circuit, based on *Overton*, remanded the matter back to the district court, who refused to lift its injunction because the Supreme Court did not touch its procedural due process ruling. The MDOC brought the instant appeal.

The Sixth Circuit held that while the Supreme Court did not expressly address the procedural due process claim, it implicitly ruled on the issue in a man-

ner inconsistent with the district court's ruling. The Supreme Court held the substance abuse regulation was a "regular means of effecting prison discipline" that did not "constitute a dramatic departure from the accepted standards for conditions of confinement" under the Eighth Amendment. Thus, a facial due process challenge was a foreclosed. Prisoners, however, may challenge the rule as applied to them.

Accordingly, the District Court's order was reversed. See: *Bazzetta v. McGinnis*, 430 F.3d 795 (6th Cir. 2005). ■

Maryland ALJ Faults Arbitrary Transfer/ Medical Order Violation

A Maryland Administration Law Judge (ALJ) held that the Maryland Division of Correction (MDOC) violated a Settlement Agreement and acted arbitrarily, capriciously and in violation of law by transferring a prisoner. The ALJ also found the refusal to provide ordered medical devices was arbitrary.

In 1985, MDOC prisoner Douglas Arey entered into a settlement agreement with MDOC, where by he "withdrew various lawsuits" in exchange for MDOC's agreement "to transfer [him] to the Maryland Penitentiary and to house him in a cell that would allow him to retain possession of all of his legal documents."

In July 1993, Arey suffered "a burst blood vessel which resulted in a torn retina. "The doctor ordered that he be 'provided with an 'egg crate' mattress and an extra pillow." MDOC complied with these orders until June 11, 2003.

Despite the 1985 Settlement Agreement, Arey was transferred to different MDOC facilities on June 11, 2003, July 24, 2003 and August 8, 2003. He was not given a reason for the transfers and he was confined "in a cell that does not allow him to retain his legal papers."

On August 13, 2003, Arey grieved that transfers, claiming they were "tantamount to severe harassment, prejudice, and discrimination." An ALJ held a hearing on the grievance on May 5, 2004.

On July 13, 2004, the ALJ found that while Arey did not have a constitutional right to be housed in a particular prison he "has a contractual right to be housed in a manner which allows him access to his legal papers." "Therefore, the ALJ found that

Arey's transfer was arbitrary and capricious and in violation of [his] contractual right."

The ALJ also found that the refusal to provide the ordered medical supplies is arbitrary and concluded that the "egg crate" mattress and extra pillow should be provided to Arey. See: *Arey v. Maryland Department of Corrections*, OAH No. DPSC-IGO-003V-04-22449 (ALJ 7/13/04). ■



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GEO Buys CSC After Settling \$38.8 Million Judgment in Texas Boot Camp Death

Correctional Services Corporation (CSC) has settled a \$38 million judgment that held the company responsible for the 2000 death of Bryan Dale Alexander, an 18 year old prisoner at a Texas boot camp. The terms are confidential, but according to an online article accessed February 6, 2006, CSC paid \$2.7 million toward the settlement. The rest will be made up by the company's liability insurers--Northland Insurance Company and AIG—which had initially balked at paying the award.

A Texas jury had found CSC and Knyvett Reyes, a nurse at the now closed Mansfield boot camp, responsible for Alexander's death on August 27, 2003. Reyes had claimed she thought

Alexander was faking his illness, even though she watched him vomit blood for 3 days. Alexander died at a local hospital on January 9, 2000. The culprit was a rare form of penicillin-resistant pneumonia.

The judgment against CSC and Reyes included \$37.4 million in actual damages and the statutory maximum of \$750,000 in punitive damages (reduced from the jury's award of \$5.1 million). CSC's insurers initially resisted paying the award arguing they weren't responsible because Reyes had been convicted of negligent homicide in 2002. [See *PLN*, February 2004 for more.]

The settlement cinched an offer by the Boca Raton, Florida-based GEO Group

to purchase CSC's adult division for \$62 million. GEO will assume \$124 million in CSC debt. The deal includes 15 prisons with 7,500 beds. GEO currently operates 46 prisons and jails with 36,000 beds in the United States, Canada, Australia, and South Africa.

James Slattery, CSC's founder, will continue running Youth Services International--which manages 1,300 beds at 17 juvenile prisons--from CSC's home base of Sarasota, Florida. Slattery paid GEO \$3.75 million for the privilege. See: *Alexander v. Correctional Services Corporation*, Tarrant County Superior Court, Case No. 236-187481-01. ■

Additional Source: *heraldtribune.com*

California Prison Excessive Force Death Suit Settled For \$850,000

Whose psychotropic medications had not been renewed for 20 days died from excessive force used to subdue him when he suffered withdrawal symptoms. On November 4, 2005, California settled his parents' civil rights wrongful death suit brought in the federal district court for \$850,000. In addition, the state agreed to hire the victim's father, a retired Los Angeles Police Department Deputy Chief, to work as a "reforms consultant" in the state prison system.

John Douglas White, 33, died on August 17, 2001, four months before his scheduled release. He had been under medical care at Corcoran, where doctors had prescribed Lithium, Risperdal, Depakote and Prozac to treat his psychological disorders.

White had been "subdued" by six to eight guards, weighing about 250 lbs. apiece, when White -- 20 days without his prescribed medication -- had a "psychotic episode" of classic withdrawal symptoms, including dizziness and sweating. The guards, planning on taking White to the prison Emergency Room, put him in leg restraints, fitted a non-porous "spit mask" over his face, pinned him to the floor on his stomach, and handcuffed him. After a few minutes, he stopped breathing and turned purple. He was resuscitated at the prison hospital, but died the next day at a community hospital. His death was determined to be due to "positional asphyxia" plus obstruction of air by the solid mask

over his face.

Prison defendants relied upon a memo authorizing use of leg restraints and the mask in such circumstances. However, this defense was trashed when it was shown that the memo was written after the death in a feckless cover-up attempt. They also claimed that White was a drug addict, alienated from his family, and had no earning capacity. However,

they did not dispute their failure to renew White's prescriptions.

White's loving parents, who anticipated White's economic support upon his release, proved economic future earning losses of \$30,000/yr. White's family was represented by Stone Busailah, LLP in Pasadena. See: *White v. Brown*, U.S.D.C. (E.D. Cal.), Case No. CIV F 02-5939 OWW/TAG. ■

Washington DOC May Seize Money for LFOS; RCW 9.94A.772 Abrogates *Angulo*

The Washington Court of Appeals upheld a decision by the Washington Department of Corrections (WDOC) to seize money from a prisoner's trust account to pay legal financial obligations (LFOs).

In 1994 John Martin was sentenced to 300 months in prison and ordered to pay \$6,844.46 in restitution. Due to his confinement, no payment schedule was ever set. However, WDOC began seizing money from his prison account to pay his restitution.

Martin filed a Personal Restraint Petition (PRP) challenging the WDOC's seizure of his money for the purpose of restitution. Relying upon *State v. Angulo*, 77 Wash.App 657, 893 P.2d 662 (1995), Martin argued that collection of restitution was to be deferred until after his release.

The appellate court rejected Martin's argument, finding that "intervening

amendments to the Sentencing Reform Act (SRA)" abrogated the application of *Angulo*. Under those amendments, the WDOC "was permitted to start collecting restitution in 2004, even though Martin remained incarcerated, had no community corrections officer, and no payment schedule had ever been set. Martin had no vested rights to the contrary."

The appeals court also rejected Martin's argument that the retroactive application of RCW 9.94A.772, which was enacted in 2003, deprived him of due process of law. "At the time of Martin's sentencing, the SRA allowed disbursements from Martin's inmate account to pay for [LFOS], RCW 72.11.020." Thus, he did not possess a vested right in delaying LFO payments until after his release. See: *In re Martin*, 129 Wash.App. 135, 118 P.3d 387 (Wash.App. Div. 1, 2005). ■

GAO: Private Contractors Perform Poorly At Overseas Military Prisons

by Matthew T. Clarke

A Government Accountability Office (GAO) report released April 29, 2005, criticized the military's poor management of private contractors in Iraq and put partial blame for the Abu Ghraib prison scandal on private contractors and their poor management. The report had been requested in a letter by Rep. David Price, D-NC, that was cosigned by over 100 members of congress. The GAO is an investigative agency of Congress that audits the federal government.

"They have confirmed our concerns," said Price. "There is confusion about the tasks assigned to contractors, a lack of oversight to ensure their safety, question as to their chain of command and inadequate information on their cost and effectiveness."

The report also criticized the misuse of Department of Interior contracts for information technology to pay for private interrogators and screeners used at the Abu Ghraib military prison complex. This practice was part of what is termed "inter-agency contracting," using workers from a pre-existing contract to another federal agency to meet interrogation and other military support requirements urgently needed in Iraq.

David Cooper of the GAO said that Abu Ghraib was a good example of the total mishandling of private contractors. The private contractors often were responsible for their own oversight and checked their own qualifications. The result was that underqualified personnel were hired and inappropriate behavior, such as the abuse of prisoners, was not punished. [Editor's Note: As previously reported in *PLN*, the punishment of military members who torture and murder Iraqi prisoners is largely non-existent.]

In two internal Army reports by two generals investigating the Abu Ghraib scandal, employees of two private contractors, CACI International, Inc. of Arlington, Virginia, and Titan Corporation of San Diego, California, were implicated in the abuse of prisoners. Those contractors have been sued by ex-Abu-Ghraib prisoners who claim to have been abused. [*PLN* Nov. 2004, p. 36].

One area in which the contracting process was a total failure was food pro-

curement. After the military reopened Saddam Hussein's infamous Abu Ghraib prison as a military prison, it gave the prisoner food procurement contract to a Qatar-based private contractor, American Service Center (ASC). ASC, which is affiliated with another company, Advanced Internet Center, claims to work with military contractors and the U.S. Army in Qatar. Its web site offers assistance with housing, car rental, telephone service and internet service.

In late 2003 and early 2004, ASC delivered food to Abu Ghraib that was rotten, insect infested, and contaminated with fecal material, dirt and rats. The food made prisoners sick, causing them to vomit and break out in boils. It also gave the impression among the Iraqis that America was incapable of feeding the prisoners in its charge.

Army Major David Dinenna of the 320th Military Police Battalion repeatedly attempted to get help from his superiors regarding the food situation at Abu Ghraib. Despite a number of increasingly desperate emails in October and November 2003, the problem was ignored by his superiors until a riot broke out over food on November 24, 2003.

The Army's response to the riot was brutal. Four prisoners were shot. The soldiers, who could not understand the prisoners' Arabic, believed that a mass escape was being attempted. A subsequent Pentagon investigation confirmed that the prisoners were protesting the inedible food at the prison. The investigation also concluded that none of the guards had

been aware of the food problems at Abu Ghraib. The guards initially used non-lethal rounds, but ran out. They then used lethal ammunition.

ASC's contract manager, Ray Parks, a 56-year-old Virginian and Vietnam veteran who was preparing to resign from ASC, was murdered on February 16, 2004. Three black-robed gunmen ambushed him in the driveway of his Baghdad home. ASC's owner and CEO, Ali Hadi, claims that all knowledge about how the Abu Ghraib food contract was run died with Parks.

Since May 2004, the food service contract has been given to another company that is handling the job better than ASC did. According to Army spokesman Jeff Mcgruder, the prisoners' meals "now far exceed all international standards for calorie content and provide food that is more culturally sensitive. Also, during Ramadan (a Muslim holy month that features dawn-to-dusk fasting) they worked an alternate chow schedule to assist those who were fasting."

As early as November 2003, interrogators were complaining that the substandard food was making prisoners so sick that they couldn't be properly interrogated and tortured. However, it took a riot, four deaths and seven months to finally get some changes made on the food level. That is a sobering reflection of the poor quality of Army contract oversight. ■

Sources: *Miami Herald-Sun*, www.corp-watch.org, *Washington Post*.

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Georgia Jail and Its Medical Provider Settle Jail Wrongful Death Suit For \$500,000

by Joan G. Crumpler

Wilkes County, Georgia and Integrative Detention Health Services, Inc. (IDHS) paid \$500,000.00 for settlement of a wrongful death suit alleging negligent medical care, deliberate indifference to serious medical needs, and wrongly allowing a paramedic to practice medicine.

Wilkes County is a small, rural Georgia community of 4,000 citizens. The average household income is \$25,000.00 per year. The average house value is \$65,000.00. The town jail houses 70 prisoners.

Beginning November 13, 2002, 41 year-old Gardner Dalton was incarcerated for drunk driving and probation violations and was to serve a three month term at the Wilkes County Jail. Mr. Dalton had been incarcerated there 16 other times for similar reasons. During his earlier incarcerations, IDHS had provided Mr. Dalton with a physical, mental health care, and medications for documented schizophrenia and a peptic ulcer. On this occasion, they denied him a physical or any examination by a doctor or RN.

Three weeks before Mr. Dalton was to be released from the jail, he submitted a medical request for abdominal pain. A paramedic, assigned to the jail 'nursing' clinic, diagnosed Reflux. The paramedic also noted that Mr. Dalton was prescribed Cogentin, a drug that controls the side-effects of anti-psychotic medications. However, there was no corresponding doctor's order and no prescription for anti-psychotic medication. A week later, Mr. Dalton again complained of serious stomach pain. Instead of contacting a medical doctor, the same paramedic diagnosed Reflux and gave Mr. Dalton some Tums. The paramedic's notes from both clinic visits document stool tests, negative for blood. Three days later, Gardner Dalton died alone in his jail cell. The medical examiner said he died from "a slow, progressive and eventual massive gastrointestinal hemorrhage."

Discovery revealed a medical record with a date different from the open records review. A forensic analyst was hired to conduct infrared testing of the original medical documents. Additional to the date change, the analyst found two ink colors in multiple places *only* for the treatment

records concerning Mr. Dalton's stomach complaints. The second ink provided the proper standard of care, (e.g. hemocult test, hemocult test results, secondary assessment, and prognosis to "monitor", etc.), giving the overwhelming impression that the paramedic never conducted any hemocult tests on Mr. Dalton and otherwise summarily addressed his complaints. Discovery also revealed that the jail's designated medical doctor never treated Gardner Dalton. Thus, the paramedic had unlawfully prescribed medications.

An expert averred that the denial of a physician's care, the missed oppor-

tunity to timely diagnose Mr. Dalton's condition, and the paramedic's practice of medicine without a license fell below the standard of care, and was directly contributory to his death. On February 6, 2006, Wilkes County settled for \$75,000, and on February 10, 2006, IDHS settled for \$425,000.00. Plaintiffs' counsel took 12 depositions and invested \$19,000.00 in pursuing the suit. See: *Dalton v. Wilkes County, Georgia, Integrative Detention Health Services, Inc.*, Wilkes County Superior Court, Case No. 04-CV-0450. The author represented Mr. Dalton's estate in this case. ■

Denial of Medication/Prescribed Treatment States Eighth Amendment Claim

In two separate cases the Eighth Circuit Court of Appeals held that a prisoner's claim of being denied medication, or not given prescribed treatment, states a claim under the Eighth Amendment.

Arkansas prisoner Willie Munn appealed a district court's dismissal of his suit after an evidentiary hearing. Munn had claimed that prison officials were deliberately indifferent to his serious medical needs. While incarcerated at the Varner Super Maximum Security Unit on May 19, 2003, Munn was issued a treatment order requiring his blood pressure and heart rate be checked. While in punitive confinement from May 21-30 he did not receive the required blood pressure checks or his high blood pressure pills.

The district court limited Munn's claim to the issue of blood pressure checks, and denied that claim on the basis that Munn had showed no physical injury. The Eighth Circuit reversed.

The appeals court held the district court improperly refused to allow testimony on the missed-medication claim because that claim was sufficiently alleged in Munn's grievances and complaint. The appellate court also held the missed-monitoring claim did not fail for lack of physical injury, for "Munn alleged and testified that he experienced headaches, cramps, nosebleeds and dizziness while he was denied treatment; section 1997c(e) is

merely a limitation on damages." Munn could receive nominal damages for those injuries, at a minimum. Thus, the lower court's ruling was reversed on all claims for further proceedings. See: *Munn v. Toney*, 433 F.3d 1087 (8th Cir. 2006).

The appellate court found similarly for Raymond King, a former pretrial detainee at the Crittenden County Jail and now an Arkansas state prisoner. King's claim was predicated on the failure to receive prescribed blood-pressure or pain medication twelve times from August 18 to October 17, 2003. After October 17 it was unclear how many times he missed his medication, but he testified at the evidentiary hearing it was "half the time," and his administrative grievances show twenty-six times from August 28, 2003 to March 8, 2004.

The Eighth Circuit found this was more than an "inadvertent failure to provide adequate medical care," making the district court's dismissal improper. In reversing, the appeals court said it was "troubled by the district court's conclusion that King failed to show how the delays in his medication harmed him. King testified that he suffered headaches and had to lie down when he did not receive his blood-pressure medication, and he asserts on appeal ... that he suffered pain." The case was reversed and remanded. See: *King v. Busby*, 162 Fed.Appx. 669 (8th Cir. 2006)(unpublished). ■

Federal Court Filing Fees Increased, Cost of Justice Too High for Many Prisoners

As of April 10, 2006, the fee for filing civil complaints in U.S. District Courts, or having state cases removed to federal court, increased from \$250 to \$350. Note that this increase applies to lawsuits and related civil claims, but not to habeas petitions.

Similarly, beginning April 10, the filing fee for docketing an appeal in the federal circuit courts increased from \$250 to \$450. This is in addition to the \$5 fee for filing a notice of appeal, which remains unchanged.

These increases were authorized by the Deficit Reduction Act of 2005 (Pub.L. No. 109-171). Parties filing an application for allowance of an interlocutory appeal

in a circuit court under 28 U.S.C. § 1292(b) are not charged the filing fee unless the appeal is permitted, in which case the \$450 fee becomes payable.

These new filing fees amount to a 40% increase in district courts and an 80% increase on the appellate level. The last filing fee increase in the federal courts occurred on Nov. 1, 2003; since that time, over a period of 2½ years, and including the most recent increases, federal court filing fees have soared 350% in district courts and 450% in the circuit courts.

Under the Prison Litigation Reform Act (PLRA) prisoners must pay the entire filing fee of their suits, in installments if

they cannot afford it themselves. Prison wages, of course, have largely remained the same, with the result that some prisoners are being priced out of the judicial system due to the high cost of filing lawsuits and appeals. It is worthy of note that the increased filing fees are higher than the annual wages that many prisoners receive for prison labor. No fees are charged to the United States when the government files a complaint or appeal in the federal courts. Prevailing parties can, however, recoup their filing fees as a cost from the defendants. ■

Florida Muslim's Forced Shave Challenge Remanded

by David Reutter

Florida's First District Court of Appeal has reversed a circuit court's order denying a petition seeking to declare the Florida Department of Corrections' (FDOC) shave policy unconstitutional when applied to Muslims.

Prisoner Akeem Muhammad, a Muslim, asserts that Islam commands male adherents to wear a beard the size of a fist or the next shorter length possible. FDOC rule 33-602.101(4), however, requires all prisoners to be clean-shaven and to submit to forced shaves if they refuse. When Muhammad refused to shave on religious grounds he was sentenced to 30 days disciplinary confinement, loss of gain time, and forced shaves. This sanction was upheld on administrative appeal and Muhammad was subject to forced shaves.

The Circuit Court denied Muhammad's writ of mandamus on the ground that he should have sought declaratory relief, which the Circuit Court had denied in a previous suit as not being the proper remedy. The First District held this was error because Muhammad's claim was clear and deserving of declaratory relief review.

In so holding, the appellate court ruled that courts have jurisdiction to consider challenges to FDOC's rule on religious grounds. Muhammad brought his claim under Florida's Religious Freedom Restoration Act (RFRA) of 1998. See: § 761, Florida statutes. The RFRA holds the government "shall not

substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." The "exercise of religion" is defined as "an act of refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."

The First District recognized that portions of the FDOC rule that regulate hair length had been affirmed, but did not resolve Muhammad's beard length issue "because hair or beards that are never cut may raise significantly greater security concerns than the quarter-inch beard Muhammad seeks to grow."

The appellate court also held that imposing a lien on Muhammad's account for this action which challenged disciplinary action was improper, for such an action is a collateral criminal proceeding not applicable to the Prison Indigency Statute.

The case was remanded for further proceedings. See: *Muhammad v. Crosby*, 922 So.2d 236 (Fla.App. 1 Dist. 2006). ■

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PHS Parent Company Fires Executives For Cause In Billing Scandal

America Service Group, the parent company of Prison Health Services, has fired two high level employees in connection with billing improprieties by its prison pharmacy division.

ASG fired Trey Hartman, president and chief operating officer of Prison Health Services, on December 7, 2005. Grant Bryson, president and CEO of Secure Pharmacy Plus (SPP), was fired on December 9. Hartman formerly ran SPP, which provides pharmaceuticals to prisons and jails. The two men were fired for cause, according to the company.

In October 2004, ASG launched an investigation to determine whether SPP overcharged its clients for drugs and

ignored generally accepted accounting principles. The audit was expected to cover all periods since ASG acquired SPP in September 2000. A recently resigned SPP controller had identified the issues under investigation, according to the company.

In November 2005 the NASDAQ stock exchange warned ASG it was subject to delisting because it had not made timely financial filings with the Securities Exchange Commission. ASG delayed its third quarter reports pending conclusion of the SPP audit. In a January 10, 2006, letter the stock exchange notified the company it would continue to be listed if its third quarter report was filed by

March 15. ASG also had to provide the final report of the SPP investigation by February 28, 2006.

America Service Group, based in Brentwood, Tennessee, is the largest provider of for-profit prison health care in the United States. It is also the subject of numerous lawsuits over inadequate medical care, deliberate indifference, negligence, and other malfeasance. The company's current trading symbol is ASGBE. The "E" will be dropped from the trading symbol when the group fully complies with NASDAQ filing requirements. ■

Sources: *tennessean.com*, *Nashville Business Journal*

California Ex-Con DNA Collection Law Ruled Not Retroactive

by John E. Dannenberg

The U.S. District Court, N.D. Cal., ruled that California's recent Proposition 69, which provides for DNA collection from all convicted persons, does not apply retroactively to ex-convicts who have been discharged from custody, parole or probation.

A class action suit was brought by the American Civil Liberties Union (ACLU) challenging the constitutionality of Prop. 69 [codified at Penal Code (PC) § 295 et seq.], an initiative act approved by California voters on November 2, 2004. The district court limited its ruling to the narrow question of whether ex-convicts, free from all custody, could nonetheless be gaffed up and forced to give a DNA sample. (The arguably more difficult question of whether Prop. 69 unconstitutionally permitted the state to collect such samples from select felony arrestees [commencing January 1, 2009] was dismissed because none of the class was ripe to make such a complaint.) ACLU attorney Julia Mass said the court's decision was "very important ... clarifying for thousands of people that they won't be subject to testing under Proposition 69."

Pivotal to the court's decision was the California Attorney General's March 15, 2005 Information Bulletin No. 04-BFS-03, which opined that such retroactivity probably did not attach. But the ACLU considered the language of the Bulletin non-binding on all state law enforcement agencies, and pursued a court ruling. The state moved to dismiss on grounds that the

plaintiff class did not have standing and that their challenge of the law was not ripe for adjudication. Although the court granted the state's motion to dismiss, in so doing it made the important clarification sought by the ACLU.

The plaintiff class consisted of individuals and organizations. The first category ("arrestee class") included plaintiff Michael Weber, joined by co-plaintiffs Ware, Delucci-Youngberg, Blair, Rivas and Craig, who had been arrested for or charged with a felony on or before November 3, 2004, but not convicted. The second category ("formerly convicted persons class") was represented by plaintiffs Walker and Pruitt, both of whom had been convicted, served their sentences and been discharged before November 3, 2004. In addition, the organizations Americans for Safe Access and All of Us or None joined seeking declaratory and injunctive relief declaring Prop. 69 unconstitutional.

The state defendants first replied by proffering their initial draft Bulletin on Prop. 69, dated January 11, 2005. Defendants further argued that the plaintiffs' complaint was based upon the "mistaken assumption that Proposition 69 is completely retroactive." The court observed that both parties appeared to agree that if the Bulletin were followed by law enforcement officials, the objectionable compulsory testing would not occur. But the plaintiffs argued that the Bulletin was not legally binding on

any such official (not even the Attorney General), and that court supervision was therefore needed.

The court first reviewed the prerequisite of Article III standing, for which a plaintiff must have suffered (1) an "injury-in-fact," (2) the injury must be both "concrete and particularized" and "actual or imminent" (as opposed to "conjectural or hypothetical"), and (3) it must be likely that the injury will be "redressed by a favorable decision." Alternatively, but with some overlap, the court also analyzed the complaint for ripeness, which requires the existence of a constitutional "case or controversy," which is further parsed into "constitutional" and "prudential" components. The former relates to past and future enforcement of the challenged statute, while the latter goes to fitness for judicial decision and hardship on the parties if the court does not act.

Here, the parties agreed that the first prong was met since the plaintiffs had long since engaged in the prerequisite felonious conduct. But the state argued that since no one had yet been subjected to the DNA testing, no one had been actually injured and the matter was not ripe.

The court ruled that the recent and finalized Bulletin constituted a formal policy that served to prohibit the disputed retroactive DNA testing liability. Therefore, no plaintiff in the classes could be even subject to testing before January 1, 2009, and relief as to them was not ripe. Although plaintiff Delucci-Youngberg

had once been arrested for murder, and would therefore fall under the ambit of PC § 295's testing mandate, because she subsequently had been acquitted, she also qualified for automatic expungement of

that DNA testing record under Prop. 69's PC § 299(a).

Accordingly, the court granted the state's motion to dismiss for lack of ripeness. But the ruling formally clarified that

the state's intent regarding Prop. 69 was to exclude any retroactive DNA testing for discharged ex-convicts. See: *Weber v. Lockyer*, 365 F.Supp.2d 1119 (N.D. Cal. 2005). ■

Failure to Procure Medical Treatment Suit Proceeds Against Puerto Rican Guard

The First Circuit Court of Appeals has affirmed in part and reversed in part a Puerto Rico District Court's grant of summary judgement to prison officials in a civil rights action alleging failure to render or procure adequate medical treatment. The action was brought by the mother of deceased Puerto Rican prisoner Orlando Ocasio Alsina (Ocasio).

Ocasio was a prisoner at Baymon prison when a riot broke out on November 8, 1997; he was injured by a blow to the head. Medical attention at a regional hospital showed Ocasio was left with head pain, convulsions, and one side of his body was paralyzed. CT scans showed no brain damage and Ocasio was returned to his cell at Bayman a week later.

During the next six weeks, Ocasio was in considerable pain, was seriously disabled, cried and screamed in pain, and being half paralyzed he could not get about. The First Circuit found there was evidence in the record that Emilio Castillo, then a guard lieutenant in contact with Ocasio, was aware of his plight but did nothing to secure medical care for him.

Ocasio was not provided a wheel-

chair until December 17. A local court had to take action on Ocasio's motion on December 23 to order further medical evaluation and treatment for Ocasio. Things began going further downhill after he was diagnosed with AIDS and toxoplasmosis (a parasite infection) after transfer to the infirmary at the Rio Piedras prison hospital on January 1, 1998. Several hospital stays resulted thereafter. An autopsy ruled Ocasio's May 11, 1998, death as caused by brain inflammation associated with AIDS.

The complaint's causes of action centered upon Ocasio's medical treatment, or lack thereof, the first six weeks after the injury. After 21 months of extensive discovery, the district court granted prison officials' motion for summary judgement.

The First Circuit upheld judgement in favor of then Administrator of Corrections Zoe Laboy-Alvardo and then sub-director of Baymon Correctional Complex Sixto Marrero, finding there was no evidence they knew about Ocasio's condition or were aware there was a continuing pattern by guards, specifically, of failure to report prisoner medical needs

from which Laboy and Marrero averted their eyes.

The situation with Castillo, however, is very dissimilar. The court held the evidence showed Castillo became aware of Ocasio's condition shortly after returning to his cell. A prisoner "testified that Ocasio's fellow prisoners had told Castillo of Ocasio's need for medical treatment, and that these reports were ignored; another [prisoner] testified that Ocasio himself requested Castillo that he be relocated to a medical facility to treat what he suspected was a blood clot or head injury and that Castillo ignored him."

The Puerto Rican prison health system has been the subject of a class action suit filed in 1980. A consent decree in 1998 required the Commonwealth Department of Health furnish health care. Thus, Castillo argued he had no duty to provide care. The Court, however, said his denial of a duty to report health needs "might well not be credible or sufficient" to avoid liability. Additionally, "if Castillo knew of prolonged, manifest, and agonizing pain being suffered by Ocasio and did nothing to advise others, we can hardly say it would be impossible to find deliberate indifference." As such, the summary judgement for Castillo was erroneous.

Accordingly, the district court's grant of summary judgement was affirmed in part and reversed as to Castillo. See: *Ortiz v. Laboy*, 400 F.3d 77 (1st Cir. 2005). ■

Hawaii Guard Given Probation for Prisoner's Death

by Gary Hunter

Brian Freitas, a former guard was sentenced to one year probation for his part in the death of Antonio Revera, a prisoner at Halawa prison in Hawaii.

Revera was beaten to death in 1998 after he bit a sergeant at the prison. Although other guards were involved, Freitas was the only one charged in the incident.

"He is still being used as a scapegoat," Freitas' father said of the conviction. "The evidence showed that corrections officers were present before Brian arrived."

Freitas was apologetic but continued to proclaim his innocence. "I'm really sorry about the situation that happened, but I just went over there to do my job," he said.

Charges against Freitas have been on hold for seven years. This fact influenced the decision of Judge Dexter Del Rosario to impose probation. The judge also noted that Freitas had given up drinking, remained actively employed and had the support of his family and church.

Revera's family had also received a \$250,000 settlement from the state as previously reported in *PLN*.

"Now I can go on with my life and can go ahead and provide for my family and live a normal life again," said Freitas.

Unfortunately, Antonio Revera cannot say the same. ■

Source: *KITV-4 News; The Hawaii Channel*

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Dismissal of the Publisher/Approved Vendor Only Challenge Reversed

The Sixth Circuit Court of Appeals reversed a district court's *sua sponte* dismissal of a Michigan prisoners' claims that rejection of a religious publication violated the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

On November 1, 2002, the Michigan Department of Corrections (MDOC) implemented Directive 05.03.118, which prohibits books, magazines, newspapers and other publications that are "not received directly from the publisher... from an unauthorized vendor, or not ordered by the prisoner using established ordering procedures."

"A pursuant to this policy, five books sent to MDOC prisoner Gregory Figel in May and June of 2003, by the Philadelphia Church of God ('PCG') in Edmond, Oklahoma were confiscated." This was "because '[PCG] is not the publisher... nor are they an authorized vendor nor did the prisoner order the book[s] using established ordering procedures.'"

Figel requested and received hearings concerning the confiscations, and the decisions were affirmed. In July 2003, Figel requested "that all religious publications be exempt from the Directive or alternatively, that all 'legitimate religious sources' automatically be given authorized vendor status under the Directive." This request was denied. Figel then filed a grievance but it "was rejected because it challenged policy, and was therefore not a 'grievable' issue. Figel twice appealed the rejection of his grievance, unsuccessfully."

Figel then brought suit in federal court "alleging that... implementation and enforcement of MDOC Policy Directive 05.03.118 restricts his rights in violation of the free exercise clause of the First Amendment, the RLUIPA, and the equal protection clause of the Fourteenth Amendment and that retaliatory actions by Defendants also violated his First Amendment rights."

The district court granted Figel leave to proceed *in forma pauperis*, then "screened" the complaint as required by 28 U.S.C. § 1915(e), 1915A, and 42 U.S.C. § 1997e. The court "concluded that Figel had failed to assert any claim upon relief could be granted, and dismissed" prior to service upon Defendants.

The Sixth Circuit explained that in assessing a complaint for failure to state a claim, "[a] *pro se* complaint should be dis-

missed only if it is 'beyond doubt' that the plaintiff can prove no set of facts which would support a grant of relief."

Applying the standard to Figel's First Amendment claim, the court noted that the district court dismissed because the Supreme Court and Sixth Circuit had previously upheld publisher-approved vendor only policies as being reasonably related to the legitimate penological interest. "While the district court was correct that Directive 05.03.118 is facially valid," the court found that the district court "erred in failing to recognize that Figel was challenging the regulation *as applied* to exclude PCG from the authorized vendor list." Thus, the court concluded that "Figel... stated a claim that exclusion of PCG from the authorized vendor list is not reasonably related to a legitimate penological interest, and the district court erred in dismissing his First Amendment claim."

Turning to the RLUIPA claim "Figel alleged that the confiscation of specific religious texts substantially burdened his right to practice his religion." The court found that "if he can prove a set of facts to support this claim, he may be entitled to relief under the RLUIPA." The court

did not "say that Figel is undoubtedly unable to establish that the confiscation of the books at issue imposes a substantial burden on his religious rights."

The court noted that the district court could have dismissed the RLUIPA claim based upon *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), which held that RLUIPA violates the Establishment Clause of the First Amendment. However, the Supreme Court had granted certiorari in *Cutter* to answer the question of RLUIPA's constitutionality, thus, "[i]t would... be inappropriate to dispose of 'Figel's claim based on... *Cutter*.'" Accordingly, the court remanded with instructions to vacate the previous decision on this claim, and hold the claim in abeyance... pending the Supreme Court's decision in *Cutter*. Since the Supreme Court reversed *Cutter* and upheld the constitutionality of § 20000-1, the district court should reconsider whether Figel has stated a claim upon relief can be granted. The supreme court subsequently reversed *Cutter* and upheld the constitutionality of the RLUIPA. This opinion is unpublished. See: *Figel v. Overton*, 121 Fed. Appx. 642 (6th Cir. 2005). ■

California Ban On Sexually Explicit Materials Upheld

The California Court of Appeal upheld the denial of a state prisoner's petition for writ of mandate seeking (1) rescission of California prison regulation 15 CCR § 3006 (c) (17) [proscribing possession of explicit sexual images], and (2) a declaration that the regulation violated both the First Amendment and Penal Code § 2601(c).

R.J. Donovan Correctional Facility prisoner Stephen Snow objected to § 3006(c)(17)'s prohibition of possession of personal photographs, drawings, or magazines depicting frontal nudity, including female breasts. [Specified exceptions include *National Geographic* magazine and departmentally acquired or approved academic, medical/scientific or artistic guides for educational or library use.]

In its *de novo* review, the court analyzed the regulation under the four-part test of *Turner v. Safley*, 482 U.S. 78 (1987). Relying on *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999), the court found that the

regulation was neutral and had a rational connection with the legitimate penological interest of maintaining prison safety and security. Similarly, the court found Snow had not met his burden in demonstrating the *Turner* prongs of an alternative means of exercising the disputed right, proving prison resources would not be unduly taxed by the requested accommodation and showing that the prison's action was an exaggerated response to the perceived concerns.

Finally, Snow argued that the statute [§ 2601(c)], which bans only material that is "obscene," or might "tend to incite murder, arson, riot, violent racism or any other forms of violence," controlled over the regulation. The court found that the prevention of intimidation and sexual harassment of female guards fell squarely within the second § 2601(c) category. Accordingly, the court upheld the dismissal below. See: *Snow v. Woodford*, 128 Cal. App. 4th 383; 26 Cal. Rptr. 3d 862 (2005). ■

Second Circuit: Drug-Abuse Based Denial Of HCV Treatment Is Actionable

by John E. Dannenberg

The Second Circuit U.S. Court of Appeals permitted a prisoner's damages claim against the New York Department of Corrections (DOC) to proceed after he had been denied treatment for his Hepatitis-C (HCV) disease because he had tested positive for marijuana within the preceding two years.

Great Meadows Correctional Facility prisoner James Johnson, diagnosed with Stage III HCV disease, bridging fibrosis and cirrhosis, was denied treatment because of his single urinalysis screen showing evidence of marijuana. DOC's policy generally forbids the prescription of HCV medication to any prisoner with evidence of active substance abuse within the previous two years. All of his doctors repeatedly recommended he be placed on Rebetron "combination therapy" medication, even though they were aware of the drug-use exclusion policy. Because the doctors' orders were being overruled by DOC's wooden application of its bureaucratic policy, Johnson sued under 42 U.S.C. § 1983 to gain treatment as well as to seek damages for DOC's deliberate indifference to his medical needs. The United States District Court (S.D.N.Y.) granted DOC's motion for summary judgment, see: *Johnson v. Wright*, 2004 U.S. Dist. LEXIS 7543 (S.D.N.Y., May 3, 2004), and he appealed.

The Second Circuit reviewed the facts in the light most favorable to Johnson. The seriousness of his disease was determined in May 1997 following a liver biopsy. In February 1998, he began interferon therapy. By October 1998, his viral load had dropped from 1.5 million units to undetectable. But by January 1999, his viral load was back up to 500,000. In light of this record, doctors ordered he be placed on Rebetron therapy, a new combination drug regimen adding ribavirin to the interferon. In June 1999, Dr. Lester Wright, DOC Chief Medical Officer, denied Johnson ribavirin "due to drug use within the past year," based on Johnson's urinalysis screen in May 1998.

On August 17, 1999 attending physician Dr. Antonelle, aware of the application of the "policy," renewed his prescription, noting, "Do not feel that this [urine test results] should preclude ribavirin." He repeated his prescription on October 2, 1999, "in spite of [DOC's] drug policy." On June 15, 2000, the un-

treated Johnson filed a grievance, which was granted on July 10, 2000; treatment commenced in August 2000.

Johnson's pro se § 1983 complaint was filed in March 2001. On December 6, 2002, the district court dismissed some defendants but ordered a hearing to determine whether (1) it was reasonable to believe that their treatment with only interferon and not Rebetron therapy was medically justifiable and (2) whether Johnson had been injured by failing to give him Rebetron therapy. See: *Johnson v. Wright*, 234 F.Supp.2d 352 (S.D.N.Y. 2002). Finding no support for either question, the court granted defendants' motion for summary judgment.

On appeal, the Second Circuit examined both the objective and subjective components of "deliberate indifference" to Johnson's serious medical needs. The objective component requires findings of whether the deprivation is "sufficiently serious," defined as one that can produce death, degeneration or extreme pain. The subjective component goes to whether the official had a "sufficiently culpable state of mind," defined as knowing of, yet disregarding, an excessive risk to prisoner health or safety.

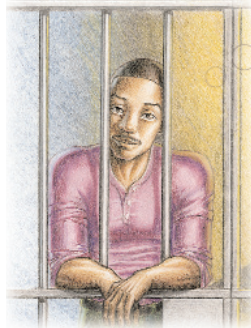
The appellate court overruled the district court's finding that the facts weighed in favor of the defendants. The correct legal inquiry was whether a jury could find deliberate indifference by application of the no-treatment-for-drug-abuse policy — that is, whether following the policy amounted to deliberate indifference. The court ruled that such a "question of fact ought to be submitted to a jury." Reviewing the record, the court opined that the evidence might well favor either side, that is, the officials believed their hands were tied by the policy, or, on the other hand, intentionally ignoring a medical doctor's orders proved the culpable

state of mind (citing *Gill v. Mooney*, 824 F.2d 192, 196 (2nd Cir. 1987) [prison officials are more than merely negligent if they deliberately defy the express instructions of a prisoner's doctors]). Moreover, the jury could consider the toxicity effects of illegal drugs on the effectiveness of the Rebetron therapy. The latter could arguably be applied to justify applying the policy in Johnson's particular case. Finally, the jury could find that reflexively relying upon medical soundness of the policy amounted to deliberate indifference. Stated another way, at what point may reason be abandoned by actions of prison authorities to constitutionally deny medical care?

Believing that Johnson's case presented issues of fact worthy of jury consideration, the court vacated the district court's ruling below and remanded for further proceedings. See: *Johnson v. Wright*, 412 F.3d 398 (2nd Cir. 2005).

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§ 1997e(e) Governs First Amendment Claims in Fifth Circuit

The Fifth Circuit Court of Appeals upheld a district court's dismissal of a *pro se* prisoner's §1983 action, "as frivolous and barred by the physical injury requirement of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e)." The court joined the Second, Third, Eighth, Tenth and D.C. Circuits in holding that § 1997e(e) applies to First Amendment claims.

Texas prisoner Michael Geiger sued prison officials alleging that they conspired to withhold sexually explicit magazines in retaliation for an earlier suit he filed. Geiger also alleged "that officials charged with handling prisoner grievances failed to remedy the situation after he filed" grievances.

The district court dismissed the action, "concluding that Geiger does not state a due process claim for deprivation of property and that his mail tampering claim, construed as a First Amendment claim, is barred by the physical injury requirement of § 1997e(e)." Additionally, the court dismissed Geiger's retaliation claim as frivolous for failure to exhaust administrative remedies.

On appeal, the Fifth Circuit concluded that while the district court did not err in dismissing Geiger's retaliation claim as frivolous for failure to exhaust, Geiger abandoned any argument regarding this claim.

The court then upheld the dismissal of Geiger's claim that defendants failed to "investigate his grievances and letters complaining about the conduct of mail room and security staff." Geiger has no "federally protected liberty interest in having these grievances resolved to his satisfaction." Hence, "any alleged due process violation arising from the alleged failure to investigate his grievances is indisputably meritless."

Finding that Geiger's deprivation of property claim was "murky at best," the court concluded that Geiger failed to "state a valid § 1983 action for deprivation of property." Therefore, the district court did not err in dismissing this claim as frivolous.

Noting that "the applicability of § 1997e(e) to prisoners' First Amendment claims [was] a question of first impression in the Fifth Circuit," the court sided with the Second, Third, Eighth, Tenth and D.C. Circuits in holding that § 1997e(e)'s physical injury requirement

does apply to First Amendment claims. See: *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir. 2002); *Allah v. Al-Hafez*, 226 F.3d 247, 250 (3rd Cir. 2000); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004); *Searles v. VanBebber*, 251 F.3d 869, 876 (10th Cir. 2001); and *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998). But see *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (§ 1997e(e) does not apply to First Amendment claims).

Accordingly, "the district court properly determined that [Geiger's] claim is barred by... § 1997e(e)" because he alleged only that "he suffered mental anguish,

emotional distress, psychological harm and insomnia as a result of this dispute with prison officials."

Lastly, the court concluded that "the district court lacks jurisdiction to entertain Geiger's claim for injunctive relief because Geiger has not shown or even alleged a likelihood of future harm. Geiger's allegations that defendants withheld his magazines on a single occasion does nothing to establish a real and immediate threat the defendants would violate his First Amendment rights in the future." Apparently he did not seek the return of the magazines. See: *Geiger v. Jowers*, 404 F.3d 371 (5th Cir. 2005). ■

PLRA Does Not Apply to Released Prisoner

In remanding for further proceedings, the Tenth Circuit Court of Appeals held that the administrative exhaustion requirement of the Prison Litigation Reform Act (PLRA) does not apply to persons not imprisoned when the suit is filed.

Before the Tenth Circuit was the appeal of former prisoner Lois Harold Norton, who brought claims that arose while imprisoned at the Love County Jail in Marietta, Oklahoma from September 2002 to March 2003. The district court dismissed all of Norton's claims when granting the defendants' motion for summary judgment.

Prior to addressing the merits of the case, the Tenth Circuit reviewed an issue of first impression after the district court required Norton to show cause why he had not pleaded exhaustion of administrative remedies as required by the PLRA. In response, Norton argued that because he was not incarcerated he did not have to exhaust administrative remedies. The appellate court agreed, siding with other circuits which have held a plaintiff who brings suit after release is not bound by the PLRA's exhaustion requirement.

The appeals court further held that the district court properly dismissed claims that were brought in a proposed pretrial order and not the amended complaint. In so holding, the Tenth Circuit said, "The responsibility for ensuring that one's claims are properly presented lies with the litigant, not the Court."

Turning to the merits of Norton's complaint, the appeals court found the

district court had erred in dismissing an excessive force claim against Sheriff Marion Joe Russell and Deputies Jeff Poteet and Raymond Ducharme.

Norton apparently became upset on December 23, 2002 about the amount of vitamins he would receive, causing him to begin kicking his cell door. This prompted other prisoners to begin kicking, yelling and screaming.

The defendants then entered Norton's cell with a backboard to restrain him. They contended the sixty-year-old Norton became combative, causing them to use force and pepper spray him.

Fellow prisoner Lynwood Moore had a bird's eye view of the incident. He said Norton was not combative and only resisted out of instinct. One of the guards held "the can [of pepper spray] about two inches from [Norton's] eyes" and "was waving the can around like he was spray-painting [Norton's] face. He sprayed ... 5 to 7 seconds." Norton said he was soaked with pepper spray.

The court held it was in dispute whether the use of the spray was harmful enough to violate Norton's Eighth Amendment rights, which turned in part on how long Norton was sprayed and whether he was adequately irrigated afterwards or left to suffer.

Accordingly, the appellate court remanded Norton's Eighth Amendment claim and his state law assault and battery claim, but affirmed in all other respects. See: *Norton v. City of Marietta, Oklahoma*, 432 F.3d 1145 (10th Cir. 2005). ■

Qualified Immunity Denied in Illinois Jail Rape Case

The Seventh Circuit Court of Appeals affirmed the denial of qualified immunity for failing to protect a pretrial detainee from being raped by his cellmate.

In 1999, David Velez was confined in the Milwaukee County, Wisconsin Jail. "In late August, Velez got a cellmate, Roberto Zayas, who was being held on charges of sexual assault and battery by a prisoner Soon after moving in, Zayas began acting 'funny'... [H]e talked to himself, paced around the cell, commented on Velez's appearance, and organized Velez's clothing. This made Velez uncomfortable and he requested a transfer. None came."

On September 5, 1999, guards Allen Bultman, Chad Haldemann and Michael Johnson worked Velez's unit. Johnson was in the control center where guards are "to monitor emergency calls from inmates confined to their cells."

While Bultman and Haldeman made their rounds at approximately 10:30 p.m., "Zayas placed a razor blade to Velez's neck. Velez rather subtly tried to get the guard's attention – he didn't loudly

scream for help because he was afraid of getting his neck slashed – but his effort was unsuccessful." He then "pressed the emergency call button ... once again, Velez was careful with his words, telling Johnson that he was 'not getting along' with Zayas. Johnson asked Velez if he had requested a transfer. Velez replied 'yes' but said that there was a conflict. Johnson took no further action ... [H]e didn't go to check out the situation or ask the other guards to do so."

"Zayas then anally raped Velez, bit his back several times, and cut his neck. Afterward, Velez again hit the emergency call button and solicited other inmates to do the same ... when the guards arrived at the cell, they discovered Velez crying hysterically. Doctors later confirmed that Velez was raped, bitten and cut."

Velez brought suit in federal court, alleging Johnson violated his constitutional rights by failing to adequately respond when Velez pushed the emergency call button, seeking protection. Johnson moved for summary judgment, asserting a qualified immunity defense, but the district court denied the motion and Johnson

filed an interlocutory appeal.

The Seventh Circuit upheld the denial of qualified immunity, finding that the constitutional right to protection from other prisoners was clearly established and, based upon the facts alleged by Velez, "a jury could find that Johnson acted with deliberate indifference."

The appellate court rejected Johnson's argument "that he could not have violated Velez's constitutional rights because he had no specific awareness that Zayas had a razor to Velez's throat or that he was planning a rape." Rather, the appeals court concluded that "Johnson did not have to know the specifics of the danger to be culpable. Indeed, accepting Johnson's position we essentially reward guards who put their heads in the sand by making them immune from suit – the less a guard knows the better."

The Seventh Circuit also rejected Johnson's request that it address the merits of Velez's claim, noting that it had no jurisdiction on interlocutory appeal to address anything but qualified immunity. See: *Velez v. Johnson*, 395 F.3d 732 (7th Cir. 2005).



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Seventh Circuit Reverses Indemnification for Guard's Abuse; Jury Awards \$400,000 in Damages Against Guard

The Seventh Circuit Court of Appeals reversed a lower court's order granting indemnification against Macon County, Illinois. The court found that a jail guard was not acting within the scope of his employment when he orchestrated an attack on a pretrial detainee.

John Copeland was arrested on charges of attempted first-degree murder and aggravated battery of a child in connection with injuring his infant son by shaking him. Darren Gregory was a Macon County Jail guard at the time.

"Before Copeland arrived at the jail, Gregory informed" a prisoner of Copeland's charges and that he was being "assigned to Gregory's area." The prisoner then "asked... if Gregory wanted him to stomp or physically assault Copeland. Gregory responded... 'that's the plan.'" The prisoner told Gregory he would re-

cruit other prisoners "to help carry out the attack on Copeland." They then "agreed that Gregory would open the doors to the cells and turn his back to allow the [prisoners] to attack Copeland."

As planned, one evening Gregory opened the cell doors and "intentionally turned his back, allowing the [prisoners] to attack and beat Copeland, until [he] became unresponsive. As a result of the beating, Copeland suffered severe injuries, including a fractured eye socket and numerous cuts and abrasions."

Gregory was charged for his role in the attack and on "February 23, 2001, [he] pled guilty to... official misconduct." Copeland then sued Gregory alleging that he "violated Copeland's civil rights when he initiated and organized the attack... On January 21, 2003, a jury returned a verdict for Copeland and awarded [him] \$400,000 in damages. Copeland then brought suit

against Macon County and the... Sheriff... for indemnification under... the Illinois Local Government and Governmental Employees Tort Immunity Act."

The district court granted Copeland summary judgment, finding that Gregory was acting within the scope of his employment when he initiated and facilitated the attack on Copeland. This finding was based upon the conclusion that he was employed by "the citizens of Macon County," not the Jail, and he "acted with the intent to prevent and punish child abuse, which is a purpose...[he] shared with" this employer.

The Seventh Circuit reversed, finding that "Gregory's conduct... was not the type of conduct that he was authorized to perform nor was his conduct actuated by a purpose to serve his employer." See: *Copeland v. County of Macon, Illinois*, 403 F.3d 929 (7th Cir. 2005). ■

Alabama Supreme Court Sidesteps Merits of Suit Challenging Contracted Prison Labor

The Alabama Supreme Court denied class certification and sidestepped ruling on the merits of a prisoner's claim that prison officials illegally contracted out his labor to a private company.

Before the Court was the appeal of prisoner Darrell Latham, who sought a declaratory judgment that the Alabama Department of Corrections (DOC) and the Alabama Correctional Industries (ACI) do not have authority to contract prisoner labor to a private company. Latham also sought back pay.

In 2003, ACI and the DOC entered into a contract with Wilson Sporting Goods Co. to have prisoners in DOC's custody inflate and package various sports balls and package other sports equipment for Wilson. Under the contract, Wilson would ship sports equipment, deflated sports balls and the necessary packaging to DOC's Decatur Community Correctional Facility (DCCF).

Prisoners would inflate the balls and package them. They would also occasionally re-label and package baseball bats and other sports equipment. The packaged equipment would then be loaded onto pallets to be shipped back to Wilson. While ACI received a per item rate of pay, prisoners were only paid up to \$.25

per hour. All prisoners, upon arrival at DCCF, were assigned to ACI for approximately 90 days.

Dissatisfied with his status as a slave for the prison industrial complex, Latham filed suit and sought class action status as the representative. The Montgomery County Circuit Court granted summary judgment, holding Latham was not a proper class representative as his claims were due to be dismissed.

The Alabama Supreme Court held that "the State is immune from any lawsuit that would directly affect a contract or property right of the State or result in the plaintiff's recovery of money from the State." The Court found a claim for back pay was a claim for compensatory damages that is barred by the doctrine of sovereign immunity. As for damages, the Court held, Latham's claim was properly dismissed.

The Court then turned to the declaratory judgment claim, which is not barred by sovereign immunity. The circuit court had held that because Latham was no longer a prisoner at DCCF, he could not represent the class. Latham did not distinguish his individual and class claims in his pleading or on appeal.

Rather than look into the merits of his claims, appointing counsel, or allow Latham,

who acted pro se, to amend his pleadings to have those merits heard, the Supreme Court went procedural. The Court sidestepped the merits by citing Rule 28(a)(10), Ala. R.App.P., which requires an appellant's brief contain "The contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefore, with citations to the cases, statutes, or other presented insufficient argument or citations to support his contention he is a proper class representative." the Supreme Court affirmed the circuit court's dismissal.

It should be noted that in a concurring opinion, Justice See pointed out the main opinion is not to be read as an imprimatur on DOC and ACI's practice of contracting prison labor for the benefit of private business, which would be violative of various statutes cited by Justice See. See: *Latham v. Department of Corrections*, 2005 WL 2811794 (Ala., 2005).

It should be noted that the Ashurst-Summers Act, 18 USC §§ 1761-62, prohibits the transportation in interstate commerce of prisoner made goods unless the prisoners are paid the prevailing wage or the minimum wage, whichever is higher. However, that is a criminal statute and the last prosecution for its violation was in 1929. ■

SJ Reversed on Delaware Detainee Triple-Celling Claim; Due Process, Not Eighth Amendment Controls

The Third Circuit Court of Appeals held that a Delaware District Court improperly analyzed a conditions of confinement claim brought by pre-trial detainees under the Eighth Amendment, rather than the Due Process Clause of the Fourteenth Amendment. The appeals court then reversed the grant of summary judgment to prison officials and remanded for proper analysis of the claim under the standard set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979).

The Multi-Purpose Criminal Justice Facility, commonly known as "Gander Hill," is located in Wilmington, Delaware. It receives approximately 18,000 admissions per year and houses both pre-trial detainees and convicted prisoners, separated into the West and East Wings, respectively.

In 1999, prison officials began "the practice of housing three detainees in cells intended and designed for one person ('triple-celling')." This "requires someone to sleep on a mattress that must be placed on the cell floor adjacent to a toilet." The cells this occurs in "range in size from 69 to 76 square feet, and the net unencumbered space in the cell (gross footage of 69 to 76 square feet less space required for a bed, mattress, desk and toilet) is less than 50 square feet, or 16 square feet per occupant of each tripled cell."

In 2000, a number of pre-trial detainees brought suit in federal court challenging numerous conditions of their confinement as violating the Fourteenth Amendment's Due Process Clause. They also alleged violations of the Americans with Disabilities Act (ADA) and sought declaratory and injunctive relief, damages, attorney's fees and costs. However, in the district court the plaintiffs limited their claim to being required to sleep on mattresses on the floor.

Prison officials conceded that triple-celling was used at Gander Hill, and that such a practice forced some detainees to sleep on a floor or mattress. This occurred despite the fact that a similar suit was filed in 1980 and resulted in a 1988 Settlement Agreement in which "prison officials agree to stop 'double bunking' and return to placing a single inmate in cells at state prisons. *Dickerson v. Castle*, Civ. Act. No. 10256, Delaware Court of Chancery." Officials denied, however, "that the mattresses are adjacent to toilets." Officials

claimed that there was ample room to arrange a mattress so that the toilet was at the prisoner's foot and several feet away. Thus, claimed the defendants, there was no reason for anyone to worry about unsanitary and unhealthy conditions as a result of sleeping on the floor.

The district court granted summary judgment to the prison officials on the due process and ADA claims. It then denied plaintiff's motion for class certification as moot.

The Third Circuit began with an extensive analysis of the legal principles that apply to conditions of confinement claims for pretrial detainees. It concluded that "the district court ... did not err in concluding that it was not bound by *Union County Jail Inmates v. DiBuono*, 713 F.3d 984 (3rd Cir. 1983), because that decision's suggestion that "the practice of placing a mattress on the floor for the second occupant of a cell designed for but one" prisoner was unconstitutional was merely dictum.

The appellate court found, however, that "the district court did not ... proceed to conduct a proper analysis of ... plaintiffs' due process claim given their

status as pre-trial detainees." Specifically, applying *Bell v. Wolfish*, the appeals court found that the district court's analysis of the claim under the Eighth Amendment was fatally flawed.

While the prison officials asserted a qualified immunity defense, the appeals court noted "[t]he district court's failure to explain why it granted summary judgment to prison officials on the ADA claim is contrary to the requirements set forth in *Valdino v. A. Valey Engineers*, 903 F.2d 253, 259 (3rd Cir. 1990)." Therefore, the Third Circuit remanded "the ADA claim ... for compliance with the directive of *Valdino*."

Finally, the appellate court assumed that the motion for class certification was denied as moot because the district court first dismissed the underlying conditions of confinement claim. Thus, since it reversed the grant of summary judgment on that claim, the appeals court "also reversed the district court's denial of the class certification motion," holding that the district court may "address that motion as it deems appropriate if the motion is renewed on remand." See: *Hubbard v. Taylor*, 399 F.3d 150 (3rd Cir. 2005). ■

Washington Community Placement Condition Barring "Pornography" Unconstitutionally Vague

The Washington Court of Appeals held that a condition of community placement prohibiting possession or perusal of "pornography" without prior probation officer approval was unconstitutional.

Richard Sansone was sentenced to prison and community placement for raping and assaulting a girlfriend. One condition of his community placement was that he not possess or peruse pornography without approval of his sexual deviancy therapist or Community Correction Officer (CCO). "Pornographic materials [were] to be defined by the therapist" or CCO.

On August 26, 2003 Sansone met with his CCO. During that meeting his CCO saw and seized from Sansone photos depicting "clothed women in low-cut blouses, a women clothed only from the waist down but covering her breasts with her arms, and a woman covered in somewhat sheer material. She 'took Sansone into custody for possessing pornographic

materials in violation of his community placement condition."

On October 20, 2003 the trial court found that Sansone had willfully violated his community placement condition and sentenced him to 60 days confinement. The state subsequently conceded, however, that the pornography prohibition was improperly applied to Sansone's conduct, and the order modifying his judgment and sentence should be reversed.

Despite this concession, the appellate court addressed Sansone's vagueness challenge, concluding "that the term pornography is unconstitutionally vague in this context." This conclusion was based, in part, upon the persuasive reasoning of *United States v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002) and *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001), which found similar "pornography" bans to be unconstitutionally vague. See: *Washington v. Sansone*, 127 Wash.App. 630, 111 P.3d 1251 (Wash.App. Div. 1, 2005). ■

News in Brief:

Alabama: On May 3, 2006, Peter Makres, 52, a prisoner was strangled and killed at the Limestone Correctional Facility inside an isolation cell. Police suspect Joseph Burns, 22, the only other person in the cell with Makres, may have committed the crime. Makres was serving a 20 year sentence for possessing child pornography. Burns is serving a 20 year sentence for theft, rape and sodomy.

Arizona: On May 4, 2006, Christopher Breiland, 36, escaped from the Correctional Services Corporation run Florence West prison, by scaling a razor wire fence. He was captured on May 17 after a chase by police when they attempted to pull him over. Police stopped the chase after Breiland reached high speeds but he nonetheless ran into three other vehicles, injuring four motorists and himself. He had been due for release on December 30, 2006. He faces additional charges from the escape and the chase. CSC will be charged for the expense of the search and arrest.

California: In August, 2005, James Davis, 51, an attorney from Rancho Cucamonga, was sentenced to 81 months in a federal prison for impersonating a Homeland Security employee so he could buy a discounted airline ticket at John Wayne airport in Orange County in 2002. While being investigated for that he was also eventually charged with tax evasion and witness tampering.

California: On May 2, 2006, Steve Felter, 35, a former guard at the Correctional Training Facility in Soledad was arrested on seven charges of fraud for submitting false worker's compensation claims. Felter claimed he was injured by a prisoner while breaking up a fight. As a result he was allegedly unable to work as a guard and received training, at state expense to work as a real estate agent, while working at a Ford dealership and receiving disability and workers compensation payment. Fraud investigators video taped Felter performing tasks he claimed he was physically unable to do. When told to return to his job as a prison guard on February 1, 2006, he resigned. The state alleges he received over \$67,000 in fraudulent benefits.

Colorado: Larry Schwarz is best known as a former conservative Republican state legislator and the chairman of the Colorado parole board from 1997 until his ouster in 2001. In 2001 he was fired from that job by governor Owens after

police raided his home looking for child pornography. Schwarz was never charged but remained unemployed for 15 months until he was offered a job as a manager at Platinum X Productions, a producer and distributor of sexually explicit films and DVDs. His adopted daughter Stephany, is the star and co-owner of the company who performs under the stage name Jewel DeNyle. His wife Debbie is sales director.

Colorado: On May 13, 2006, Elizabeth Medina, 34, a teacher at the Federal Correctional Institution in Florence, was sentenced to two months home detention after pleading guilty to having sex with a prisoner over a four month period last summer.

Florida: On May 25, 2006, Robert Stenlunk, 32, a guard at the Charlotte county jail engaged in sex with a female prisoner at the jail. The prisoner told police the sex was consensual but Florida, like all other states, criminalizes sex acts between prisoners and staff. Stenlunk was arrested and charged with sexual misconduct between a detention employee and a prisoner.

Florida: Prisoners at the Marion county jail sew all the logos, stars, patches and name tags onto the uniforms of jail guards and sheriffs deputies in the county. The sheriff claims this saves the county \$8,000 a year, news reports did not state how much, if anything, prisoners are paid for their labor.

Georgia: In early May, 2006, Christopher Kubiak, 21, pleaded guilty to methamphetamine possession, DUI and vehicular homicide for striking and killing a state prisoner picking up trash alongside U.S. Highway 129 in Jackson County. Kubiak admitted being high of methamphetamine when he struck and killed the prisoner. Jackson county superior court judge David Motes sentenced Kubiak to five years in prison and ten years probation.

Germany: On May 25, 2006, the federal government passed a law making it legal for the government to jam mobile phones during "major events" and in prisons. Telecommunications industry companies opposed the law stating the jammers will interfere with legitimate communications nearby.

Guatemala: On May 19, 2006, prisoners at the Mazatenango prison fought with gang member prisoners leaving five prisoners dead and 13 injured, mostly from gun shot wounds

Illinois: On May 23, 2006, Clarence Howard, 24, a guard at the St. Clair county jail pleaded guilty to two misdemeanor charges of smuggling drugs into the jail for prisoners who bribed him to do so. Howard was sentenced to two years probation and a \$1,500 fine.

Illinois: On May 23, 2006, the city of Chicago announced it would contract with Collectors Training Institute to collect unpaid traffic fines, water bills and similar debts owed to the city. CTI is a non profit agency which employs ex prisoners whom it trains. Mayor Richard Daley has earmarked over \$8 million for ex prisoner retraining and job programs.

Michigan: On May 25, 2006, Walter Born, 34, a prisoner in the Bay County jail died after overdosing on heroin smuggled into the jail by another prisoner. One unidentified prisoner was in a coma and four others became violently ill after ingesting the heroin.

Michigan: On October 3, 2005, David Green, 21, a prisoner at the Camp Cusino prison in Munising was stabbed and killed by another prisoner at the minimum security camp. Michael Melton, 43, and Andy Anderson, 20, were charged with murder in Green's death. Prosecutor's claim they killed Green after a dispute between Green and Anderson which Anderson lost earlier in the day. The men were scheduled to go on trial in early June, 2006.

New Hampshire: On May 17, 2006, Joseph Panarello, 54, the superintendent of the Belknap county jail, was arraigned on misdemeanor marijuana possession charges and felony criminal threatening with a deadly weapon. The underlying incident began May 16 when Panarello did not show up for work and his deputy, Lt. R.A. Grenier, asked police to check on him. Hillsborough police officer Amy Collins went to Panarello's house and entered when no one answered the open door. As she was leaving Panarello came downstairs and pointed a pistol at her. Collins fled and called reinforcements. After a four hour standoff with a local SWAT team, fire department, three other police departments and the state Fish and Game Department, Panarello surrendered without incident. Panarello has been placed on leave from his \$72,000 a year job.

New York: On May 16, 2006, Charles Peryea, 50, a guard at the Bare Hill Correctional Facility in Malone was charged with second degree murder, criminally

negligent homicide and second degree manslaughter for charges stemming from his drunken driving accident that killed an 18 year old boy and seriously injured another teenager. Peryea had a blood alcohol level of .12.

New York: On May 3, 2006, state Department of Corrections commissioner Glenn Goord was stopped by Lake Placid police for chatting on his cell phone. Goord acknowledged having had "a couple glasses of wine at dinner" but denied being drunk. He was sent on his way after showing police his license, registration and badge, as a law enforcement officer Goord is allowed to use a cell phone without a hands free device.

Ohio: On August 25, 2005, Jeffrey Lisath, 45, deputy warden at the Ross Correctional Institution in Chillicothe was suspended for five days after he placed a video tape on the prison's closed circuit TV channel of an HBO boxing match and an unspecified "sexually explicit" movie that aired on HBO afterward. The showing violated HBO's copyright and the Department of Corrections and Rehabilitation sent HBO a letter of apology. Lisath was officially suspended for not submitting the movie for review by the prison's movie screening committee.

Ohio: On May 17, 2006, Marion Smith, 30, a prisoner at the Mansfield Correctional Institution attempted to escape during a visit to the Ohio State University Medical Center by stabbing guard Gary Myers during the trip and attempting to flee. Myers gave chase and shot Smith in the head. Myers suffered minor injuries while Smith is expected to survive. Leon Hess, another guard escorting Smith, helped in the recapture. Prison officials are investigating how Smith took the knife with him undetected.

Ohio: On May 25, 2006, Lt. Shaun Wells and Sgt. Steven French were fired from their jobs at the Cincinnati jail for viewing pornographic internet sites while on the job at the jail.

Oklahoma: On May 18, 2006, Michael Edelin, 36, and Justin Reynolds, 24, escaped from the Bryan County Auxiliary jail. Reynolds had escaped from the main jail with two other prisoners a few months earlier and was recaptured the same day. This was the seventh escape, involving a total of 12 prisoners, from the same jail in the past 15 months.

Philippines: On May 16, 2006, police arrested two Navotas jail guards as suspects in the shooting death of journalist Alberto

Orsolino. Both guards denied guilt but refused to take paraffin tests to determine if they had recently fired guns.

Texas: On May 22, 2006, David Pace, 35, a prisoner at the state prison in Cuero attempted to escape from a field work crew by running away. Guards shot at him and found Pace two hours later with gunshot wounds to his thigh and chest, he is expected to survive. On January 18, 2006, Pace began serving a 40 year sentence for DUI, unauthorized use of a motor vehicle and aggravated assault.

Texas: On May 24, 2006, Mario Lopez, 47, a nurse employed by Prison Health Services at the El Paso county jail, was arrested on charges of improper sexual activity with a prisoner.

West Virginia: On May 19, 2006, Frank Dunn, 65, a former guard at the West Virginia State Penitentiary and a McMechen police chief, was sentenced to 15 to 40 years after being convicted of four counts of incest for having sex with two of his 16 year old step daughters. Dunn's attorney, Keith Hart, claims Dunn is concerned about safety in prison due to his law enforcement background and being convicted of raping his children. Hart used that to unsuccessfully argue for home

detention and treatment for Dunn.

Wisconsin: On May 22, 2006, police arrested Mary Gilmore, 24, a guard at the Columbia Correctional Institution and charged her with theft, possession of a controlled substance and possession of same in a prison. Gilmore is accused of stealing methadone painkillers from prisoners with serious illnesses. The thefts came to light after prisoners complained their prescriptions, which were kept in a secure lock box in the prisoner's housing unit, were running out faster than they should have. ■

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PLRA's 150% Attorney Fee Cap Applied in Nominal Damages, Non Prison Case Against Police

The Tenth Circuit Court of Appeals, sitting en banc, has reversed a panel ruling holding that the Prison Litigation Reform Act (PLRA) mandates attorney fees be limited to 150% of the damage award in all prisoner-filed civil rights actions.

Before the court was the appeal of Ralph Robbins, who filed a civil rights action against police officer Larry Chronister based upon an incident prior to Robbins' imprisonment. Robbins' suit was filed in federal court in Kansas while he was imprisoned at the Federal Correctional Institution in Greenville, Illinois.

Chronister recognized Robbins in December 1995 while returning home from work in his truck. Robbins was sitting in his car at a gas station in Kansas City, Kansas. Knowing Robbins had five outstanding warrants for his arrest, Chronister parked his truck behind Robbins' car. He approached Robbins with a baton in his hand, identifying himself and ordering Robbins out of the vehicle.

When Robbins began backing the car towards Chronister's truck, Chronister shattered the car window and tried to pull Robbins from the car. Robbins unsuccessfully accelerated on the icy parking lot, fishtailed, and a few blocks away Robbins crashed and was taken to a hospital with three gunshot wounds.

After he pled guilty to attempted aggravated assault on a law enforcement officer, Robbins sought 42 U.S.C. § 1983 relief, alleging Chronister had used excessive force in violation of the Fourth Amendment. The district court appointed counsel. After a bench trial the district court ruled Chronister's use of deadly force was reasonable, but breaking Robbins' car window with the baton was not, and awarded Robbins \$1.00 in nominal damages.

The district court held the PLRA's attorney fee cap would produce an absurd result in the case and awarded Robbins \$9,680.00 in fees and \$915.16 in expenses. See: *Robbins v. Chronister*, 2002 U.S. Dist. LEXIS 3835. Chronister appealed. A divided panel of the Tenth Circuit affirmed. See: *Robbins v. Chronister*, 402 F.3d 1047 (10th Cir. 2005).

On en banc rehearing, the Tenth Circuit reversed. The appellate court said it was uncontested that the 150% fee cap applies if (1) the plaintiff was a prisoner at the time the action was brought and (2) the plaintiff was awarded attorney fees under 42 U.S.C. § 1988. The appeals court found both provisions applied in Robbins' case. Robbins argued the result was absurd.

The appellate court said it could only apply the absurd result standard if the result would be "so bizarre the Congress could not have intended it." The modern absurdity doctrine has two features: 1) courts should be particularly resistant to

claims of absurdity when rejection of plain language cannot be justified by a recognized canon of construction or interpretive tool, and 2) a court's "commonsense" view of public policy must not override the rough and tumble of the legislative process.

The appeals court held the PLRA fee cap provision was clear in its language. Moreover, the Tenth Circuit said it is worth remembering the American Rule is that the losing party in litigation is not required to reimburse the prevailing party's attorney's fee. What is significant is that this ruling applies the attorney fee cap to a non prison or jail case brought by someone who happened to be imprisoned when they filed suit. "We see nothing absurd about reducing that incentive for all civil-rights claims filed by prisoners, not just those challenging conditions in prison." Accordingly, the appellate court reversed, ordering attorney fees of \$1.50. See: *Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (en banc). ■

Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 915 15th St. N.W., 7th Floor, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. FAMM-gram, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rul

ings, administrative developments and news about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 881, Seattle, WA 97423.

November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.

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Writing to Win: The Legal Writer, Steven D. Stark. Broadway Books, 283 pages. \$15.95. Explains the writing of effective complaints, responses, briefs, motions and other legal papers. 1035

The Celling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 Pages. \$19.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

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Dedicated to Protecting Human Rights

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CCA Florida Jail Operations: An Experiment in Mismanagement

by David M. Reutter

After being in business for twenty-three years, one would think that Corrections Corporation of America (CCA) would have refined the art of running prisons and jails. Yet an examination of CCA's three jails in Florida reveals a pattern of gross mismanagement and substandard or indifferent care of prisoners on every level, which has resulted in injuries and deaths. Risks to the community abound in frequent escapes. Repeated suicides, beatings, rapes and misconduct by CCA employees have occurred.

CCA is the United States' largest operator or privatized prisons and jails. The Nashville-based company was founded in 1983 by Doctor Crants and

Thomas Beasley, former chair of the Tennessee Republican party. CCA runs three state prisons and three county jails in Florida. The jails, which are the focus of this article, are located in Bay, Citrus and Hernando Counties. These counties sought privatization of their jails after buying into CCA's sales pitch that it could save taxpayers money.

Critics, however, claim that the savings come from hiring unqualified, untrained personnel at low wages, and by scrimping on services and security measures that the contracts require and prisoners have a constitutional right to receive. As the old adage says, "You get what you pay for."

as kidney stones and had her wait in a chair. Minutes later, Bozeman gave birth to her baby, Crystal. "I had to catch my own baby," said Bozeman. "It fell out into her pants," added fellow prisoner Charla Meadows.

Nurse Melissa Blalock removed the umbilical cord from around Crystal's neck, ordered guards to call 911 and helped cover the baby in blankets. The prematurely-born Crystal was flown to a Gainesville hospital. Bozeman paid her fine and was released the next day. For their substandard responses to Bozeman's early labor pains and childbirth, Blalock received a written reprimand while Elliott was fired.

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Catching Her Own Baby

It seems that CCA believes that because prisoners don't pay for medical care, they are entitled to none. No health care is exactly what Jennifer Bozeman, 26, received when she went into labor on November 7, 2005 at the Bay County Jail Annex.

Bozeman, who had been imprisoned two months earlier for failing to pay a \$500 child support fine, began experiencing labor pains at about 2 a.m. A guard advised her that a CCA nurse, Joan Elliott, said she had to fill out a "sick call" request. When Elliott received that sick call request two hours later she stated, "it could wait."

While Elliott tended to other medical matters, sympathetic prisoners comforted Bozeman. It was not until 6 a.m. that Bozeman was finally taken to the infirmary. Upon arrival, medical personnel diagnosed her condition

Other Cases of Questionable Medical Care

For Justin Sturgis, 20, the lack of medical care at the Bay County jail cost him his life. Sturgis was admitted to the jail for driving under the influence on February 15, 2002, at 2:30 a.m. He was placed in a holding cell. A half hour later Sturgis felt distressed, and sought medical assistance for a possible overdose. He told a guard he had swallowed ten Ecstasy pills to avoid a drug charge.

After examining Sturgis, CCA nurse William Schwartz, Jr. called Bay Medical Center's emergency room. Dr. George Tracy advised Schwartz to take Sturgis' vital signs and report back with that information. Schwartz never furnished Dr. Tracy with the requested information. Instead, Schwartz ordered Sturgis to be monitored.

During that "monitoring" period guards did little more than watch Sturgis'

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CCA in Florida (cont.)

condition deteriorate. Sturgis appeared to grab at things that were not there, acted as though he was smoking a cigarette he did not have, said he was cooking something, and spoke to a guard by identifying him as someone Sturgis had worked with. These abnormal behaviors were not reported by guards to a doctor or nurse, nor were they documented in any observation record, but came to light during a subsequent grand jury investigation.

Rather than ensure that Sturgis received proper medical care for what any rational person could realize was a drug-induced hallucination episode, guards treated Sturgis as a "freak show," parading other prisoners by Sturgis' cell.

A 24-year-old man being booked into the jail witnessed Sturgis going into convulsions. "[The guard] was telling me I had to see this messed-up kid here tonight. He said he ate like 10 Ecstasy pills at one time," said the man, who requested that *The News Herald* maintain his anonymity. "I told [the guard] if he ate that many, you need to take him to the hospital and he was like, 'oh he's just a drug addict.' People were just looking in there like he was a freak show. The only time people checked on him were when they were getting checked into the jail. They were showing him off."

When it was finally decided to transport Sturgis to a hospital, it was too late. He was pronounced dead shortly after his arrival at 7:00 a.m. The grand jury said it was uncertain if Sturgis could have survived even with proper care, but his chances would have been far greater if he had received treatment at the onset of the adverse symptoms rather than four hours later.

CCA officials said Sturgis caused his own death by swallowing the drugs to avoid prosecution and not telling Schwartz what he had done. "In effect, CCA has issued a death sentence to any kid who takes drugs. Even someone who has subjected himself to an overdose of drugs must be cared for. There's no excuse in denying someone reasonable medical care," said the Sturgis family's attorney, George Pittman. Ultimately CCA agreed to that premise, when it paid Sturgis' estate \$500,000.

Pittman said denial of medical care at the Bay County facility was not unusual. "It's more than a weekly event that I'm

receiving letters and telephone calls from people who have been deprived of medication that's been prescribed to them," he said. "They've been totally ignored just as Justin Sturgis was."

In another case where a prisoner's medical condition was ignored, John T. Wells, 43, who was being held at the Hernando County jail on minor charges, died on January 27, 2006 from a brain aneurism after suffering terrible headaches. "He was up in the cell complaining all night long that he needed medical attention. The corrections officer told him, 'You're pulling my leg,'" said Steven Masciarelli, another prisoner at the jail. "The nurse took him up and said there was nothing wrong with him.... Finally they brought him to the hospital." Wells suffered a brain hemorrhage while at Spring Hill Regional Hospital, which eventually caused his death. The state attorney found the jail wasn't negligent in Wells' medical treatment, but Wells' sister, Nancy Shave, disagrees. "In my opinion, they are responsible," said Shave. "Somebody does not come to jail and in 12 days get so sick that they become brain dead."

Suicidal Solitude

If you intend to commit suicide, being ignored is exactly what you want. And CCA jails are the perfect place to be if you have suicidal tendencies, even if they're known to guards. From November 2005 to January 2006, three suicidal prisoners took advantage of guards' failure to make regular checks at the Hernando County jail. Each took place in the late hours of the night or early in the morning.

First there was Daniel Ray Warren, 39, who hanged himself on November 2, 2005 by tying bed sheets to his cell bars. Warren previously had been assaulted by other jail prisoners, who tormented and punched him and threatened to pour shampoo down his throat. There were also allegations that he had been gang-raped, but medical reports indicated that was not the case. "You tell me what is going on in that jail. Is it so bad that these guys are taking their lives because they can't take the abuse?" said Sue Coleman, Warren's mother.

Two months later, on January 5, 2006, Geoffrey M. Conley, 21, used his sheets to hang himself from his bed frame. Conley's case caused a media storm because he had a history of mental instability and had been on suicide watch during most

CCA in Florida (cont.)

of his time at the jail. CCA guards falsely documented in logbooks that they had checked on Conley every 30 minutes. The uproar came after an investigation uncovered video tapes that showed no one had checked on him for more than two hours before he was found dead.

Despite the two suicides, CCA apparently took no corrective action. Truoc Tran, 33, a federal prisoner being held at the jail, was another victim of CCA's indifferent attitude when he hanged himself on January 27, 2006. Video footage shows Tran was checked on at 4:35 a.m. and was not looked in on again until almost two hours later, when he was found dead at 6:33 a.m. (Ironically, Tran killed himself the same week that CCA corporate officials met with members of the Hernando County Commission to assure them the company would make improvements at the jail).

The failure of guards to make timely checks on prisoners was raised as far back as 2002. Laren Sims, 36, weaved bed sheets into a rope and hanged herself in March 2002. When a suicide note from Sims disclosed that staff did not check on her every 15 minutes, CCA cried foul. "There were checks of her about every 15 minutes and each check was recorded in a log book according to policies and procedures in place," said CCA spokesman Steve Owens. One cannot help but wonder if video cameras would have revealed that the company's guards falsified those logbooks as was the case in Conley's self-induced death.

Several suicides occurred at CCA's Bay County jail, too. On April 5, 2005, James T. Sly, Jr., 35, used a bedsheet to hang himself from a showerhead. Sly had been arrested after trying to kill himself in January and had been seen by a mental health counselor five times at the jail, but was not on suicide watch at the time of his

death. According to a May 2005 report by the jail's contract monitor, a CCA guard identified only as "J. Harris" had included Sly in the midnight count without actually seeing him, assuming that he was in the shower because he heard the water running. And the previous year, William Henry Cantor, 22, hanged himself at the Bay County facility on Sept. 15, 2004; he was alone in a cell isolated from other prisoners at the time.

Endangering the Public

From a community standpoint, the biggest problem with CCA is its failure to keep prisoners imprisoned. Shortly after it assumed management over the Hernando County jail, four prisoners escaped from CCA's custody in January 1990. Those escapes resulted from similar lapses that contributed to the recent suicides: failure to check prisoners who were known escape risks every 15 minutes, and falsification of records to cover it up. A few months later another prisoner escaped by removing a stainless steel plate in a shower stall.

Jail prisoner John De Vane was allowed to walk away in July 2001 after he replaced his identification bracelet with a lower-security bracelet he found in the trash. De Vane then walked out the facility to empty the trash, and kept on walking. On November 6, 2002, Nelson Georges cut a hole in the Hernando County jail's ceiling and found his way to freedom.

Matthew Draper walked through an unlocked door at the jail on February 10, 2006, climbed a stack of chairs to get to the roof, and then jumped down and ran away. Tiffany Wilson, a CCA guard who had been employed for less than five months, was reprimanded for leaving the door unsecured. "The nightmare continues," said County Commissioner Jeff Stabins. A month later, on March 9, after Draper had been caught and returned to the jail, he tried to kill himself by cutting his arm with a blade removed from a safety razor.

CCA's Bay County jail has had its share of escapes, too. Prisoner Tracy Collier escaped in June 2001 after guards left him unattended at a courthouse law library. The most recent escape at Bay County occurred on Feb. 18, 2005 when 18-year-old Jeremy D. Aultman manipulated the locks on a CCA transport van and fled. According to prisoner Ryan Meadows, the van's only guard, the driver,

"jumped out of the van, leaving his door and our door wide open – keys still in the van." A dozen other prisoners were in the vehicle but none tried to flee. When he returned, the CCA guard then unsuccessfully tried to follow Aultman in the van at high speed through a residential area. "This is an endangerment of the public and I can't tolerate that," said Hernando Commissioner Chris Kingley. In contrast, the Florida Department of Corrections (DOC) has had only three escapes from secure prisons since July 2003.

Taking Hostages and Other Violent Incidents

CCA not only has problems keeping prisoners within its privately-run facilities; it also has a problem keeping them in their cells. Bay County guard James C. Hall was supervising the jail's third floor on September 5, 2004, when he allowed prisoners to shut their own cell doors after another prisoner began "popping doors."

Hall let prisoner Kevin Nix out of his medical cell to talk to him. Nix then began messing with the door lock control box, opening the cell doors. Shortly thereafter, Hall let three prisoners into the dayroom, in violation of jail policy, and allowed them to lock their own doors upon returning to their cells.

At 7:40 p.m., while Hall was checking on a prisoner that hadn't respond to the nurse at pill call, he was attacked by prisoner James R. Norton. Nix, Norton and two other prisoners, Kevin Bradley Winslett and Matthew R. Coffin, then took control of the third floor with homemade weapons, seizing Hall and CCA nurses Ann Hunt, Glenn Baker and Kathleen Baucum as hostages.

Two and a half hours later Hall was released in exchange for cigarettes and pizza. Baker and Baucum were released between midnight and 3:30 a.m. The stand-off came to an end the next day at 8:00 a.m. when a SWAT team member fired five shots at Nix's legs. CCA nurse Hunt was struck three times in the fusillade of bullets, which hit her in the lower leg and small of her back. Nix and Norton were also shot, though nobody was killed.

CCA guard James Hall was fired in Dec. 2004 for policy violations related to the prisoners' escape from their cells; Hall admitted to investigators that he falsified shift logs, made a "mistake" in allowing three of the prisoners into the dayroom

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area prior to the hostage-taking, and lied about how hard he was hit on the head by Norton. Nix, Norton and Coffin were later acquitted of kidnapping, aggravated assault and escape charges, but were convicted of three counts of false imprisonment. On Sept. 6, 2005 they each received 15-year sentences.

The forth prisoner involved in the hostage incident, Kevin Winslett, was referred for a mental competency evaluation instead of going to trial. On March 7, 2006, Winslett injured a CCA guard at the Bay County jail during a cell extraction, slamming a shield into his face and splitting his lip. A few hours later the same unnamed guard who had been injured by Winslett entered the cell of another prisoner, Robert James Bailey, an accused cop killer facing the death penalty. Bailey promptly cut the unnamed guard's head with a homemade shiv. In August 2005, Bay County jail officials, after being alerted by DEA agents, had found seven hacksaw blades in Bailey's cell, which he had used to cut through several bolts in a screen over his cell window in an escape attempt. CCA was unable to explain how Bailey, a maximum security prisoner, obtained the saw blades.

On Dec. 20, 2005, Robert Sweatt, 49, a prisoner on suicide watch at the Bay County Jail Annex, was housed with another prisoner, Orlando Marcus Holly, 25, who had a history of assaulting his cellmates. Sweatt was beaten by Holly so severely that he remained in critical condition for two weeks and suffered brain swelling. The County's contract monitor found no procedural violations with the "questionable" cell assignment, despite the fact that Sweatt had asked to be moved out of the cell with Holly, but rather blamed overcrowding for the assault.

Three Bay County jail prisoners were injured in a racially-motivated attack on July 19, 2004. Nine prisoners were involved in the fight, which involved one group attacking another with their fists and a makeshift weapon. CCA said two guards were on duty at the time and called for backup. The prisoners received minor injuries; five were charged with felony battery.

And on March 29, 2004, James DeRossetti and Larry K. Burks, the last two of six Bay County jail prisoners charged in the Oct. 2002 beating death of another prisoner, Chad Littles, 18, were sentenced

to ten and seven years in prison, respectively. The other four prisoners convicted in Littles' death had previously received sentences ranging from five to 12 years; Littles was beaten because they thought he was a snitch. Littles' mother filed a lawsuit against CCA, saying the company's guards didn't protect him.

Improper Releases/Fingerprint Backlog

CCA's internal controls and training of staff were found to be virtually nonexistent in two critical areas: prisoner releases and notification of arrests on a statewide computer network.

Violet Armour, 58, and Deborah Castillo, 40, were arrested by Florida Department of Law Enforcement (FDLE) agents on warrants from the Virgin Islands for charges of embezzlement and forgery. They refused to waive extradition and were to appear in court on May 11, 2005 to determine if they should be extradited. Florida law holds that contested extraditions cannot occur without the Governor signing a warrant.

Despite state law and the scheduled hearing, CCA officials at Hernando County contacted the U.S. Virgin Islands Justice Department on April 27 and stated in a fax that Armour and Castillo were "ready for pickup." On May 7, 2005 the women were turned over to Virgin Islands authorities. "It's off the charts bizarre. I've never seen anything like it," said the women's attorney, John F. Lazoro. "The jail literally opened up the gates and said 'take them wherever you want.'"

Not even a court order is always sufficient to keep prisoners in the Hernando County jail, apparently. After sentencing Aaron Hagen to five years in prison for vehicular homicide on January 17, 2006, the judge ordered that Hagen remain at the jail until his co-defendant's case was resolved. The next morning Hagen was transferred by CCA to FDOC's Central Florida Reception Center in Orlando.

On December 19, 2005,

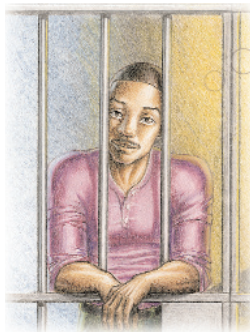
Daniel Swetokos was mistakenly released from the Hernando County jail; when he reported to his probation officer the following morning he was immediately reincarcerated. Hernando County prisoner Kelly Hewitt was scheduled for release on dealing in stolen property charges, and CCA allowed him to go free in June 2004. The problem was that Hewitt had a pending warrant in Pasco County, which wanted to take him into custody. CCA could say nothing other than they let him walk free.

In regard to CCA's performance of security-related administrative duties, in 2002 the Florida Department of Law Enforcement examined CCA's computerized arrest records at Bay County against 288 booking reports, finding a "high percentage" of discrepancies that ranged from incorrect or misspelled names to incorrect charges. But at least staff at the Bay County jail were entering the records.

It was discovered in December 2005 that CCA's Hernando County jail had a backlog of 758 arrests that had not been entered into a statewide fingerprint data-

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CCA in Florida (cont.)

base. Thus, the arrests didn't show up on electronic searches by law enforcement. Hernando Sheriff Richard B. Nugent called it a "serious, serious public safety concern," noting that "One of these guys could be on a national terror watch list and get booked into the county jail on a minuscule charge, and the information never gets past the jail."

On February 14, 2006, apparently not trusting CCA to fix the fingerprint backlog, the Hernando County Commission voted to assign six deputies to operate the digital fingerprint machine at the jail. The \$305,000 annual cost will be subtracted from the County's payments to CCA.

"Atrocious" Conditions

When one learns about the conditions in CCA's Florida jails, one can hardly blame prisoners for trying to get out. At the Citrus County jail rat feces is in the cellblock and bat feces is in the recreation yard. Mold, staph infections, bad food, cold air, problems with the telephone system and difficulties in obtaining medicines are among prisoner complaints.

A 41-page report from an internal audit conducted by CCA in August 2005 found that the Hernando County facility was "non-performing" in five broad categories, including patrols and inspections, safety/emergency procedures, and physical plant. The facility received an overall 72% rating in the audit, and only 70% in certain areas. "If they say their own people are only performing at a C-minus level, that should throw the flag up," said County Commissioner Chris Kingsley. The Hernando County jail is also grossly overcrowded, with prisoners sleeping on stacked bunks or cots in dayroom areas. The company's response? "God bless the Sheriff. God bless the judges," said CCA's Hernando County spokeswoman Cathy Sullivan in 2004. "They keep bringing them in." Interestingly, the Hernando County jail is ACA accredited.

The Bay County hostage-taking episode resulted in part due to faulty locks that had gone unrepaired for months. Living conditions at the facility are no better. Mold and rust permeate the showers and the drain doesn't work properly. The facility is infested with roaches. When attorney Nancy Jones defended the prisoners who took CCA employees hostage

at the jail in 2004, she said in her opening statements that the prisoners wanted to raise awareness of the "horrible" and "horrendous" conditions at the facility. "Conditions in that jail were so bad they made one's toes curl," she said. Robert James Bailey, the accused cop killer who had tried to escape and had attacked a CCA guard in March 2006, had previously complained that the toilet in his cell wouldn't flush for three months. A judge finally ordered Bay County jail employees to repair the commode. "A Fortune 500 company like Corrections Corporation of America can't fix a toilet?" asked Deputy Public Defender Walter Smith, Bailey's lawyer.

And as for conditions at CCA's Citrus County jail, four former prisoners, Javon Walker, Jeffrey Young, Larry Robbins and Greg Platt, filed suit against the company on March 10, 2006, saying they suffered medical problems after at least two CCA guards had urinated and placed fecal matter in their food and drinks on multiple occasions in late 2004 when they were held in segregation. CCA admitted that one of their employees had twice mixed urine into juice served to prisoners at the jail. The lawsuit further alleged that the contaminated food was part of systemic torture and abuse at the facility, claims that are being investigated by the Florida Department of Law Enforcement.

Two CCA guards, Kevin Hessler and Alexander Diaz, and a supervisor, Charles Mulligan, were fired in December, 2004 in connection with the allegations of contaminated food and drinks. CCA later accused Bill Grant and Bo Samargya, the attorneys representing the four prisoners who filed suit, of using media coverage in an "overt effort" to get the company to pay a larger settlement in the case. "We're not the ones scrambling about like a cockroach when the light comes on," Grant replied.

"Running a Business"

Anyone with a modicum of business sense realizes that labor is one of the largest expenses of running a business. Prisons and jails are no different, with staffing costs typically consuming up to 80% of detention facility budgets. CCA realizes that, and does a great job at minimizing such employee costs. Critics, however, say that is one of the reasons that CCA jails are improperly run.

"The guys coming in there, they're qualified to handle the average Joes on

the street. But they're not capable of watching out for the guys with psychiatric problems," said James Black, a former Hernando County jail guard. "Management is not the problem. Their problem is a lack of qualified corrections officers and in my opinion that sums it up."

Management, however, sets the pay scales and does the hiring. At Hernando County, 53 of the 109 guards are uncertified. Salaries for uncertified guards start at \$10.02 an hour while certified guards start at \$13.46 an hour. That's about \$20,842 and \$27,997 per year. In contrast, prospective employees only need to go down the road to the Hernando Correctional Institution, operated by the Florida DOC, where uncertified guards start at \$27,458 and certified guards at \$30,204.

Uncertified guards are on "temporary employment authorization" status, which means they can work as guards while awaiting state certification. According to the State Attorney's office, the significant number of uncertified guards at the Hernando County jail was "without question a contributing factor to the problems experienced" at that facility. For example, one uncertified CCA guard, Reynaldo Luciano, a former Wal-Mart employee, was on duty when both Daniel Warren and Geoffrey Conley committed suicide, and was reprimanded for not checking on Conley in violation of jail policy.

"When you're there uncertified, I didn't know anything. They just put you through a one-week orientation. It's kind of ridiculous," said Daniel Laufenberg, who worked at the Hernando County facility for 15 months. "Sometimes you have brand new officers come in who hadn't had orientation. They'd put people on their second or third day on a post. That's wrong to do to someone. That's like throwing them in the lion's den. A lot of officers quit."

Statistics at the CCA jail prove Laufenberg's point. As of April 2005, of the company's guards at the Hernando County facility, fully 51% had been there less than one year. Seventy employees left the jail's employ in 2005; some were fired and one died. Most of them, 45 to be precise, voluntarily resigned. CCA employees at the Hernando County facility had a turnover rate of 75% in 2004 and 82% in 2003, according to the FDLE's 2004 Criminal Justice Agency Profile.

There is high turnover among CCA's management staff, too. On March 21, 2006, Mark Henry abruptly resigned as

warden over the Bay County jail. Six months earlier he had replaced the former warden, Kevin Watson, who requested a transfer for "personal reasons" in August 2005 – about the same time that the jail's Assistant Warden, John Rochefort, was fired for violating an undisclosed company policy. And in February, 2006, Hernando County jail warden Arvil Chapman was replaced by Don Stewart, whom CCA described as their "most experienced" warden.

Rather than blame CCA, Stephan Langley, executive director of the American Jail Association, blamed the county for lack of qualified labor at the Hernando County facility. "It's really a community issue," he said. "People want everyone locked up. They want to throw away the key, but they don't want to pay for it." More precisely, he should have noted that CCA doesn't want to pay higher wages that will attract more experienced, qualified and professional employees.

Employee Misconduct

It is believed that low pay pushed one CCA guard to steal from prisoners. Jeffrey S. Hodges, 32, used his position as a booking officer at Hernando County to steal money from incoming prisoners. He was arrested and booked into the jail himself on February 7, 2006.

Hodge's arrest stemmed from an investigation that started after Timothy Milwee was released from Hernando County on January 15, 2006. He was missing \$350 that he had when he was booked in. That investigation tied into the November 2005 complaint of Uriel Cervantes, who was arrested with \$445 but given a receipt for only \$45.93 upon his release.

The arrest came as no surprise to Brooksville lawyer Ashley Aulls. "You talk to any defense lawyer in this town, and they've heard the stories, one after another," he said. "Where there's smoke, there's fire." Hodges plead guilty in March, 2006 to two counts of grand theft, and was placed on 18 months' probation and ordered to pay restitution. He still faces several misdemeanor charges.

In April 2006, a CCA guard at the Hernando County jail was arrested for taking part in an escape attempt. Verda May Terry was charged after she agreed to help prisoner Tommy Lee escape by smuggling hacksaw blades and other tools into the facility in a submarine sandwich.

CCA Hernando County jail guard

Nathaniel Pullings, 33, was fired on September 30, 2005. Pullings had walked into a women's housing unit in the jail and ordered the female prisoners to strip naked so he could wash their laundry, calling them "bitches." He was overheard by a husband of one of the prisoners, who was talking with him on the phone.

On July 16, 2005, a male nurse employed by CCA at the Bay County Jail Annex was arrested on felony charges of having sex with a female prisoner. Christopher Michael Byrd, 33 was accused of having sex with the prisoner on an examining table in the medical unit. Byrd and a jail supervisor were fired in connection with the incident.

CCA also fired Bay County jail guard Grant Cox, 35, on April 8, 2005 after Cox got into a fight with prisoner Skylar Jones. Cox reportedly violated the company's policy by hitting Jones during a "verbal altercation" in the jail's elevator. According to Jones, Cox grabbed him by the throat, pushed him to the ground and put his knee into his chest, then rushed him after the elevator door opened and knocked him into a trash can. Cox was charged with misdemeanor assault.

On March 5, 2005, a former CCA guard at the Hernando County jail, Louis Gregory, 38, plead guilty to sexual misconduct involving Kim Hines, a then 17-year-old prisoner. Gregory had twice touched the teenager inappropriately after she got out of a shower. Previously named CCA's workhouse employee of the month in February, 2003, he was sentenced to six months in jail.

Further, police arrested a CCA guard employed at the Bay County jail on February 4, 2005 on charges of selling and possession of cocaine, possession of steroids, possession of Xanax, possession of drug paraphernalia and sale of a controlled substance. Jamie Bishop, 29, was booked into the jail where he worked and held without bond.

"A Misguided Experiment"

In April 2006, the Florida state attorney's office, in an 11-page report, detailed the numerous problems at the Hernando County jail described above, including negligence and incompetence by CCA employees, failure to check on prisoners, leaving a door unlocked which resulted in an escape, and failure to log hundreds of arrests into the statewide fingerprint database. However, the state attorney determined that no criminal

charges would be filed. "We're still disappointed in [CCA]. At least I am," stated County Commissioner Chris Kingsley. "It was a negative report. It just doesn't say there was anything criminal."

The many deficiencies at the jail caused the Hernando County Commissioners to consider terminating CCA's contract; they even threatened to call for a grand jury investigation. In January 2006 the county fined CCA \$20,000 on two separate occasions for failing to perform its contractual obligations. However, county officials eventually bought into CCA's assurances that the company would upgrade its personnel and services at the jail. While the County Commission swallowed CCA's sales pitch, former Hernando

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CCA in Florida (cont.)

Sheriff Tom Mylander said the company's sweet-talk sounded just like it did 19 years ago when CCA first proposed taking over the jail. The question is, he said, "will they follow through?"

Apparently Bay, Citrus and Hernando Counties have deluded themselves into thinking so. Hernando County Commissioners voted in 2003 for an \$11 million expansion of the CCA-run jail, at the taxpayers' expense. Further, the commissioners agreed in February, 2006 to let CCA continue to operate the jail after the company agreed to make improvements and abide by new contract requirements, including hiring a contract monitor and paying increased fines of up to \$200,000 per quarter for future contract violations (only three commissioners voted on the contract extension, since two, Nancy Robinson and Paul Sullivan, had family member's who were employed by CCA at the jail). In mid- 2005, CCA agreed to pay for a 360-bed expansion at the Citrus County jail – so long as the company gets a contract to run the facility for the next 20 years. And Bay County agreed in February, 2006 to build a new jail in cooperation with CCA, estimated to cost \$39.7 million, which the company will operate under a six-year contract.

Why would these counties agree to continue their relationships with CCA in light of the company's terrible track record regarding jail management? Money. Taking over the operation of their jails would be an expensive undertaking. In Hernando County, Purchasing Director James Gantt estimated that if the Sheriff's Department operated the jail, the annual cost would be \$7.5 to \$10 million higher than what CCA was being paid. "It's the nature of the beast. That's why these people get contracts," said Gantt.

Ken Kopczynski, Director of the Florida-based Private Corrections Institute, which opposes prison privatization, disagreed. "The county is ultimately responsible for the well-being of the inmates. That's a core function of county government," he said. "And it's going to cost money. Let's face it, you get what you pay for. The commissioners need to get some spine and pony up." But apparently it's cheaper to allow CCA to keep running the facilities regardless of the cost to public safety, and to the safety of prisoners and the company's privately-

employed guards.

Sometimes the county commissioners share the blame, too. In July 2003, the Florida Police Benevolent Association filed complaints with the Florida Ethics Commission against three former Bay County commissioners, Danny Sparks, Carol Atkinson and Richard Stewart, and former county manager Jon Mantay, former county attorney Nevin Zimmerman and county emergency services director Bob Majka. All had taken a trip to visit a CCA-run jail in Tennessee in February, 2000. CCA had paid for their flights; the county was negotiating a renewal of CCA's contract for the Bay County jail at the time.

Critics Speak Out

Critics believe privatization of jails and prisons simply does not work. "CCA has succeeded in staying in business for two decades, but it has not succeeded in demonstrating that prison privatization makes sense," says a study commissioned by the non-profit Grassroots Leadership, released in December, 2003.

"For a company that set out to improve upon what the public sector can offer, it has had to spend an inordinate amount of time defending its own performance," the study continues. "Overall,

CCA's record during the first two decades of its existence is far from impressive. Rather than fulfilling the original promise of raising standards of corrections, CCA has built a reputation marred by numerous instances of scandal, mismanagement, [and] alleged mistreatment of prisoners and its own employees."

Frequent readers of *PLN*, and those who have ever done time in a CCA jail or prison, should agree with that report's conclusion that, "while CCA celebrates the past 20 years and looks forward to many more, we believe the time has come to put an end to the misguided experiment of prison privatization."

But it should be remembered that CCA's goal is not public safety, nor the rehabilitation of prisoners, nor frugal use of public resources. CCA's goal and fiduciary duty is to enrich its shareholders, and it has done a remarkable job of accomplishing that goal. The fact that CCA has profited at the expense of taxpayers, and the safety of prisoners, the public and the company's employees, is another issue – one that is wholly beside the point. ■

Sources: *St. Petersburg Times*; *New Herald*; *Hernando Today*; *Florida Today*; *Citrus Times*.

From the Editor

by Paul Wright

With this issue of *PLN* we are back on our regular publishing schedule of sending each issue to the printer around the end of the month. We got behind last summer due to switching over to a new layout program and a trial in Florida. Hopefully we now stay on schedule.

I would like to thank all the readers who took the time to respond to our reader survey. We got over 500 responses and we are still tabulating the results, which I hope to be able to report next month.

In last month's editorial I misspoke when I said that *PLN*'s website had over 100,000 subscribers in the year since we revamped it. Rather, we have received over 109,000 visitors since we revamped it last year. We are continuing to add new features to *PLN*'s website, including prison and jail videos, new articles and cases and much more on a daily basis. We also have a list serv that sends out news and legal information every day, for free. Go

to our website at www.prisonlegalnews.org and sign up. Prisoners can tell their friends and family members to sign up for them as well.

PLN was recently featured in an in depth feature story by Jenna Fischer in the *New York Review of Magazines*, a publication of the Columbia Journalism School in New York City. The article describes *PLN*'s history and accomplishments over the years.

I am also grateful to being the recipient of *High Times* "Freedom Fighter of the Month" award in their July 2006, issue which describes some of the work I have done with *PLN* over the past 16 years. Both articles are on *PLN*'s website in the section *PLN in the News*.

This editorial will be brief as I don't have a lot to say and we have a lot of news to put out. Enjoy this issue and encourage others to subscribe and consider buying gift subscriptions at our low Subscription Madness rates! ■

Youth Dies in Florida Boot Camp; Cause of Death Questioned

by David M. Reutter

For the fifth time in five years a juvenile has died in a Florida boot camp. A videotape of 14-year-old Martin Lee Anderson being "counseled" at a Bay County boot camp facility in Panama City shows guards abusing and battering him while he lays limp on the ground. A medical examiner's autopsy, however, initially concluded that Martin died of complications from sickle cell trait. A second autopsy revealed he was suffocated to death.

Martin entered the boot camp, which is operated by the Bay County Sheriff's Office under contract with Florida's Department of Juvenile Justice, on January 5, 2006. He was sentenced to the one-year camp for grand theft after taking his grandmother's Jeep Cherokee from a church parking lot while she was at Sunday services. Martin and some friends later crashed the Jeep into a ditch. Despite the grandmother's plea to not press charges, state prosecutors went forward with the prosecution anyway, a decision that would later prove to be fatal.

The videotape of Martin's death begins with the induction of Martin and several other youths into the boot camp on January 5. The video shows the youths standing against a wooden fence while drill instructors scream at them. Martin is first seen being held on the ground by two guards with his hands spread out. One of the guards has his knee in Martin's back.

A few minutes later Martin stands up and tries to run around the camp's track, but he stumbles. Four guards rush him, pinning him to the wooden fence "with his arms spread out like a crucifix." Once again he was held to the ground with a knee in the back.

Despite complaints of having trouble breathing, Martin was again forced to run. He was clearly unsteady. This prompted a guard to put his forearm against Martin's neck in a chokehold. On his next attempt to comply with their orders to run, Martin stumbles and falls. "He is like a rag doll ... they are holding him up." The video shows Martin being pushed, punched, kneed, dragged and apparently choked by at least seven guards while he remained limp and, eventually, became unresponsive. The brutal beating went on for 30-40 minutes.

The video, which was not released until February 17, 2006, shows a nurse, Kristin Anne Schmidt, standing by as Martin was clearly in distress, occasionally checking him. The only medical care that was rendered was ammonia capsules pushed into Martin's nose. By the time Martin was finally taken to a hospital after boot camp officials called 911, it was too late. He died the next day. "They picked on him so much until they murdered my baby ...," said a sobbing Gina Jones, Martin's mother. State Rep. Gus Barreiro was quoted in *The Miami Herald* as saying the videotape showed "the most

heinous treatment of a human being" he had ever seen. "It was obvious to me the kid was unconscious, and they were still abusing him. People will be outraged when they see this tape, and they should be outraged."

After Martin was hospitalized, the Bay County Sheriff's office issued a press release stating that he had become "ill." The press release headline read, "Boot Camp Offender Receives Medical Care." It was later learned that five guards involved in Martin's death had been accused in 63 other use-of-force incidents against juvenile offenders, including knee strikes, hammer-fist blows and painful pressure point restraints, according to reports filed in 2004-2005 with the Florida Dept. of Juvenile Justice.

A furor erupted after the Bay County

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Florida Boot Camp (cont.)

medical examiner, Charles Siebert, ruled that Martin had died of natural causes due to complications from sickle cell anemia, a genetic blood disorder that affects mostly people of African descent. "This is a sad day in the state of Florida," said state Sen. Frederica Wilson. "Just the idea, the arrogance, the audacity for someone to think that Florida, the nation, would believe that this young man died from an undiagnosed trait of sickle cell."

Siebert stated that the exertion of Martin's physical exercise triggered a chain reaction that ultimately led him to bleed to death. A number of experts, however, wanted to know why Martin had bled profusely in an area behind his kidneys. It was also learned that Siebert had allowed his medical license to lapse at the time he issued the autopsy report. State lawmakers successfully petitioned the medical examiner's board to investigate, and on March 10, 2006, with the permission of his family, Martin's body was exhumed for a new autopsy.

The second autopsy was performed by Tampa's chief medical examiner, Dr. Vernard Adams. In his report, released on May 5, Adams found that "Martin Anderson's death was caused by suffocation due to actions of the guards at the boot camp." Adams said the suffocation resulted in part by hands being placed over Martin's mouth, as well as the "forced inhalation of ammonia fumes."

Guy Tunnell, Commissioner of the state's Dept. of Law Enforcement, was

responsible for an investigation into Martin's death. Instead, Tunnell resigned on April 20, 2006 after he reportedly sent "chummy" e-mails to the Bay County Sheriff, who was one of the officials being investigated. (Tunnell, when he served as Bay County's Sheriff in 1994, had created the boot camp program in which Martin later died). The next day, on April 21, approximately 1,500 students accompanied by civil rights leaders marched in Tallahassee in protest over the circumstances of Martin's death.

A review of Florida's juvenile five boot camps indicated the programs had serious problems. Sixty-two percent of the camp participants were rearrested after their release, raising questions about their effectiveness. "Are we really being effective in what we're trying to do?" stated Pinellas Sheriff Jim Coats. "Somewhere, there's a breakdown in the system here."

PLN has reported in the past that paramilitary boot camps have a low success rate if lowered recidivism is their goal. "It filled my heart with hate, that's it," said former boot camper Sean Matthew Lewen. Nor are such programs safe. Previous deaths in Florida's Dept. of Juvenile Justice include the June 9, 2003 death of Omar Paisley, 17, who died of a ruptured appendix after three agonizing days without treatment (two nurses were charged with murder in connection with his death); the May 31, 2003 death of Daniel Matthews, 17, who died after a fight with another juvenile offender; and the October 30, 2001 death of Shawn Smith, 13, who committed suicide. Another juvenile, Willie Lawrence Durden

III, 17, died of natural causes at the Cypress Creek Juvenile facility on Oct. 14, 2005. But boot camps are more than a Florida problem. Over the last three years, 30 youths have died in boot camps nationwide.

Bay County Sheriff Frank McKei then decided to close their boot camp in light of Martin's death, and the former guards at the facility are now seeking jobs at the CCA-operated Bay County Jail – where they will fit right in with that facility's culture of neglect and abuse. [see the accompanying article in this issue of *PLN*, *CCA Florida Jail Operations*].

And on May 31, 2006, Florida Governor Jeb Bush signed into law the Martin Lee Anderson Act, which eliminates the state's military-style boot camps and replaces them with Sheriffs Training and Respect facilities that will provide treatment, emphasize self-esteem and after-care, and ban physical discipline by guards. "I would like to thank the governor and all the lawmakers for the support and what happened today, but I would still like the guards to be held accountable for killing my baby," said Gina Jones.

Florida State Attorney Mark Ober continues to investigate Martin's death, though to date no one has been charged, or even reprimanded. "I want justice; that's what I want," said Robert Anderson, Martin's father. "But I can't really get it, because my son is gone." The videotape of Martin's death can be viewed at: <http://www.nospank.net/anderson.htm>. 📺

Sources: *Miami Herald*; *Associated Press*; *St. Petersburg Times*.

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BOP Transfers Unescorted Prisoners On Civilian Buses, Some Escape

by Matthew T. Clarke

In a little-known program, the Federal Bureau of Prisons (BOP) has been allowing unescorted prisoners to transfer between prisons using Greyhound and other civilian buses. Not surprisingly, some never show up at their destination.

The program is considered a form of furlough by the BOP, related to the "Voluntary Surrenders" program that allows a newly-convicted person to voluntarily show up at the prison of assignment if permitted or ordered by the sentencing judge.

The prisoner being transferred is required to sign a letter promising show up at the destination and being threatened with an additional five years of incarceration if they don't. The program was established in 1996 as a cost-cutting measure. Since then, tens of thousands of prisoners have been given bus rides under the program.

The BOP says it limits the participants to "appropriate prisoners." This means non-violent, low-security prisoners being transferred from a federal correction facility (prison) to a federal prison camp or halfway house. The BOP web site says the prisoners must have less than two years remaining on their sentences, but a BOP assistant warden said that ten years was the actual limit.

The program was recently thrust into the limelight when the U.S. Marshalls Service listed one of the escapees as "armed and dangerous." Dwayne Fitzen, 55, also known as "The Shadow" and "Coyote", who is serving 24 years for a 1992 federal cocaine dealing conviction out of Florida, was put on the bus in Minnesota and told to check in to the Federal Correctional Institute in Lompoc, California, when the bus arrived there on September 16, 2004. The 6'-2", 211 pound Fitzen, a known member of the Aliens MC Nomad Motorcycle Club, got off the bus in Las Vegas, where he has relatives, withdrew \$12,000 from his bank account, and vanished. He had previous narcotics convictions and a possession of a firearm conviction.

"We have completed tens of thousands of these types of transfers for many years and less than one percent have escaped during the unescorted transfer," said BOP spokesperson Traci Bilingsley.

"Additionally, the vast majority of these escapees have been recaptured or returned to custody."

Other escapees from the bus transfer program include Alvin Lee Lewis, 49, who was doing six years for a 1999 wire fraud conviction and an additional year for failing to voluntarily surrender to start his sentence, escaped in April 2003. Roberto Cortez, Jr., 26, was doing 11 years for conspiracy to distribute methamphetamine, escaped on December 13, 2004. Luis Castillo-Mejia, 30, was doing 41 months for a June 2003, conspiracy to import marijuana with intent to distribute conviction, disappeared during a transfer between Los Angeles and El Paso, Texas. Alejandro Barerra Lara, 56, was one year deep into a three-year sentence for marijuana importation when he left the bus transferring him from Tennessee to Lompoc in 2003. He had a previous attempted escape in 1997. Richard Renard Grey, 37, who was three years into a fifteen-year methamphetamine trafficking conviction when he bought two years of freedom by escaping on a trip from California to Florida. He was recaptured with the help of a Los Angeles TV station's *Most Wanted* program.

According to federal officials, at least four Lompoc-bound prisoners have escaped within the past two years. They refused to tell Sen. Joseph Biden, D-Del., how many bus-transfer prisoners have escaped overall, saying instead that a formal response to his request for information was working its way through the Justice Department's bureaucracy. However, they have a list of at least 14 bus transfer escapees who escaped since 2002 and have not been recaptured and the assistant director for the U.S. Marshall's witness security and prison operations program, Sylvester Jones, admitted that probably "more than a dozen" bus transfer prisoners escape annually.

Greyhound Bus Lines receives the vast majority

of the prisoner bus transfers. However, Greyhound officials say the company was unaware of the program until the media picked up on the Fitzen story. Local officials in Lompoc also expressed surprise and dismay upon learning of the program.

"If you're putting your kid on a Greyhound bus, I wouldn't be very comfortable knowing there's a clandestine prisoner on there, especially if they're escaping along the way," said Lompoc city administrator Gary Keefe.

Congressman Elton Gallegly, R-Simi Valley, who is a member of the House Judiciary Committee and whose district includes Lompoc, was also surprised and troubled by the program.

"I think it's a great thing to save money," Gallegly said. "But the amount of money to apprehend [Fitzen] - plus the concern of what he may do to harm the community - certainly outweighs whatever cost savings are made in the process."

Greyhound reacted with greater vigor. Greyhound COO Jack Haugland sent a letter to the BOP director Lappin telling him to cease and desist from using Greyhound buses to transport prisoners. It also suspended service to Lompoc starting on April 2, 2005. As of September 23, 2005, they had been unable to resolve the issue with the BOP. ■

Sources: *Copley News Service, Lompoc Record, USMS Press Release, BOP Program Statement-Unescorted Transfers and Voluntary Surrenders, telephone interview of Kim Plaskett, Greyhound spokesman, by Alex Friedman of PLN.*

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Standing Up to Corruption

by Stephen James

Prison Systems co-workers Joe Reynoso and Dave Lewis both were called heroes by their peers. One was an investigator digging into prison crime, and one was accused of a crime. Guess which one was supported by the guards union.

In her letter supporting the nomination of investigator Joe Reynoso for the Award of Ethical Courage, federal prosecutor Melinda Haag never used the word “hero,” but her implication was clear. Haag described the hardships and trauma that Reynoso, who worked for the California Department of Corrections (CDC), had to endure during the years he helped her build and prosecute the federal government’s case against prison guards Jose Garcia and Michael Powers of the Pelican Bay State Prison in Del Norte County. It was one of the most publicized, high-profile trials of the prison-scandal-ridden 1990s, and the assistant U.S. attorney and state investigator worked side by side.

Before he agreed to help Haag’s team, Reynoso had worked for years at Pelican Bay as a guard, sergeant and lieutenant, and was liked and respected by his peers. But when he began assisting the federal government with its case, he was seen by some co-workers as a traitor for acknowledging the dirty laundry of the close-knit prison community.

Reynoso had violated the code of silence, which required prison employees to ignore, or help cover up, the misconduct of co-workers. Actually assisting outside federal investigators, as Reynoso did, was a potentially fatal breach of the code.

“Reynoso was told by a number of colleagues that he was hurting his career and should get off the case,” recounted Haag. But the reaction went beyond career advice. “The tires on his personal vehicle were slashed, and the doors were ‘keyed,’” she said. Reynoso was labeled a rat--the ultimate insult in the cliquish world of prison workers-- and “officers who had been Reynoso’s friends would not speak to him (at least in front of anyone else),” she added.

Eventually, the retribution took its toll on Reynoso and his family, and they moved south to a city near Sacramento. “He and his wife sold the lovely home they had designed and built together, and

moved hundreds of miles away so they could shop, see movies and live their lives without enduring glares and whispers from their neighbors. All because he was just trying to do his job,” said Haag.

The Powers-Garcia case, as it came to be known, was complicated and involved 11 separate incidents spanning a four-year period, requiring testimony from more than 35 witnesses, and the trial took two months before it was handed over to the jury. With Reynoso’s help, Haag convinced the jury to convict Powers and Garcia of conspiring to violate the civil rights of prisoners by arranging to have them beaten or stabbed by other prisoners, or by carrying out the assaults themselves.

One prisoner was stabbed to death at Powers’ behest, according to the indictment. Haag called Reynoso “the single most important person to the prosecution team.” [Editor’s Note: As reported in the May, 2006, issue of PLN, despite being sentenced and losing their appeals, Powers and Garcia have, as this issue of PLN goes to press, yet to actually go to prison and the prosecution appears to be in no hurry to send them.]

The ethical-courage award is given by the California Peace Officers’ Association, whose membership represents more than 538 police and law-enforcement agencies in the state. Each year the association gives out awards for valor, distinction and professional achievement to law-enforcement officers. The ethical-courage award, however, is unique and is not necessarily given out each year, but only when a peace officer breaks the code of silence and exposes inter-agency or similar misconduct. “It is intended to commend and spotlight individuals who do not confuse silence with loyalty and integrity and who have the strength of character to withstand the criticism and accept the personal risks associated with their decision,” explained association executive director Rich Gregson.

On June 8, 2005, at a ceremony in Indian Wells, the award was presented to Reynoso by California Attorney General Bill Lockyer. “The recognition that I got from the other law-enforcement people that were in the room validated my work,” he said. After he received the award, some of the other law-enforce-

ment officers in attendance came up to him and offered him encouragement and support. “They said, ‘Congratulations on a tough job,’ ‘Not enough people do what you did. Congratulations for sticking it out,’” he recalled.

The peer reinforcement meant a lot to Reynoso because his own employer essentially ignored his achievement in the successful Powers-Garcia prosecution and his receipt of the ethical-courage award. Even though a letter announcing Reynoso’s award was sent to then-California corrections czar Rod Hickman, “all I got from my own department was ‘Oh, you pissed off a lot of people. Man is your career over,’” he said. A call to CDC spokesman J.P. Tremblay confirmed Reynoso’s frustration regarding recognition: Tremblay was unaware that Reynoso had received the award.

Reynoso barely had time to savor the moment of honor because he was working up to 12 hours a day to help the government prepare for a new federal criminal trial against another Pelican Bay prison guard, Dave Lewis. Reynoso had worked the case, off and on, for more than 10 years, and the trial would be the final showdown from the Powers-Garcia era. Like Santa Barbara County District Attorney Tom Sneddon’s unrelenting 10-plus-year pursuit of Michael Jackson, Reynoso had a piece of his psyche in this battle. But unlike what happened with Jackson, who escaped Sneddon’s grasp in an earlier alleged child-molestation incident by paying off the victim, Reynoso had helped the feds put Lewis away once before, only to see his conviction reversed on appeal and a new trial ordered. Reynoso had a huge investment of pride and emotion in the case and viewed its anticipated outcome as the final vindication of the years of sacrifice that had irreversibly altered his life.

The case was expected to be difficult to prosecute because some of the witness challenges from the first trial and the Powers-Garcia case were expected to occur in the Lewis retrial. “The witnesses are very reluctant to take the stand again for us,” Reynoso said.

In her letter, Haag recited some of the witness-intimidation problems from the Powers-Garcia prosecution, including a Pelican Bay female staff member who had human feces spread on her car in the prison

parking lot. Another witness, who had critical evidence proving that the defendants were involved in having a prisoner stabbed, had to take a stress retirement. "One staff witness literally begged us in the hallway outside of court not to ask him to go through with testifying--he was happy in his current assignment, his children were happy in their schools, and he was certain he would have to move if he went through with testifying," and prosecutors honored his request. In addition, prisoner witnesses faced the possibility of retaliation by staff and the prison gangs in their employ. Haag said Reynoso had the unique ability to work with and reassure both employee and prisoner witnesses because he understood the prison culture.

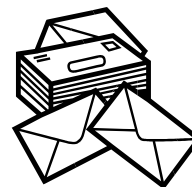
The final prosecution of Lewis would be a pivotal point in the ongoing struggle between the handful of CDC employees, like Reynoso, willing to stand up to the corruption, endure the retaliation that was guaranteed to follow, and weather it all with virtually no support from the higher-ups at the CDC. Reynoso also stood up to the money and power of the prison-guard union. And, for a prosecutor, the landscape was littered with those who had sought justice but had failed to

bring back the coveted criminal conviction, the only measure of success.

After three years of false starts and delays, the second Lewis trial finally went before a San Francisco jury in June, 2005. But the outcome would leave a permanent scar on Reynoso's soul.

About a year before Reynoso was forced to move from his Northern California home, the state's prison-guard union, the California Correctional Peace Officers Association (CCPOA), held its 25th annual convention in Sparks, Nevada. Taking place just two weeks after the September 11 World Trade Center attacks in 2001, the event had the theme "Of heroes and healing," according to a detailed post-convention report, with 26 color photos, in the union's in-house magazine, Peacekeeper.

The convention planners drew a connection between the firefighters and police officers killed in the World Trade Center disaster and the brotherhood of California prison guards. "Two weeks following the tragedies of September 11, where the professions of law enforcement and fire and rescue lost so many of their own trying to save the doomed souls in the World Trade Center, CCPOA's annual



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Standing Up to Corruption (cont.)

convention was marked by the shocked and sad faces of a brethren of peace officers mourning the loss of their brothers and sisters 3,000 miles away," reported Peacekeeper. The convention floor featured a replica of the Statue of Liberty, and a photomontage presentation of the terrorist attacks "stunned and hushed the crowd" and then "brought the delegation to its feet chanting USA, USA, USA."

A live and in-person hero highlight of the convention, attended by more than 1,000 union members and their families, was the triumphant return of former Pelican Bay prison guard Dave Lewis. Just weeks before the convention, Lewis had been released after serving 15 months in federal prison for the 1994 nonfatal shooting of prisoner Harry Long after an altercation in the prison yard. In 1999, the government indicted Lewis, claiming that he deliberately shot Long because he believed Long was a child molester. In early 2000, Lewis was convicted and then sentenced to more than seven years in prison and fined \$2,000, but then he was released pending the outcome of a retrial ordered by the appellate court. At the convention, Lewis took the stage against a dramatic backdrop--decorated in a red, white and blue star-spangled theme that might have made Leni Riefenstahl blush--and recounted his ordeal to the audience. "On his conclusion, his peers gave this hero a standing ovation," said Peacekeeper in its account of the moment.

Reynoso, who used to be a member of the CCPOA, is disturbed by the union's promotion of Lewis. "It's a disgrace to think that you have an employee who you're propping up as a hero, compared to a lot of people who do a great job and should be heroes--people who do their job everyday and don't get in any trouble and finish their careers," he said.

Indeed, to an outside observer, the elevation of Lewis to hero status by the CCPOA might seem puzzling. In 1996, two years after he had shot Long but when he had yet to be indicted by the federal government, Lewis was still working at Pelican Bay when he was fired by the state for an assortment of misconduct unrelated to the Long incident. According to State Personnel Board (SPB) and court records, Lewis was canned for inexcusable neglect of duty, discourteous treatment of the public or other employees, willful

disobedience, and other failures of good behavior that caused discredit to the CDC. Among other employee rule and regulation violations, Lewis "routinely referred to black inmates as 'primates,' 'monkeys,' 'toads,' and 'niggers'" and also was accused of demeaning actions toward sex offenders, including referring to child molesters as "Chesters," according to the records.

The nine-year veteran also was found to be dishonest because he gave false statements during the investigation of his misconduct. His termination was affirmed by an SPB administrative-law judge who also noted that "the likelihood of recurrence is significant given [Lewis'] dishonesty at the investigation of the incident, continued denial of wrongdoing at the [SPB] hearing, and his apparent lack of remorse." (Lewis did not respond to several interview requests relayed through his attorney and the union.)

"And here you're holding up a guy as your hero who was fired by the department for misconduct and racism and other stuff, and shot a guy. I mean it's a disgrace to what CCPOA claims they stand for, working 'the toughest beat in the state.' It's incredible," Reynoso said.

But what was apparently more important to the union officials and convention delegates was that Lewis had beaten the federal government's case against him, at least for the time being. The subject of Lewis' return and retrial was the cover story in the next issue of Peacekeeper (January/February 2002). The article, Miscarriage of Justice--A former correctional peace officer is forced to relive a nightmare as he prepares for a retrial, detailed a litany of alleged government misconduct from Lewis' first trial and implied that Lewis was the victim of a conspiracy between CDC internal-affairs investigators, including Reynoso, and the feds.

"Yes, there does seem to be a conspiracy afoot," surmised the story. The article also said that Lewis and his new and improved legal team, which included nationally renowned San Francisco criminal-defense attorney Dennis Riordan, were anxious to get the retrial started. Although Lewis initially refused to waive his right to a speedy trial, the proceeding was in fact delayed for more than three years. At the end of June, 2005, the day of reckoning finally had arrived. Surrounded by his high-priced legal team and a small entourage of CCPOA officials, Lewis walked into a federal courtroom in San Francisco

and confronted the nightmare.

When the United States of America v. David Gene Lewis criminal trial began on June 27, 2005, both sides had pride and ego at stake, as well as a sizeable financial investment in the case. Reynoso estimates that the CCPOA had gambled well more than a million dollars of its members' money to defend Lewis (CCPOA Vice President Lance Corcoran declined to estimate what the union had spent on the case). It was a gamble because, under the terms of the union's contract with the state, if Lewis was found not guilty, the taxpayers of California would have to pay Lewis' attorney fees and all related costs of his defense. If they lost, the guards union would eat the sizeable investment, which dumbfounded Reynoso. "Because they've held this guy up as their hero, they're willing to go to the mat for him," he said.

The federal government undoubtedly had spent even more. At least two FBI agents, prosecutors and support staff had worked on the case off and on for more than 10 years. The result of the prosecution likely was also important to the government's self-esteem: It was still stinging from a defeat in a similar, but much larger, case it had lost in a federal courtroom in Fresno in 2000. In that case, eight Corcoran state-prison guards were acquitted for allegedly setting up prisoner fights and shootings for "blood sport." The scandal had gotten nationwide coverage, including a segment on 60 Minutes.

The retrial of Lewis began on the last Monday in June with jury selection. By the end of the day, the jury was seated, and Reynoso was cautiously upbeat. "They think they got a good jury, and we think we got a good jury, so one of us is full of crap," he joked.

Riordan's defense team was trying to block some documents from being admitted into evidence, and Reynoso spent that night rounding up written declarations from CDC officials in order to validate the records. On Tuesday, federal prosecutor Laurel Beeler got the case under way. Lewis was charged with depriving Long of his constitutional right not to be subjected to cruel and unusual punishment by assaulting him under color of law and, in a second count, using a firearm in connection with the deprivation of Long's rights.

In essence, Beeler had to prove that the shooting was deliberate and did not comply with CDC policy, which only permitted shooting to break up a fight if a

prisoner faced an imminent threat of great bodily injury or death. In most cases, that standard was interpreted as requiring the possession of a weapon by one or more prisoners, and neither Long nor his assailant was found to have a weapon.

On Tuesday and Wednesday, a parade of prisoner and prison-employee witnesses testified to various aspects of the incident, essentially painting a picture of a minor fistfight between two prisoners without weapons. On cross-examination, Riordan attempted to discredit the government's witnesses and, in particular, the prisoner witnesses, by pointing out their generally extensive and, in some cases, heinous criminal histories. Riordan also hammered home the fact that the convicted felons were given, or were potentially eligible for, sentence reductions of three to six months for their testimony against Lewis.

On Thursday, Beeler called to the stand a CDC training officer who testified that Lewis had attended an annual group training session less than a month before the shooting. The class included instruction on the CDC shooting policy. This was one of the strongest parts of the prosecution case, according to Reynoso.

"He also reviewed several shoot/don't shoot scenarios where he said adamantly, 'I do not teach that you can shoot for a fistfight,'" he said. The training officer's testimony was incriminating, and Riordan spent more time on cross-examination of the witness than he did on any other, according to Reynoso. Riordan got the witness to admit that even without a weapon, a prisoner conceivably could use a bare fist to kill or cause great bodily injury. "But clearly the evidence that the training officer put in showed that you could not shoot a man for a fistfight," Reynoso said.

The last witness of the day was Reynoso, who mostly testified to the authenticity of the records in the case, the cell histories of the prisoners, employee time sheets and other technical aspects of the evidence. At the conclusion of his testimony, the government rested its case. The jury was given Friday off while the lawyers met with the judge to hear a motion. The defense case would begin on the Tuesday following the three-day Fourth of July weekend. It was anticipated that the defense case would run a week or longer.

On that Tuesday, Riordan began

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the defense by entering into evidence a portion of an official CDC report on the shooting. CDC regulations required that the investigation of all shootings be conducted by a Shooting Review Board (SRB), which is partly made up of prison officials from other institutions. The SRB then determines whether the shooting was justified and complied with CDC policy. Riordan had the jury read the report, which had concluded that the Lewis shooting did not violate CDC rules. Without putting Lewis on the stand, Riordan then announced that the defense case was finished. Keeping Lewis off the stand, Riordan later explained, prevented him from being grilled on cross-examination and possibly opening the door to the potentially damaging details of his 1994 job termination. “[W]e wanted to keep the focus on their case,” he said.

The prosecution was caught off guard by the abbreviated defense, but it had expected Riordan to bring up the SRB report, and Reynoso had prepared an elaborate rebuttal to the report, which, in connection with a long-running federal civil case against the CDC, *Madrid v. Woodford*, had been independently reviewed by a court-appointed investigator in 2004. The review concluded that “no competent manager would use the SRB report as a valid basis for finding that Mr. Lewis acted in conformance with policy in the use of lethal force against inmate Long. The report raises more questions than it answers, is superficial, and fails to address the legal standard for using lethal force.” In fact, during the 1990s, the SRB report process statewide was found to be grossly inadequate, leading to legislative hearings and major procedural changes to the shooting-review process.

The Lewis jury wasn’t shown any evidence that the SRB process statewide, and the Lewis SRB report in particular, had been significantly discredited.

When Beeler told Reynoso she had decided not to offer evidence to discredit the SRB report, Reynoso was taken aback. “I was [thinking], ‘What the hell are we doing?’ We could have shredded [the report] to pieces, to pieces. The state SRB process was a sham!” he recalled. Reynoso said Beeler attempted to downplay the SRB report in her closing argument, but without having presented evidence to back up the assertion, it was too little too late.

“I knew then we’d been beat. If we can’t rebut the SRB, we’re through,” he said.

Beeler told Sacramento News and Report she couldn’t discuss the case without permission from U.S. attorney’s office spokesman Luke Macaulay. Macaulay said the office “won’t be able to make [Beeler] available for an interview” and instead provided a written statement from U.S. Attorney Kevin Ryan. Ryan said he was “gratified by the dedication and commitment of our trial team” and wanted to thank everyone, including the FBI and the CDC for their support and participation in the case.

After Riordan and Beeler completed their closing arguments late that Tuesday, the case was sent to the jury. The jury came back that Wednesday morning and deliberated for about three hours before returning a verdict of not guilty on both counts. And Dave Lewis walked out of the courtroom a free man.

“Well, I think it’s fair to say he was extremely relieved,” Riordan said after being asked for Lewis’ reaction to the verdict. Even though he was terminated by the CDC in 1996, Lewis was granted “industrial disability” retirement status and gets \$2,156 in retirement pay each month, according to Brad Pacheco of the California Public Employees Retirement System.

Reynoso obviously was frustrated by the trial outcome, and his concerns about the government’s failure to effectively rebut the SRB report turned out to be valid. Both Riordan and Reynoso talked with several jurors when the case was over and confirmed that the report, which was virtually the entire defense case, had been the key piece of evidence that persuaded the jury. “One juror we talked to afterward said, ‘We were of the opinion that if Ms. Beeler was going to argue that we shouldn’t give the SRB report any credibility or any credence, then we thought, ‘Well, then why didn’t she put in any evidence to back that up?’” Reynoso said. Riordan talked to a juror who was also a lawyer. The juror confirmed that the SRB report was important and that the government failed to prove its case beyond a reasonable doubt. “[The juror said] that if it had been a civil case, they might well have concluded that the shooting was negligent, but they definitely didn’t think that he had criminal intent,” Riordan said.

Lance Corcoran, the CCPOA’s vice president, called the verdict a victory not only for Lewis, but also for the profession. He attributed the prosecution to vindictive-

ness—a payback by the federal government for its loss in the Corcoran prison case of 2000. “I mean, this is a story about federal court abuse; this was truly a case of politics,” he said. “They brought a case that had no merit whatsoever.” Corcoran is also bitter at the CDC for not providing Lewis legal representation from the beginning. “What kills me is even though his department cleared him of wrongdoing, they did nothing to support him,” he said.

Corcoran said he has great respect for Lewis, whom he called a gentle soul and an amazing man in spite of his abruptly ended career. “He was terminated for some really awful language, and he acknowledged that. He’s noble in that he acknowledges his mistakes,” he said.

At least one member of the CCPOA rank and file also was apparently elated by the verdict. An Internet message board used by Pelican Bay guards posted the outcome of the trial within 24 hours after the jury decided the case. “WHAT A RESOUNDING NOT GUILTY this was from the federal courts in San Francisco,” read the post. Illustrating that not much has changed in the workplace culture at the prison, the author also had a coded message for Reynoso and another CDC investigator that had worked on the case. “[T]o those two idiots involved in this case from the [CDC] who helped in the harassment of Dave Lewis I say, ‘See that blinking light in the corner of your eye ...’”

Reynoso explained that the message was a veiled threat promising future payback. “The blinking light in the corner of our eye is the train coming; the train’s coming after us now,” he explained.

But it won’t be the first train he has stared down, and, for now, he is glad to be out of the partnership with the federal government and will go back to working on run-of-the-mill CDC investigations, preferably not involving staff misconduct. He said he would not object if he never has to work on another case against a corrupt co-worker.

“I’m never going to do a staff case again, not like this. Not until the department is really and truly reformed to where they support this kind of an effort. The department has to be behind a guy that’s doing this. If they’re not, it makes for a miserable existence.” ■

Stephen James is a freelance reporter in Sacramento. This article originally appeared in the Sacramento News and Report. It is reprinted here with permission.

Legal Research Prohibition Upon Contract Attorney Denies Adequate Court Access

by David M. Reutter

An Iowa federal district court has held that the legal assistance program at Iowa's Anamosa State Penitentiary (ASP) was an unconstitutional impediment to a prisoner's access to the court because it did not provide "a reasonable adequate opportunity to present claimed violations of fundamental constitutional rights to the courts" where the legal assistance system precluded even the minimal level of legal research that would be necessary in some specific circumstances, to provide reasonable competent legal advice sufficient for a prisoner to present his claims to the court.

To save money, ASP discontinued updating its law libraries in 1998. Instead, ASP set up in October 2000, a "legal assistance" system where "contract attorneys" were hired to provide prisoners with legal advice and assistance. The State Public Defender's Office contracted with attorneys to provide prisoners assistance in filing post-conviction remedies and civil rights actions.

ASP prisoner Duane White presented himself to contract attorney John J. Wolfe to seek guidance on a very unique legal claim. White had been arrested for drug charges in Iowa and South Dakota, which resulted in concurrent sentences. White felt he had a claim that the courts lacked jurisdiction because he was shuffled between the two states without either going through procedures of the Interstate Agreement on Detainers. Wolfe gave White a post-conviction form without advice on the merits, advising him to file it on the claim. White, however, did not do so because he was fearful that his claim would be meritless, which would subject him to reinstatement of dismissed charges that carried 150 years under his plea agreement.

White then brought a civil rights action alleging that the contract attorney was prohibited from doing legal research into his claim, depriving him of access to the courts. A Magistrate Judge recommended summary judgment be entered for prison officials. White's objections were before the district court.

The Magistrate felt that because prisoners had an opportunity to have the contract attorney "confer and advise", adequate access is provided. The district

court said that an obligation to "confer and advise" necessarily and reasonably requires provision of *competent* advice. Advice can be "competent" without actually being "correct". "Thus, where *circumstances reasonably warranted it*, an obligation to "confer and advise" necessarily imposed an obligation to do at least the minimum level of legal research reasonably required to provide professionally competent advice.

The Court found RSP prohibited contracted attorneys from doing legal research for prisoners, providing only "off the cuff" advice. The Court held that "off the cuff" or uninformed advice cannot, in every circumstance, provide a prisoner who had no other access to legal advice or authority adequate access to the courts. Accordingly, the Court held it was ASP's legal advice system that deprived adequate White of court access.

Moreover, the Court found White incurred actual injury. Adequate research would show that while White did not have a remedy to invalidate his conviction, he did have a civil rights claim for the denial of his due process rights for a claim of improper extradition. Because the two year statute of limitations had expired on that claim, White had a colorable claim due to ASP's inadequate legal assistance system.

Despite his injury, the Court did little to remedy White for the harm incurred. It rejected his claim for compensatory damages, awarding only \$1.00 nominal damages. Additionally, it refused to award punitive damages, holding there was no sinister motive into what appears to be a shortsighted cost-cuttings measure that simply failed to contemplate realistically what would be necessary to provide prisoners with unusual claims a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.

The Court put prison officials on notice, by declaratory judgment, that their legal assistance system is inadequate. The Court, however, declined to impose injunctive relief to cure the problem because White no longer has the legal problem he sought relief upon. Judgment was entered in White's favor. See: *White v. Kautzky*, 386 F.Supp.2d 1042(N.D. Iowa 2005). ■

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Federal Judge Strikes Down Iowa Prison's Faith-Based Rehabilitation Program

by Michael Rigby

A federal judge in Iowa has ruled that the state's partial funding of a Christian rehabilitation program is unconstitutional. In a 140-page opinion issued on June 2, 2006, U.S. District Judge Robert W. Pratt ordered the Iowa Department of Corrections (IDOC) to disband the program within 60 days and directed the InnerChange Freedom Initiative--a division of Prison Fellowship Ministries--to repay the \$1.5 million it has received in state funding since 1999. Both orders were stayed, however, pending the outcome of an expected appeal to the 8th Circuit.

In his ruling Judge Pratt concluded that the InnerChange program at Iowa's Newton Correctional Facility violated the First Amendment's prohibition against government-established religion because it was state funded, overwhelmingly sectarian, and aimed at religious conversion. "The overtly religious atmosphere of the InnerChange program is not simply an overlay or secondary effect of the program--it is the program," Pratt wrote. Pratt also concluded the program was inherently intolerant of other faiths, despite claims that all religions were welcome to participate. Though a prisoner could, theoretically, graduate from InnerChange without converting to Christianity, the coercive nature of the program demands obedience to its dogmas and doctrine," the decision said.

The case, brought by Americans United for Separation of Church and State and Iowa prisoners in February 2003, has been seen as a wider challenge to President Bush's faith-based initiative. The Bush plan seeks to funnel more government funding to fundamentalist Christian groups that provide social services, particularly in prison. Bush has also expressed interest in expanding faith-based programs in federal prisons. Attorneys for both sides agree that if Judge Pratt's reasoning is applied nationwide it could be a decisive blow to the faith-based initiative while also invalidating many similar prison programs. "I think this is an extraordinarily important lawsuit because it raises so many of the issues involved in so-called faith-based programs at the national and state level all over the country," said Barry Lynn, execu-

tive director of Americans United.

Background

InnerChange is a subsidiary of the Virginia-based Prison Fellowship Ministries, a non-profit organization founded by Watergate figure Chuck Colson. In addition to Iowa, InnerChange operates "values-based" rehabilitation programs in Texas, Minnesota, Kansas, Tennessee, Arkansas, and Missouri. The program is designed to transform prisoners into good citizens, reduce recidivism, and prepare prisoners for release from prison. Rather than utilizing scientific and medical theories and treatment based models to advance these goals, however, InnerChange posits that sin, or disobedience to God, is the root of all maladaptive behavior. The only way to overcome this, believers say, is through the transforming power of God by way of his son, Jesus Christ.

In the mid-1990s the Iowa prison system was faced with overcrowding and budget concerns. When prisoners started arriving at the state's newest prison in 1997, the Newton Facility, full treatment programs and classes were not yet in place. Walter "Kip" Kautzky, then-director of the IDOC and longtime friend of Chuck Colson, was aware of InnerChange and its operation in Texas since 1997. According to Judge Pratt, Kautzky initiated an inquiry into InnerChange despite being aware of significant constitutional issues. Prison officials ostensibly concluded that due to budget constraints, InnerChange--which would receive state funding for only non-secular aspects of its programming--was the only viable choice.

Under the contract, the state would reimburse InnerChange for non-sectarian programming via the prisoner telephone fund (money kickbacked to the prison system from "commissions" charged to people who accept collect calls at high rates from Iowa prisoners) and the tobacco fund. The telephone fund consists of money paid by prisoners and their families into individual accounts for phone privileges. By statute profits from the funds are to be used "for the benefit of inmates." Tobacco funds were derived from settlements with Tobacco

companies that most states received. In total, from September 1999--the first year of the contract--through June 30, 2005, the IDOC made direct payments of \$1,529,182.70 to InnerChange; \$843,150 came from the prisoner Telephone Fund, and \$686,032.70 from the Tobacco Fund. Another \$310,000 was appropriated from the tobacco fund for InnerChange programming in fiscal year July 1, 2005 through June 30, 2006. These payments, estimated Norman Cox, the National Director of InnerChange, constituted 35-40% of the ministry's operating costs in Iowa. By contrast, state funding for InnerChange in Kansas is 27%, and 22% in Minnesota. The InnerChange program in Texas is funded entirely through private donations.

Proponents of InnerChange contend it serves a compelling government interest by reducing recidivism rates. According to Prison Fellowship, since 1999 InnerChange graduates had recidivism rates of 6% after one year and 10-12% after two years, compared to the state's average of 33-50%. These numbers, however, were unsubstantiated. Judge Pratt noted in his opinion that "the Defendants offered no definitive study about the actual effects the InnerChange program has on recidivism rates." About 220 prisoners participate in the Iowa program at any one time. [Editor's Note: Studies have been conducted showing the lower recidivism claims made by InnerChange are exaggerated and anecdotal, at best.]

Likewise, advocates of the 18-24 month program argue that although InnerChange is based on Christian values--specifically Evangelical Christianity--it does not discriminate against those of other faiths. Under the InnerChange program, "Every prisoner still has constitutional freedom when it comes to his faith," said Mark Earley, President of Prison Fellowship. At trial, however, several prisoners of different faiths, including Sunni Muslims, Jews, and those belonging to the Nation of Islam and the Reorganized Latter Day Saints, testified that their religion precluded them from participating fully in the Christian aspects of the InnerChange program--a requirement for successful completion. The

Court also found that non-religious persons were characterized by InnerChange staff as “unsaved,” lost,” pagan,” those “who served the flesh,” “of Satan,” “sinful,” and “of darkness.” Native Americans were also discriminated against. One Native American prisoner was told while in the InnerChange program that the sweat lodge ceremonies he participated in were “basically a form of witchcraft, against the Bible, sorcery, and worship of false idols.” Consequently, Pratt concluded that “the InnerChange program effectively precludes non-Evangelical Christian inmates from participating.” And of course atheist and agnostic prisoners, who profess no believe in the supernatural, are effectively excluded completely.

The Ruling

The First Amendment of the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” In determining whether the collaboration between the state of Iowa and InnerChange violated this clause, Judge Pratt relied on the 3-part test delineated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). “Under the *Lemon* test, government practice is permissible for purposes of Establishment Clause analysis only if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion.” As to the first element, the Court held that although several high-ranking prison officials and legislators favored InnerChange because of their own personal religious beliefs, the promotion of religions did not appear to be “the primary concern of those state officials in passing legislation authorizing the funding.” Therefore, the purpose was secular.

Regarding the second element, however, the Court found that the program’s “primary effect” was to advance religion. This conclusion was based on two factors: First that the program was pervasively sectarian in nature, and second, that separation of InnerChange’s secular and non-secular aspects was impossible.

As to the sectarian aspect, the Court first noted that, for all intents and purposes, InnerChange and Prison Fellowship were state actors. As such, they were “burdened with the same responsibilities of any state employee: to respect the civil rights of all persons, including the First Amendment’s prohibition on indoctrinat-

ing others in their form of religion.” This they did not do. “InnerChange’s daily activities, its required religious qualifications for employees, and the fact that it was chosen by the state, in part, because its religious nature was viewed as a cure for the ills of recidivism, can only lead to the conclusion that its non-sectarian aspects are substantially subsumed within its religious nature,” Pratt wrote.

The Court further concluded that the religious and non-religious aspects of the program were inseparable. Every aspect of InnerChange is designed to one end: the spiritual transformation of the prisoners. Even traditional state rehabilitation classes—including substance abuse treatment, anger management, victim awareness, and parenting classes—as operated by InnerChange, are designed to indoctrinate prisoners into the Christian faith.

What’s more, InnerChange’s billing procedures could not assure that the state paid for only non-secular expenses. No definition of what constitutes a secular or non-secular expense existed, and even if such a definition did exist, there is no state monitoring to ensure compliance. For instance, with regard to the salaries of employees whose duties included both secular and non-secular activities, “No hour by hour calculation ever occurred, ‘it was more of a general understanding of how the time would be spent,’” one InnerChange official testified. Evidence also showed that all phone bills, computer costs, office supplies, blank videotapes, and other miscellaneous items were billed to the state as secular expenses, as were

religious key chains and bookmarks presented as gifts to graduates and volunteers. “In short,” the Court concluded, “there is no way to guarantee that public funds are used only for secular portions of the InnerChange program.”

The program also impermissibly advanced religion because (a) the program was not administered in a neutral fashion, and (b) Iowa prisoners—the indirect recipients of the state funding—had no genuine choice among religious and non-religious programming. The Court based its decision on several factors. For one, evidence presented at trial showed that InnerChange provided incentives to join the program, such as better living conditions and the opportunity to complete classes required for parole earlier than would otherwise be possible. Moreover, Iowa’s limited programming provided prisoners with no other opportunities to obtain the same level of services. And as noted above, though all faiths were ostensibly welcome in the InnerChange program, this was true in form only.

Finally, the Court concluded that the weight of the evidence left no room for doubt that the state was “excessively entangled with religion through the InnerChange program. ... For all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one its [sic] penal institutions, giving the leaders of that congregation, i.e., InnerChange employees, authority to control the spiritual, emotional, and physical lives of hundreds of Iowa inmates. ... The state, through its

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Faith-Based Rehabilitation (cont.)

direct funding of InnerChange, hopes to cure recidivism through state-sponsored prayer and devotion. While such spiritual and emotional 'rewiring' may be possible in the life of an individual and lower the risk of committing other crimes, it cannot be permissible to force taxpayers to fund such an enterprise under the Establishment Clause."

Based on the above reasoning, Judge Pratt permanently enjoined the operation of InnerChange in any Iowa prison and ordered the IDOC to disband the InnerChange program at the Newton prison within 60 days. Pratt also ordered

InnerChange to reimburse the state for payments made since the contract's inception, in 1999. The amount--no less than \$1,529,182.70--is to be paid pro rata, with at least \$843,150 going to the individual Telephone Fund accounts from which it was taken, and at least \$686,032.70 going to the Tobacco Trust. Noting the virtual certainty of an appeal to the 8th Circuit, Pratt suspended his order pending the outcome. He did, however, require InnerChange and Prison Fellowship to post a superseded bond for \$1,529,182.70. See: *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, USDC SD IA, Case No. 4:03-cv-90074. The ruling is available on PLN's website at www.prisonlegalnews.org.

[Editor's Note: The rise of the "faith based" prison program must be seen in the context of the government removing secular programs such as drug and sex offender treatment, education classes, etc., then substituting religious programs as the only alternatives. In many cases atheist, agnostic and non Christian prisoners are effectively coerced into attending these programs because, whether InnerChange affects recidivism rates is questionable, it does appear to affect parole rates and prisoners who attend are more likely to be paroled than those who do not.]

Additional sources: *Washington Post*, *bpnews.com*, *CBN.com*, *Des Moines Register*, *Seattle-Post Intelligencer*

Crimes of the Heart: Incarceration Collusion

by Bob Williams & G.A. Bowers

What would a woman do for her man? Run a front-end loader through a jail wall? Drive her lover out of prison in a food service truck? Murder witnesses? Smuggle in guns and drugs? Melt her lover out of prison using acid? Gun down a guard in a courthouse parking lot? Women nationwide have tried or committed these very acts of desperation.

One such violent act has led the news in a recent Tennessee case. Jennifer Forsyth Hyatte, 31, is accused of shooting and killing prison guard Wayne "Cotton" Morgan, 56, in the parking lot of the Roane County Courthouse in Kingston, Tennessee on August 9, 2005 while aiding her husband, George Hyatt, 34, in a brazen escape. Jennifer, a former contract nurse, met her future husband while working at the Northwest Correctional Complex in Tiptonville. Jennifer was fired in August 2004 for smuggling food to and having an illicit relationship with George Hyatte, who had escaped from authorities four times previously. The couple continued their relationship and were married in May 2005, with the warden's permission.

Thirty-six hours and 300 miles after the dramatic courthouse escape, the couple was arrested without a struggle in Columbus, Ohio. Completely divorced from the reality of the situation, Jennifer called out to her husband, "Baby, baby, it'll be OK! It'll be OK!"

The Hyatte incident is by no means isolated. On October 2, 2004, Edward R. McDaniel, 37, escaped from the Lois M.

DeBerry Special Needs Facility in Nashville with the help of DOC guard Vicki Sanford, 52, a mother of six and grandmother of seven, and Michael Moize, 30, Sanford's son-in-law, who worked in the prison's central control office. Moize provided a guard's uniform to Sanford; she smuggled it into the facility and gave it to McDaniel, who wore it when he walked out of the prison during a shift change. Sanford and McDaniel were captured in Texas six days later; Sanford and Moize subsequently pled guilty and received probation. Even after her arrest, Sanford wrote McDaniel telling him she still loved him and wished they'd made it to Mexico.

A Tennessee DOC report released on June 1, 2005 found that between 2001 and 2004, 12 nurses, five counselors and 69 female guards were fired over inappropriate relationships with prisoners -- and that's just female employees. "The numbers were a little more astounding than I thought they would be," said Warden Reuben Hodge, chairman of the committee that produced the report. As some recent examples demonstrate, these incidents occur in every state.

In Nevada, convicted robber Kenneth Jody Thompson, 24, escaped on August 25, 2005 from the Northern Nevada Correctional Center in a prison van. He was aided by Ana Christina Kastner, 40, a prison dental assistant, who had smuggled a cell phone to Thompson. Kastner received probation on felony charges in connection with the escape in March 2006,

and Carolyn Thomas, another dental assistant at the Northern Nevada Corr. Center, was fired.

Last year in Riverside, California, sheriff's deputy Angela Carol Parks, 32, fell in love with accused killer George Anthony Hernandez, Jr., 28. Sixteen months of training and three years of experience at the Robert Presley Detention Center didn't prepare Parks for Hernandez. They exchanged hundreds of letters and phone calls. She wrote of her desire "to climb down the walls into her baby's cell" and professed how much she loved him and would kill for him, reminding Hernandez that she had her "toys" and also was a "pretty good shot." She allegedly smuggled drugs to him, and conspired to murder two witnesses in his murder case. Once caught she admitted writing the letters but claimed it was only a "fantasy" relationship. Parks had to face harsh reality when she was charged with conspiracy to solicit murder and jailed herself, on a \$1 million bond.

On August 6, 2005, Michigan prison kitchen guard Karen Sleep, 42, smuggled Garfield Lawson III, 35, out of the Baraga Maximum Correctional Facility in a food service truck. Sleep, divorced with two adult daughters, worked with Lawson in the prison kitchen. Lawson must have had a golden rap because he convinced Sleep and Jodi Lynn Axley, 38, a prison guard, to not only have sex with him but to bust him out of prison. Lawson and Sleep were captured two days later; Sleep pled guilty on June 13, 2006 to felony

charges, including attempted criminal sexual conduct for her relationship with Lawson while she was a prison employee, and awaits sentencing in July. Axley also pled guilty, and received a 58-62 month sentence for her role in the escape.

Lawson's manipulative talents, however, pale in comparison to those of Eric James Kurtz, 21, whose only tool was an intercom and his gift of gab. Last year Kurtz convinced April Becerra, 26, a civilian jail employee, to help him escape from the Bob Wiley Detention Facility in Tulane County, California with a promise of marriage. Becerra smuggled food and marijuana to Kurtz. Between them they hatched a failed hair-brained scheme that involved a power drill, extension cord, and acid to melt the jail's concrete walls. Becerra was arrested on Aug. 26, 2005 following a sheriff's dept. investigation; she was charged with conspiring to help Kurtz escape and conspiring to provide him with escape tools.

On November 20, 2004, an Alaskan, Misty Hoffman, 29, mother of two children, took a different approach to bust her boyfriend, Randy Watson, 30, out of the Fairbanks Correctional Center. Misty plowed down two fences before repeatedly ramming the jail with a stolen front-end loader. Unbelievably, the jail withstood the assault. Alert police arrested her days later at a routine traffic stop. In October 2005, Misty, one of six charged in the plot, received a seven-year prison sentence with three years suspended.

Misty at least knew what she was doing. Celina Clay, 51, a Tennessee prison guard, apparently gave no thought as to what might happen when she smuggled a loaded .38 caliber Derringer into the Charles Bass Correctional Complex in Nashville in Oct. 2005. Celina gave the pistol to prisoner Clinton Osborne, who was to pass it along to Celina's lover, David Allen Lane, 33. Osborne turned out to be unreliable, however, when he opened the bag that Celina gave him and found a gun. He reported the gun the next day. Celina was fired on November 14, 2005, and Osborne and Lane were transferred to a maximum security facility.

In perhaps the best planned escape of all, Toby Young, 48, a married mother of two adult sons, smuggled John Manard, 27, a murderous carjacker, out of Kansas' Lansing Correctional Facility on February 12, 2006. Young had founded the Safe Harbor Prison Dog program, which rescued dogs from animal shelters

and used prisoners to train the dogs to be adoptable. Kansas Corrections spokesman Bill Miskell described Young as "well-known and well-liked." She was apparently liked well enough that seven prisoners packed Manard into a dog crate and loaded it into Young's van, which was then waved through the front gates by trusting guards.

Toby had prepared well, gathering \$10,000, two guns, hair dye and an electric razor prior to the escape. She had also bought a car and rented a storage area. Despite her preparations, the couple was caught near Chattanooga, Tennessee on February 24, 2006. In a jailhouse interview a tearful Toby was unable to explain why she had helped Manard escape. On June 1, 2006 she pled guilty in exchange for a 21-month sentence.


And on May 13, 2006, Elizabeth M. Medina, 31, a former teacher at FCI Florence, was sentenced to two months of home detention as a result of her relationship with prisoner Jesus "Jesse" Barrientes, an alleged leader of the Mexican Mafia. Medina admitted to having sex with her imprisoned lover from May to Sept. 2005 at the federal prison in Colorado, and became pregnant by him. She also provided him with information about another prisoner, Joe Tamayo, who had cooperated with government authorities against the Mexican Mafia during an April 2005 trial. Tamayo was later stabbed by other prisoners; the hit was allegedly ordered by Barrientes based on the information that Medina had provided.

An interesting dynamic exists between the genders. While PLN frequently reports on male guards who rape and sexually assault the women prisoners in their care, it is rare to find instances where male staff actually have relationships with the prisoners in their care or go to the lengths described above. While the above examples are

dramatic, in many instances female employees simply quit their jobs with prisons and jails and marry the men they have met in prison having "regular" relationships.

However, it is the high profile incidents that capture the news headlines and media attention. Captain Bill Kripp of the California Department of Corrections and Rehabilitation calls such incidents a "crime of passion, a crime of the heart." These crimes of the heart, however, carry serious penalties. Jennifer Hyatte and her husband, George, are now facing the death penalty on charges of first degree murder, with trial dates set for July and August 2006. The State of Tennessee aims to truly break Jennifer's heart. Sometimes, love hurts. 🐾

Sources: *Associated Press, Beaumont Enterprise, Detroit Free Press, Fresno Bee, Houston Chronicle, The New York Times, Palm Beach Post, Press-Enterprise, Pueblo Chieftain, Reno Gazette-Journal, Rocky Mountain News, The Tennessean, USA Today, WVLT Channel 8.*



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\$9 Million Jury Award In Arizona County Jail Death

by John E. Dannenberg

A federal jury awarded \$9 million to the family of a Scottsdale, Arizona prisoner who suffocated in a restraint chair in the Maricopa County Jail (MCJ) in 2001. Found negligent and liable were Sheriff Joe Arpaio and nurses from contract health-care provider Correctional Health Services (CHS). This award comes on the heels of an \$8.5 million settlement in another MCJ restraint chair death when 33 year-old Scott Norberg died in June 1996.

On August 6, 2001, Charles Agster III, mentally retarded and high on methamphetamine, was forcibly put in a restraint chair by nine guards in the MCJ. They put a hood over his head, whereafter Agster stopped breathing and died three days later. The last moments of Agster's 45-minute stay inside the jail were videotaped.

Agster's attorney, Michael Manning [who had previously represented the Norberg family], focused the blame where it belonged. He asked the jury to only return \$1 judgments against the nine involved guards, because they had never been trained on how to safely use restraint chairs. "They [did] two to 13 chairings every night in the [now-closed] Madison Street jail and not one of those people have ever been trained on how to do it safely without killing someone," Manning explained. Sheriff Arpaio continued to maintain, "My officers did not cause this man to die."

Obviously, the jury agreed. They found Arpaio, not his guards, "caused this man to die," by failure to train his guards. In fact, the jury awarded \$4.5 million in compensatory damages against the sheriff's office. In addition, the jury awarded \$2.2 million against CHS for its failure to give CPR to Agster for 15 minutes after he stopped breathing. Finally, the jury levied \$180,000 in compensatory damages plus \$2 million in punitive damages against CHS nurse Betty Lewis. Overall, the jury's award had been \$10 million, but it assigned \$1 million in contributive liability against Agster himself, his parents and the person who sold him the methamphetamine.

The legal path to the damages trial was tortuous. First, Sheriff Arpaio tried to hide what happened by declaring the incident files "confidential." He ultimately lost this in the Ninth Circuit U.S. Court of Appeals (*Agster v. Maricopa County*,

422 F.3d 836 (9th Cir. 2005). Next, the defendants claimed qualified immunity. The Ninth Circuit affirmed the district court's ruling that the nurses and guards were not entitled to qualified immunity, but found that Arpaio was so entitled, because he had no direct participation in the restraint actions. The court expressly ruled that Arpaio's famed "swagger" and "braggadocio" alone could not inculpate him. See: *Agster v. Maricopa County*, 144 Fed.Appx. 594, July 20, 2005. Thus, the scene was set for a liability trial against the guards and nurses who did participate. The Sheriff's Department was found liable because of its policy to routinely use the restraint chair without training its staff, which exposed prisoners to repeat susceptibility to the positional

asphyxia suffered by victims Norberg and Agster.

Attorney Manning was outspoken. "This county's own paid consultants ... have been telling this county for five and six years that there are serious and lethal problems in Joe Arpaio's jails. This jury now shouts from this roof that they agree." Manning added, "What does that tell you about the culture of the sheriff's department? This is not a Third World country, but we have a sheriff's department that handles things like [it is]." The legend of Joe Arpaio endures. See: *Agster v. Maricopa County*, USDC D AZ, Case No. CV-02-01686-JAT. ■

Other sources: *Phoenix New Times*, *Scottsdale Tribune*.

U.S. Corrections Corporation Suit Settled for \$13.2 Million

The former owners of U.S. Correctional Corporation (USCC) have agreed to settle a lawsuit over misuse of the employee stock-ownership plan for \$13.2 million.

Prior to 1998, when it was purchased by Corrections Corporation of America (CCA) for \$225 million, USCC ran four private prisons in Kentucky: Marion County Adjustment Center, Lee County Adjustment Center, Otter Creek Correctional Center and River City Correctional Center. Prior to the buyout by CCA, USCC had over 750 employees and an employee stock ownership plan. In 1993, Milton Thompson and Robert B. McQueen, the trustees of the employee stock-ownership plan, used the plan to seize control of USCC. In 1995, faced with the possible conviction and imprisonment of USCC owner J. Clifford Todd for paying almost \$200,000 in bribes to Jefferson County Corrections Chief Richard Frey for USCC to keep a profitable contract with Jefferson County, Thompson and McQueen used the employee stock ownership plan to purchase the company from Todd at a higher-than-fair-market price. All told, they paid \$9.9 million more than the stock was worth according to the court's expert. In 1996, Todd was convicted and sentenced to 15 months in jail.

The past employees of USCC sued Thompson and McQueen. In 2002, U.S. District Judge Jennifer Coffman found that Thompson and McQueen had failed to investigate the purchase price of the stock, improperly costing the employees millions of dollars. In January 2005, she ordered Thompson and McQueen to pay \$20.7 million in damages. Instead of appealing the decision, Thompson and McQueen, who made over \$70 million in profit on the sale of USCC to CCA, entered into settlement negotiations.

On May 6, 2005, they agreed to pay \$13.4 million in damages to settle the suit. "All the parties will contribute to the payment but the amount each party is paying is confidential," according to Sheryl Snyder of Louisville, Kentucky, who represents Thompson and McQueen. "We had an all-day mediation session and reached a global settlement of three lawsuits among six parties." It is hardly a surprise that the administrators of a private prison company, an industry that seeks to profit from human misery, have no moral compass when it comes to stock manipulations. See: *McQueen v. Corrections Corporation of America*, USDC D Ky., Case No. 3:00-cv-00804-JBC-JDM. ■

Additional Source: *Lexington Herald*.

Audit: California Private Prison Contracting Tainted by Conflicts of Interest

The California State Auditor reported in September 2005 that the California Department of Corrections and Rehabilitation (CDCR), when contracting with private prison contractors for two minimum security Community Correctional Facilities (CCF), issued no-bid awards to companies who had hired recently retired senior CDCR and Finance employees with economic interests in the awards.

Specifically, the Auditor found that (1) actions taken by two of CDCR's former employees may have violated conflict-of-interest laws, (2) CDCR does not ensure that retired annuitants [former employees on retirement pay who are rehired on a second salary] file statements of economic interest, (3) state funds were committed and spent before approval was obtained for a no-bid contract and (4) justification for the no-bid contracts was based on a misleading claim of cost comparisons that did not include all comparable costs. The Auditor further criticized CDCR's future prison population projections [and hence the need for such private facilities] because no documentation of the projection process existed, denying the Auditor ability to establish the validity of the projections.

In addition to 34 state prisons, CDCR operates 12 minimum security CCFs, six of which are operated by private contractors and the other six by local governments. All CCF contracts are to be competitively bid. Statewide, 4,733 CDCR prisoners are housed in CCFs.

Due to lack of funds in fiscal 2003-04, three private CCFs were closed: McFarland, Mesa Verde and Eagle Mountain. It was estimated that these beds would not be needed due to anticipated alternatives-to-incarceration programs. Moreover, CDCR's projections through 2009 showed a stable population. But when the new programs were canceled due to guards' union (CCPOA) pressure [private prisons do not employ CCPOA guards] CDCR was beset with an "unexpected" sudden need for prison beds, and reversed course to reopen McFarland and Mesa Verde. CDCR began by using one-year no-bid contracts, with a planned competitive bidding process for the long term.

Auditing these two contracts at the California Legislature's request, the

Auditor found that for the \$6.8 million Mesa Verde contract, the contractor (Civigenics) failed to disclose that two of its senior staff had worked for CDCR in the twelve months prior to the award and were currently retired annuitants for CDCR while yet participating in Civigenics' operations at Mesa Verde. One was former Chief Deputy Director David Tristan, who retired from CDCR on May 27, 2004 but was still on its payroll as a retired annuitant. Deputy Director as of July 2005, while pre-award contract funds were being expended at Mesa Verde. The other triple-dipping employee was Michael Pickett, a former Deputy Director, who retired on January 31, 2003 but was rehired as a retired annuitant two days later (and remained on that pay status as of July 2005). (See: *PLN*, Jan. 2006 *Private Prison Firms Stumble; Hire Former California Officials To Lobby For Beds*.) After reviewing relevant conflict-of-interest laws, CDCR disqualified Civigenics' June 2005 bid on July 14, 2005 (thus effectively voiding the contract), citing the participation of a current CDCR employee in violation of California Contract Code §§ 10410, 10411. Significantly, the two no-bid contracts had been justified on the basis of an "unexpected" CDCR population explosion, but when Civigenics' conflict of interest was exposed, the population projection suspiciously imploded, obviating the need for those beds.

The contract for McFarland was awarded to GEO Group, Inc. (GEO) before it was approved by the Department of General Services. A challenge was raised of influence by California's

former Director of Finance Donna Arduin, who left office in October 2004 to become a trustee of the real estate trust (Correctional Properties Trust) that owns the McFarland asset, which is leased to GEO. It was nonetheless determined that distancing herself by association with the Trust rather than GEO sufficed to insulate Arduin from a conflict of interest.

Looking deeper, the Auditor found that some CDCR policies lacked proper controls, and recommended new ones. For example, CDCR claimed that because the CCFs' average daily costs (\$45 at McFarland and \$54 at Mesa Verde) were lower than the \$59 maximum daily county jail rate, CCFs were cost effective. The auditor disagreed, noting that CDCR was "hiding the ball" of ancillary remaining "overhead" support from CDCR to the CCFs, including health care, transportation, disciplinary housing, counselors and administrative appeals. Thus, CCF contract comparison justifications failed in general, although the auditor found the non-competitive contract bids in line with other CCF contracts (after excluding a \$1 million "startup" cost to reequip the older Mesa Verde facility for the contractor).

The auditor recommended correcting all of the above "indiscretions." See: California State Auditor, *CDCR: It Needs To Better Ensure Against Conflicts Of Interest And To Improve Its Inmate Population Projections*, Report No. 2005-105 (Sept. 2005). Free single copies are available from Bureau of State Audits, 555 Capitol Mall, Suite 300, Sacramento, CA 95814; also at www.bsa.ca.gov and www.prison-legalnews.org. ■

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Hurricane Threat Forces Texas Prison Evacuations, Damage Worsens Overcrowding

by Michael Rigby

As Rita churned westward through the Gulf of Mexico, at times a monstrous Category 5 hurricane with wind speeds of 175 mph, officials with the Texas Department of Criminal Justice (TDCJ) ordered the evacuation of entire prisons in coastal and low-lying areas of Southeast Texas. More than 9,000 prisoners were ultimately evacuated, but thousands more were left in harm's way. Damage from Rita also left two prisons closed indefinitely, exacerbating overcrowding in a system already bursting at the seams.

The massive relocation effort began in the pre-dawn hours of Wednesday, September 21, 2005, two days before the hurricane's expected landfall. Prison officials hoped the job could be completed in a single day, but TDCJ's fleet of 85 buses became mired in traffic as 1.8 million Texas and Louisiana residents--fearing a repeat of the devastation caused in New Orleans by hurricane Katrina--flooded evacuation routes designed for far fewer people. Once the prisoners arrived at prisons further inland, they were housed in gymnasiums, chapels, dayrooms, and other makeshift dormitories.

On September 22, prison officials were still scrambling to complete the relocations. Mandatory evacuation orders had been issued for a number of Texas coastal counties, including Brazoria County, where at least 6 state prisons are located.

Yet only 3 were evacuated. Buses showed up at the Ramsey One Unit to relocate its approximately 1,800 prisoners early Thursday morning. But just as prisoners began filing out to the buses, the evacuation was abruptly canceled. Rita's projected path had shifted to the east, from the Houston-Galveston area to the Beaumont area. The buses then made a mad dash to remove the prisoners in Beaumont. Two units there, Gist and LeBlanc, were completely evacuated, while 2,800 prisoners at the maximum-security Stiles Unit rode out the storm.

Prison officials contend their decision to evacuate only certain prisons was based on building composition and location. "Units being evacuated are those in more coastal areas," said Michelle Lyons, spokeswoman for TDCJ. "We also consider the makeup of buildings. Some are metal and can withstand high

winds, and others are not." While there is some truth to this, it appears the decisions were made out of necessity due to poor preparation and a late start rather than rational planning.

Fortunately for the prisoners in Brazoria County, they experienced only gale-force winds and intermittent heavy rain as Rita continued on her predicted path. They remained locked in their cells, however, because the prisons were operating on skeleton crews since most of the guards and other employees chose to heed the mandatory evacuation orders and fled to the safety of higher ground with their families.

Prisoners at the Stiles unit also experienced some discomfort. During and shortly after the hurricane, the prisoners were served cold cuts, military-style prepared meals, and bottled water. They were forced to use portable toilets until water and sewer services were restored.

Another 5,665 federal prisoners, housed in 4 separate units at the federal prison complex in Beaumont, were similarly set to weather the tempest but were apparently evacuated at the last minute. One federal prisoner reported that prisoners at the complex were moved from 2:00 a.m. Friday morning through Sunday evening in what he called the largest evacuation ever conducted by the Bureau of Prisons.

The prisoners were taken to Yazoo City, Mississippi, where they spent the entire first week with no electricity, no air conditioning, no ventilation, and no water. "It was quite hellish," the prisoner said. Everyone broke out in a rash from head to toe, he continued. For a week, the prisoners were fed once a day with peanut butter and jelly packs. They had no water for flushing for several days, then enough to flush just once a day. Their property was abandoned in Beaumont, and prison officials told them they would probably never see it again.

Many other prisoners were also relocated in anticipation of hurricane Rita. Louisiana moved 1,700 state prisoners to higher ground, while the Galveston County, Texas, jail transferred 875 prisoners. Numerous other small city and county jails likely evacuated hundreds more.

Stiles Unit suffered only minor damage to its perimeter fence and an unoccupied dormitory. But the Gist and LeBlanc Units

sustained major damage and will be closed indefinitely. Top prison officials, speaking privately, said they expect the damage to run in the millions of dollars and that repairs could take months.

With two prisons down, overcrowding has reached crisis proportions in the already packed system. On September 29, 2005, TDCJ was running at 97% capacity with roughly 150,500 prisoners, according to prison officials. Several maximum-security prisons were reportedly 100% full, while some were even operating at 102% capacity.

"It's put a crunch on the system, that's for sure," said state Senator John Whitmire (D-Houston), chairman of the Senate Criminal Justice Committee, which oversees Texas prisons. "We put money in the budget to lease about 6,000 beds over the next 2 years. This means we'll probably spend that sooner than we counted on. And that doesn't include whatever the cost will be to repair the damaged units."

In spring 2005, Texas legislators had allocated \$19.9 million for leased bed space in fiscal year 2005-06, and \$43.8 million for 2006-07. Governor Rick Perry later vetoed all but \$10 million for leased beds in the current year. On October 4, 2005, TDCJ had 826 prisoners in leased beds in county jails and privately operated jails, compared with just 600 a few weeks earlier.

Kathy Walt, spokeswoman for Governor Perry, said state officials won't make any decisions until they receive a final assessment. "It may be we'll have to make provisions for additional contracted beds, or it could be we'll have to consider budget execution authority to allow TDCJ to have additional funds available," she said. "We'll be looking at all options. But right now we don't know what may or not be needed."

Senator Whitmire said the real problem is too many people in prison. "Obviously, this gets us back to the issue of the thousands of people we have in prison beds who probably don't need to be there, when they should be in community-based programs instead," he said. "This issue was coming up when the system filled. The hurricane has just caused that to happen sooner rather than later." ■

Sources: *Austin American-Statesman*, *Galveston Daily News*, *Austin News 8*, *Houston Chronicle*, *Beaumont Enterprise*

Gun-smuggling Prisoners Convicted in Shooting Scam

by Gary Hunter

Fraud takes many forms but few as bizarre as the one allegedly concocted by D.C. prisoners Shawn Gray, Jamal Jefferson, Leonard Johnson and Fredrick Robinson.

On December 20, 2003 all four men were wounded by gunfire inside of the Southeast Washington prison. Originally, it was believed that the shootings resulted from a murder-for-hire contract placed on the men.

"There was a hit put out, and that was the reason for what went down in the jail," said defense attorney Gregory Lattimer.

Lattimer argued that the shooting was retaliation for a dispute resulting from drugs and cell phones being smuggled into the prison. The gun itself was smuggled in via a package tossed onto a ledge near the recreation yard.

By the time the trial began in September 2005, however, prosecutors were telling jurors a different story. According to Assistant U.S. Attorneys Emory V. Cole and Thomas A. Gillice, the four prisoners contrived a scheme to profit from the lax security and rampant violence of the prison.

Shawn Gray supposedly masterminded the scheme in which the four men would inflict each other with gunshot wounds and eventually sue the District for damages. According to the indictment, Gray purportedly postponed the plans several times, once because "he did not want the inmates to go without their [weekly] supplies," from the lockdown that would follow the shooting.

Prosecutors said that Jefferson tried to back out of the plan but Gray and Johnson shot him anyway. The jury found the two not guilty on that charge. None of the prisoners sustained serious wounds from the gunfire. The men were also acquitted of firearm and contraband charges.

Gray and Robinson were convicted of conspiracy, four weapons charges. On March 23, 2006, Gray was sentenced to 72 months in prison. On January 26, 2006, Robinson was sentenced to 69 months in prison.

Lattimer said the scenario created by the prosecutors was ridiculous and was made believable only because of key evidentiary rulings against the defense and the jury's willingness to believe the worst

about already incarcerated prisoners. For their part, Johnson and Jefferson testified on behalf of the government.

"It was an unfair verdict," he said.

Interestingly, over the years *PLN* has reported on these gun smuggling schemes on a semi regular basis in New York, Georgia and Illinois where prison-

ers purport to shoot themselves and then file a lawsuit. In its extensive coverage of prison and jail litigation *PLN* has yet to discover a single successful gunshot suit by a prisoner, except when it is a prison or jail employee doing the shooting. ■

Source: *Washington Post*

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Alleged Attacks Plotted By New Folsom Prisoners Uncovered

by Matthew T. Clarke

A federal grand jury has indicted four men--two of whom have been prisoners at the California State Prison-Sacramento (New Folsom Prison)--with conspiracy to levy war against the United States, to possess and use firearms in the furtherance of violence, and to kill U.S. and foreign officials. The six-count indictment stems from the alleged plot to attack around two dozen targets in southern California, including National Guard recruitment centers, Israel's El Al airline facilities, the Israeli consulate in Los Angeles and several area synagogues. The attacks were planned to begin on September 11, 2005, with an assault rifle attack on a recruitment center and were to peak during the Jewish High Holy Days in October.

The master planner behind the plot is allegedly New Folsom prisoner Kevin Lamar James, 29. James arrived at New Folsom in 1996. There he joined the largest Muslim group in American prisons, the Nation of Islam (NOI). NOI is currently led by Louis Farrakhan and is known for his anti-Semitic and inflammatory rhetoric and for the group's adherence to the teachings of black separatist Elijah Muhammad. Finding NOI, which opposes armed struggle, too mainstream, within a year of arriving at New Folsom, James founded his own radical Islamic group, Jamiyyat Ul-Isikam Is-Saheeh, (the Academy of Authentic Islam) also known as JIS. California prison officials consider JIS to be a disruptive gang.

James met Levar Harvey Washington, 25, while in prison. The indictment alleges that Washington pledged his loyalty "until death by martyrdom." Washington was released from prison in November 2004, allegedly with instructions to recruit others--especially five people without felony criminal histories to purchase firearms and a bomb-maker. The group was then to undergo extensive training and amass an arsenal that included silenced firearms.

After his release, Washington met Gregory Vernon Patterson, 21, a student at El Camino College and Cal State Northridge who worked at the duty-free store at LAX and lived with his parents in a gated community in Gardena. Patterson's father is a college professor and his mother is an administrator at Harbor College.

Washington met Patterson and

Hammad Riaz Samana, 21, at the predominately South Asian Jamat-a-Masjidul Islam mosque in Inglewood, California. He was raised Muslim in Pakistan. In 2000, he moved with his family to an apartment across the street from the mosque. He attended Santa Monica College and worked at a Barnes and Noble bookstore.

The plan was allegedly to rob a series of gas stations and use the spoils to finance the purchase of an assault rifle to use in the attacks. Washington and Patterson face state charges of robbing several gas stations, including one in Torrance. Police recovered Patterson's cell phone from the scene of that robbery. The police then staked out Patterson. They observed him and Washington rob a Fullerton gas station on July 5, 2005, and identified Samana as a person of interest from the surveillance.

Evidence of the purported plot was discovered at Washington's apartment. The evidence included bulletproof vests, knives, radical Islamic literature and potential sites for attacks, along with their addresses, marked on a map. They also discovered that on July 10, 2005, Patterson was to pick up an AR-15, .223 caliber assault rifle (the civilian version of the M-16) he had ordered from a sporting goods store.

The indictment alleges that Patterson conducted internet research on the Israeli national airline, El Al, the Israeli Consulate, and local events planned for Yom Kippur, the Day of Atonement, the holiest day in the Jewish calendar.

Armed with a shotgun, Washington and Patterson allegedly began the string of robberies in May, 2005. The state indictment against them listed ten counts of armed robbery and one count of attempted robbery. Washington is also charged by the state with being a felon in possession of a firearm.

The investigation into the alleged plot involved over 200 FBI agents, LAPD detectives, and counter-terrorism officials of the state and federal governments. They discovered no evidence that the mosque, which is nondenominational, was involved in the plot.

The idea of prisons being used by radical Islamic groups as recruiting grounds for guerrillas has been discussed

in police circles since 2002, when it was alleged that Jose Padilla, whom authorities claim planned to use a radioactive "dirty bomb" on a American city, had been recruited into Islamic struggle while in prison. Richard Reid, the thwarted shoe bomber of an American Airlines flight in 2001, was also recruited to radical Islam while in prison according to the FBI. One of the suspects in the attempted suicide bombings in London on July 21, 2005, is also believed to have converted to Islam while in prison.

As a result of the prison recruitment angst, FBI agents throughout the U.S. are conducting "threat assessments" of prisoners. The objective is to identify which prisoners might have become politically radicalized while in prison and might commit armed acts upon their release.

People from the mosque who know the alleged jihadists say they are unlikely candidates for such activities. Samana's friends describe him as studious and mild-mannered. Patterson is described as an "overachieving nerd" by his ex-high-school principle. Washington is called quiet and respectful by other mosque attendees.

Shakeel Syed, a Muslim prison chaplain for the federal Bureau of Prisons disputes the concept that prisons are breeding Muslim terrorists.

"Can they be a breeding ground? Indeed, yes. Has that been the case with the Muslims? Indeed not," said Syed.

Syed and other prison experts note that Islam is generally a positive influence on prisoners. Furthermore, the government's stories about the dangers of prison-recruitment of dissidents is overblown according to some experts, such as New York scholar Robert Dannin.

"It's pretty doubtful that a sophisticated international terrorist organization is going to be using the good-old American prison system to do recruiting," said Dannin. Noting that a significant number of prisoners are informants he asks, "How can you trust a plot to them?" "People have taken this 'tale' of Malcom X, the one famous example (of a prison conversion to Islam), and built it into a powerful myth," said Dannin. This often results in false stories of prison conversions.

According to Dannin, Padilla was not converted to Islam while in prison,

but rather while working at Taco Bell and living in Florida. Likewise, previous reports of radical infiltration of the ranks of prison and military chaplains proved to be overblown. [PLN, July 2004, p. 8; Sept. 2003, p. 20]. It also remains to be seen how this prosecution fares, as to date, all the government's big "terrorism" cases have been launched with much fanfare

and ended with reduced charges, acquittals and prosecutorial fiascos. When Jose Padilla was actually charged in court, for example, no mention was made of "dirty bombs."

Unfortunately, past and present administrations have never let truth get in the way of a reactionary policy decision. Therefore, we can expect a lengthy fed-

eral probe of prisoners, especially those professing Islam. We can also expect to hear repeated proclamations about what dangerous recruiting grounds the prisons are. ■

Sources: *Associated Press, Los Angeles Times, Sacramento Bee, Seattle Times, Washington Post, San Diego Union-Tri-*

Non-Sex-Offender Parolee Entitled to Due Process Before Being Treated As Sex Offender

by Matthew T. Clarke

The Fifth Circuit court of appeals held that a parolee who has never been convicted of a sex offense is entitled to a due process hearing prior to being required to register as a sex offender and attend sex offender treatment as a condition of parole.

Tony Ray Coleman, a Texas state prisoner, was on parole for burglary of a habitation when he was indicted for aggravated sexual assault of a child and indecency with a child by contact. He pleaded guilty to the lesser charge of misdemeanor assault and his parole was revoked. Later, he was released on mandatory supervision. However, without giving him advanced notice or a hearing to contest the conditions, the parole panel required him to register as a sex offender and attend sex offender therapy. Coleman registered, but failed to attend therapy and was revoked for that reason.

Coleman filed a pro se federal petition for a writ of habeas corpus alleging that his procedural and substantive due process rights were violated when the parole panel required him to register as a sex offender and participate in sex offender therapy even though he had no sex offense conviction. The district court dismissed the petition and Coleman appealed.

The Fifth Circuit appointed Daniel Edward Laytin and Elizabeth A. Larsen of Chicago, Illinois, as Coleman's counsel on appeal. Overruling the state's attempt to have two of Coleman's claims procedurally barred, the Fifth Circuit held that Coleman could properly exhaust his claims by raising them in his reply to the state's answer to his state petition for a writ of habeas corpus.

Following the Ninth and Eleventh Circuits, the Fifth Circuit held that a

prisoner who has not been convicted of a sex offense has a liberty interest in freedom from classification as a sex offender. In doing so, the court applied the stigma plus compelled behavior-modification treatment standard of *Vitek v. Jones*, 100 S.Ct. 1251 (1980). "As in *Vitek*, the state imposed stigmatizing classification and treatment on Coleman without providing him any process. The state's sex offender therapy, involving intrusive and behavior-modifying techniques, is also analogous to the treatment provided for in *Vitek*.... Accordingly, the Due Process Clause, as interpreted in *Vitek*, provides Coleman with a liberty interest in freedom from the stigma and compelled treatment on which his parole was conditioned, and the state was required to provide procedural protections before imposing such conditions." The state court's denial of the state habeas petition was thus contrary to clearly-established federal law.

The Fifth Circuit held that the sex offender treatment, even that involving hooking a "strain gauge" to the penis (called a plethysmograph) and showing the sex offender a series of photographs to identify deviant sexual arousal patterns and modify them into acceptable sexual arousal patterns is not conduct that "shocks the conscience." It also held that the parole panel did not impose the registration and treatment conditions intending to injure Coleman. Thus, Coleman's substantive due process rights

were not violated.

Coleman had a procedural due process right to a hearing in which the state may seek to prove that he lacks sexual control and thus constitutes a threat to society. Only if it proves the lack of sexual control and threat to society may the state impose sex offender registration and treatment as a condition of Coleman's parole. The case was returned to the district court for further proceedings consistent with the Fifth Circuit's opinion. See: *Coleman v. Dretke*, 395 F.3d 216 (5th. Cir. 2004). ■

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Ohio DOC Stipulates To Vastly Improved Medical Care

by John E. Dannenberg

The Ohio Department of Rehabilitation and Correction (ODRC) settled a prisoner class action federal lawsuit on October 6, 2005 by stipulating to comprehensive improvements to its prisoner medical care, grounded in adding 321 medical personnel to the existing 540 and in overhauling its medical facilities. In the first year, \$7 million will be added to the present \$140 million budgeted for medical care. Over 21 million will be spent in the first three years. Lawyers for both sides agreed that the proactive reforms would pay for themselves in the long run because much of the emphasis will be placed on preventive measures.

In a class action complaint, prisoners Rodney Fussell (S. Ohio Correctional Facility), Gary Roberts (London Correctional Institution) and James Love (Lebanon Correctional Facility) sued ODRC officials in U.S. District Court (S.D. Ohio) in October 2003 for injunctive relief for deprivations of state law and constitutionally required medical care. The class is defined as all ODRC prisoners, present and future, who are denied such care. Additionally, a subclass consists of all prisoners who were required to pay a \$3 co-pay fee since July 1, 1996. The class and subclass are estimated to encompass over 40,000 prisoners in ODRC's 33 prisons.

The complaint addresses all disciplines of medical care, including chronic disease and dental. Although "Ohio State University Medical Center was used for treatment outside that provided at the prisons, delays of months to get to see the specialists seriously endangered prisoner's lives. Prisoner grievances over medical care were inappropriately answered by unqualified prison officials, not doctors. Prison administrators frequently overruled doctors' orders for specialists and follow-up care. Some prisons had no chief medical officer for months, thus compromising medical care. Staff shortages in the dental department often delayed routine care for more than two years, causing prisoners to develop worse problems. Lengthy delays in ordering diagnostic tests in HCV (Hepatitis-C) cases also seriously endangered prisoners' lives.

Treatment was often ordered on a limited cost-basis instead of medical need. Lack of emergency medical care for critically ill prisoners caused deaths. A severely restricted HCV treatment protocol

(treatment denied until liver disease was advanced) was challenged because it denied treatment to most HCV positive prisoners. (See, e.g.: *PLN*, May 2004, p.1, *Prisons Nationwide Fail To Treat HCV Epidemic*). The \$3 co-pay fee was used illegally as a bar to gaining medical/dental care. Named plaintiffs Fussell and Roberts suffered for ten years from HCV but were refused necessary liver biopsies, thus precluding treatment for those ten years. Plaintiff Love suffered periodontal disease after being forced to wait 27 months to get his teeth cleaned, and will now lose four front teeth.

The 33 page Stipulation was focused on improving medical care, not on assessing damages. Plaintiffs' attorney David Singleton said, "The health care system was broken when we filed this suit. It will be a much improved system." Both sides agreed that the improvements will tend to pay for themselves in the long run because they are based on preventive measures such as early screening and improved diet.

The Stipulation announces ODRC's standard: "to provide only the minimum level medical care required by the Eighth Amendment." In other words, if it is not "deliberate indifference" with a "sadistic" intent," sufficient to "shock the conscience," it passes ODRC's muster. Although this writer found much of the language of the Stipulation susceptible to broad subjective interpretation, couched in "intent to improve" verbiage rather than bright line mandates, the net effect, if responsibly administered, could vastly improve ODRC prisoners' health care. Whether it actually does, remains to be seen. The Stipulation provides for quarterly oversight reports, based upon on-site inspections by a multi-disciplinary team under the leadership of Professor Fred Cohen who also headed the monitoring effort in the mental health class action in Ohio, *Dunn v. Voinovich*.

Some of the highlights are that all medical and dental care shall be timely, performed by credentialed personnel. The program will include wellness information, healthy diets and food in the commissary, and accommodation of non-smokers. ODRC agrees to provide at least one full time physician per 900 prisoners (phased in over two years). Physician staffing will thus increase by 20 positions to 53. Over a four-year period, fifty-four RNs will be added to reach a level of 410, while 79 LPNs will

be added to reach a total of 146.

Reception health assessment screening shall be performed within seven days of arrival, in clinical settings with adequate medical supplies and hand-washing facilities. Prisoners transferred between prisons shall be screened within 12 hours of arrival, and may not be shipped without their medical file accompanying them. Chronic care programs shall be set up for asthma, diabetes, high-cholesterol, HIV, cardiac/hypertension, seizure disorders, TB and general medicine disorders. Access to emergency medical and dental care shall be provided 24/7 at all ODRC facilities. Sick call requests shall be triaged within 24 hours by a nurse. Infectious diseases to be treated and prevented include TB, HCV, HIV and MRSA (Methicillin Resistant Staphylococcus Aureus). Infirmary care requires the patient to be within constant sight and sound of a licensed health care provider.

Only physicians licensed in Ohio may be employed in prisoner care. All licenses will be reviewed annually. Physicians practicing in a primary care area shall have a residency in that field. A physician leadership and monitoring program shall be established to maintain quality control of ODORC medical care. Grievances shall be reviewed only by a new assistant chief inspector who shall be at least a registered nurse. Retaliation for filing grievances is expressly prohibited. All medical care and interviews shall be conducted with full visual and aural privacy. Medical diets shall be provided per doctors orders, and general diet shall be improved with the addition of a licensed dietician to prepare healthy system-wide diets. Co-payments shall not operate as to discourage seeking of medical care. As to damages, only the named plaintiffs will receive relief, consisting of "economic and non-economic" terms. And only the named plaintiffs have standing to move for enforcement of the Stipulation, for which the court retains jurisdiction. Attorney fees shall be determined per the Prison Litigation Reform Act, but the term of the Stipulation is for five years. The plaintiffs were awarded \$160,000 in attorney fees in this case. Plaintiffs were represented by Cincinnati attorneys David Singleton of the Ohio Justice and Policy Center (formerly the Prison Reform Advocacy Center) and Alphonse Gerhardtstein. See: *Fussell v. Wilkinson*, U.S.D.C. (S.D. Ohio, W. Div.) Case No. C-1-03-704 (SSB). ■

South Carolina Prisoner Awarded \$825,000 for Untreated Infection

On January 10, 2006, a South Carolina jury awarded \$825,000 to a state prisoner who received inadequate medical treatment for a life threatening infection.

State prisoner Jason Bynum was diagnosed with a serious mouth infection on January 9, 2002, while imprisoned at the Turbeville Correctional Facility. The untreated infection began as an abscessed tooth but quickly progressed to Ludwig's Angina, which can lead to a potentially fatal swelling of the throat. Edward Bell, Bynum's attorney with the Bell Legal Group, said his client's painful and serious condition was noted by nurses but ignored by doctors and prison management.

Bynum was admitted to the hospital on January 23--two weeks later--after complaining of breathing problems. By then the raging infection had left his lungs 90% full of pus. Hospital doctors were appalled at the inhumane treatment Bynum received, said Carter Elliot, head of the Bell Legal Group's Police and Jail Misconduct Division. Elliot went on to say that one expert witness, a professor at a Maryland Medical School, said Bynum's case was the worst example of medical neglect he had ever seen.

Bynum underwent multiple surgeries and spent several weeks on a ventilator. He suffers from residual nerve damage, impaired speech, and difficulty swallowing.

Bynum sued alleging the South Carolina Department of Corrections was medically negligent in his treatment. The jury agreed and awarded him \$825,000 in actual damages. A separate settlement was reached with a private oral surgeon, Dr. Robert Blease, in the amount of \$50,000.

Attorney Edward Bell was assisted by C. Carter Elliot, Jr. and Vanessa A. Richardson of the Bell Legal Group in Georgetown, South Carolina, and Sam Floyd and Ashley Boyd of the Kingtree, South Carolina, firm Jarrett & Kellahan. See: *Bynum v. South Carolina Dept. of Correction*, Court of Common Pleas, Clarendon Co., Case No. 03-CP-14-482. ■

Fifth Circuit Joins Four Others in Denying Prospective BOP Good Time Credits

The Fifth Circuit Court of Appeals dismissed a federal prisoner's habeas corpus petition seeking advance good time credits because the claim was not ripe. The appellate court further opined that even if it were ripe, a reasonable interpretation of the controlling statute, 18 U.S.C. § 3624(b), would permit only 47, not 54, days of credit per year.

Bureau of Prisons (BOP) prisoner Brandon Sample sued Warden Marvin Morrison for habeas relief under 28 U.S.C. § 2241. Sample, serving 168 months for money laundering and due to be released in 2012, sought good-time credits to be pre-awarded for his entire term. Morrison countered that Sample was statutorily permitted to accrue credits only annually, after he had served each year with good behavior. Simply stated, Sample could not expect to be rewarded for good behavior he had not yet delivered.

The Fifth Circuit dismissed the petition on the jurisdictional ground that it was not ripe. "Given the temporally and speculative nature of Sample's claim, his allegations do not establish that he 'will sustain immediate injury' or 'that such injury would be redressed by the relief requested.'"

But even if Sample's petition were ripe, the appellate court [agreeing with sister circuits: *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001) [*PLN*, Jan. 2002, p.19]; *White v. Scibana*, 390

F.3d 997 (7th Cir. 2004); *Perez-Olivio v. Chavez*, 394 F.3d 45 (1st Cir. 2005); and *O'Donald v. Johns*, 402 F.3d 172 (3d Cir. 2005); [*PLN*, Apr. 2005, p.39]] held that any ambiguity that might exist in

the statute would be resolved in favor of the plain meaning as determined by the administrative agency (in this case, the BOP). See: *Sample v. Morrison*, 406 F.3d 310 (5th Cir. 2005). ■

Missouri Seizes Prisoner Assets Worth \$748,682 In 2005

A more accurate motto for the "show me" state may be the "show me the money" state. In 2005 Attorney General Jay Nixon confiscated \$748,682 from Missouri's most oppressed residents--state prisoners.

The money was seized under the 1988 Missouri Incarceration Reimbursement Act, which allows the state to pirate up to 90% of a prisoner's assets, exclusive of obligations to a spouse or children. Nixon has appropriated more than \$4 million from prisoners for supposed imprisonment costs since he took office in 1993.

"Thanks to the investigative legwork done by my staff, we've once again identified those inmates with the means to pay in 2005 and recovered assets due to the state," Nixon crowed.

He neglected to say how much that "investigative legwork" cost, but it was likely more than the amount collected. Cost of incarceration statutes, increasingly popular, are generally more about good politics than good fiscal stewardship.

Some notable seizures from Missouri prisoners included \$34,036 from John Del-

main and \$10,768 from Warren Delmain, brothers who inherited money from their dead father's estate; \$30,335 confiscated from the bank account of John Cox, serving time for driving while intoxicated; and \$20,684 left to Latrelle Campbell through a relative's estate.

Perhaps prisoners will next be forced to pay for their own executions--a potential boon for Texas. ■

Source: *infozine.com*

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Unconstitutionality of Lockdown of California Hispanics Upheld On Appeal

by Marvin Mentor

The California Court of Appeal upheld the Del Norte County Superior Court's 2003 ruling [case no. HCPB 00-5164] requiring supermax Pelican Bay State Prison (PBSP) officials to cease locking down "Southern Hispanic" prisoners endlessly solely based upon their ethnicity. In an unpublished ruling in 2004, the appellate court rejected PBSP officials' arguments that the superior court had used the wrong constitutional analysis. The court independently reviewed the record using the reasonableness standard of *Turner v. Safley*, 482 U.S. 78, 89 (1987).

The superior court had found that PBSP's policy of automatically locking down all Southern Hispanics, whether they had participated in the major 2000 riot or not, or even if they were not at PBSP when it occurred, amounted to unconstitutional invidious discrimination. Indeed, the court found that by so isolating and discriminating against Southern Hispanics, PBSP was literally fomenting a culture of separation. Worse yet, the court found that while prisoners could get into the gang affiliation label, they could not get out of it. The court found PBSP's administrative review process offering deprogramming to be woefully slow, and ordered them to increase their resources to get the task done on a specified timetable. See: *PLN*, Mar. 2003, p.6, *California Three-Year Lockdown of "Southern Hispanics" Held Unconstitutional*.

The principal contention on appeal was that the lower court had only looked into whether the lockdown policy was "necessary" rather than determining if it served a "legitimate penological interest." PBSP had focused on the court's language, "A lockdown of all inmates, without regard to ethnicity, would be permissible, even over an extended period of time, if it were necessary to maintain order and institutional safety." The appellate court distinguished this as validation only of a hypothetical non-discriminatory lockdown of all prisoners, not a legal standard justifying a racially discriminatory lockdown. Thus, PBSP's argument fell "far short of demonstrating the application of an erroneous legal standard."

The appellate court then proceeded to conduct an independent four-part *Turner*

analysis. It first found that the facts demonstrated a rational basis for PBSP's actions, clearing the way for continued analysis as announced in *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001). As to the second *Turner* factor, reasonable alternatives, PBSP argued that the affected class still had some rights because they were getting medical care and [non-contact] visitation. This didn't wash with the appellate court, who viewed the lockdown disadvantages of no exercise, no work, and no program activities as disparaging.

Recognizing its own mistaken policy in the interim, PBSP revised its policy in 2001 to discern only two cognizable groups: those who wanted to "program" and those who did not, irrespective of

ethnicity. In so doing, the appellate court ruled that PBSP had in essence conceded the final two *Turner* factors, and affirmed the lower court's order requiring PBSP to quickly terminate the by then four-year lockdown (PBSP had obtained a stay pending appeal) by implementing a firm schedule to end the standoff. See: *Escalera v. Terhune*, California Court of Appeal (1st District), 2004; 2004 WL 238783. Note the case is unpublished.

To date, deprogramming seems to be gaining acceptance. Some 13,000 California prisoners have been placed in protective custody prisons (necessary after "dropping out" of a gang), with a waiting list of thousands more pending. See: *PLN*, April, 2006 for more details.)

Guard Out on Bond, Woman He Allegedly Raped Jailed Beyond Her Sentence

Platte County (Wyoming) Detention Center control clerk Jeremy King was charged with two counts of second-degree felony sexual assault for having sex with a female Jamaican prisoner convicted of federal drug offenses. The woman, who was not named, had served her entire sentence and probation period in jail but was still being held as a witness. King, who pleaded not guilty on September 19, 2005, was free on bond.

In a hearing held November 14, 2005 before 8th Judicial District Judge John C. Brooks, King's attorney, William Disney, argued in favor of the woman's continued incarceration in the Goshen County Detention Center while King awaited his February 28, 2006 trial date. Special Prosecutor Robert Reese asked the judge to let the woman videotape a deposition for use during trial and then release her to be deported to Jamaica. The woman has a 3-year-old child who is in her sister's care, but her sister is about to be deployed to Afghanistan. Thus, said Reese, it would be unfair to keep the woman imprisoned.

Brooks agreed that it would be unfair to continue to incarcerate the woman pending a trial in which she is the alleged victim. Therefore, Brooks told Disney to choose between an accelerated trial date in Dec. 2005, or taking videotaped

depositions with the opportunity to cross-examine the woman during one of the depositions. King's lawyer picked the latter, and the female prisoner was duly deposed and then deported.

On March 1, 2006, a jury found King not guilty of the sexual assault charges despite police testimony that he admitted to having sex with the female prisoner, which he said was consensual. Platte County Attorney Eric Alden said he found the notion of a guard having sex with a prisoner "shocking." "This is not a dating service, this is a jail," he stated.

Another Platte County Detention Center employee, Glenn Dunham, 37, was also charged with second-degree sexual assault and one count of mistreating a prisoner. He has not yet gone to trial. Both King and Dunham were fired in 2004, and three former female prisoners have since filed notice that they intend to sue the county.

Sources: *Casper Star-Tribune*, *Associated Press*.

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Washington Liable for Negligent Parolee Supervision; Bad Jury Instruction Vacates \$33 Million Award

In a 6-3 decision, the Washington Supreme Court reaffirmed its earlier holdings that the state may be held liable for negligent supervision of offenders. However, the court vacated a \$22.4 million verdict resulting from a 2000 jury trial, which had ballooned with interest to \$33 million, because the trial court gave a faulty jury instruction. On remand the state settled the case for \$6.5 million.

Vernon Stewart was on community supervision for assault and car theft. The 1995 assault was his first adult felony but he had numerous juvenile offenses and a long history of mental illness.

Stewart was assigned Community Corrections Officer (CCO) Catherine Lo. From the beginning, Stewart was completely non-compliant with his supervision obligations. However, Lo wrote him up for only three of an estimated 100 supervision violations. She also failed to obtain, review or notify the courts of Stewart's mental health history.

On May 9, 1997, Stewart's supervision was transferred to a different CCO. Despite knowing Stewart was non-compliant, the new CCO never met with Stewart or obtained his medical records.

On August 8, 1997 Stewart stole a Suburban, drove 70 mph on city streets, ran red lights and ultimately rammed a vehicle driven by Paula Joyce, killing her. Stewart was under the influence of marijuana at the time of the accident and was subsequently convicted of second-degree murder.

Joyce's family brought suit against Stewart and the state Department of Corrections. The trial court rejected the state's motion to dismiss, which argued that it owed no duty to Joyce. At trial, Joyce's attorney, Jack Connelly, argued that Stewart could have been in jail at the time of the collision if the CCO had done her job. A jury found the state liable and awarded Joyce \$22,400,000, which was the largest civil verdict ever levied against the state [*PLN*, May 2001, p.1]. The Washington Court of Appeals affirmed, *Joyce v. DOC*, 116 Wash.App. 569, 75 P.3d 548 (2003), and the Washington Supreme Court granted review. *Joyce v. DOC*, 150 Wash.2d 1032, 84 P.3d 1229 (2004)[*PLN*, June 2004, p.18].

The court rejected the state's attempt

"to drastically narrow [its] duty of reasonable care as a matter of law." It noted that it had "answered all of the questions raised by the state about its duty before." See, e.g., *Taggart v. State*, 118 Wash.2d 195, 822 P.2d 243 (1992). Therefore, "the trial court did not err in denying the Department's motion to dismiss as a matter of law."

The Court agreed with the state, however, that the trial court gave an erroneous jury instruction which suggested that a policy directive *required* CCOs to report *all* violations. Policy directives do not, however, have the force of law. Therefore, it could be offered only as "evidence of the standard of care" and not as "negligence per se." The state supreme court concluded that "reading the instructions as a whole, the state was not meaningfully allowed to argue its theory of the case because the jury misdirected." The court's decision vacates the damage award and remands the case for a new trial. "I feel sad for the family because it's been eight years since Paula Joyce was killed and they'll have to deal with it for a longer period of time," said Connelly, "But I'm fully confident that a jury will recognize the failures are so bad in this case ... [and] justice will be done." See: *Joyce v. Department of Corrections*, 155 Wash.2d 306, 119 P.3d 825 (Wash. 2005).

On December 15, 2005, before a second trial, the state agreed to settle the case for \$6.5 million -- the largest wrongful death settlement paid by the state of Washington in a single death case to date. The DOC stated in a press release that the settlement was in the best interests of the state and the Joyce family.

"This case put a spotlight on an important area of government. The people of Washington state spend a lot of money for the proper supervision of felons

who have been released from prison. The public deserves accountability and they deserve to know if DOC is exercising reasonable care in attempting to do its job. That didn't happen here," said Connelly.

Since 1987, Washington has paid out \$445 million for all types of claims. \$60 million of that has been paid by the DOC, \$50.1 million of which comes from six wrongful death/negligent supervision cases between 1999 and 2003. Alas, many have failed to conclude that the DOC is no better at supervising mentally ill parolees than it is rehabilitating prisoners, providing medical care to them, etc. ■

Additional Sources: *The Seattle Times*, *The News Tribune*

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Arizona Jail Prisoners Not Pretty in Pink

by Gary Hunter

Paraded in pink boxers, pink flip-flops and pink handcuffs more than 2,600 Arizona prisoners walked four blocks to new jail facilities in downtown Phoenix. Most moved from the Madison Street Jail, which closed for remodeling, to either the Towers Jail, the new Lower Buckeye Jail or the new Fourth Street Jail. It was Maricopa County Sheriff Joe Arpaio's grand event.

The moves took place in increments on Friday, April 15, 2005. First, 70 prisoners under psychiatric care were moved followed by 190 juvenile prisoners. The third wave consisted of 220 closed custody prisoners including 28 alleged members of the Mexican Mafia. Members of this group were shackled, moved individually and escorted by U.S. Marshals, FBI agents and the Sheriff's Special Response Team.

The main event was Sheriff Arpaio's self-proclaimed "Walk-A-Con" which marched 680 prisoners to the new Lower Buckeye Jail. Pink attired prisoners were flanked by canine guard units, Sheriff posse volunteers, SWAT team deputies and mounted deputies. Overhead, the pink contingent was watched by helicopter patrols. One privileged prisoner was allowed to cut the ribbons officially opening the jail.

Ceremonies culminated with the remaining 1,500 prisoners being transported by bus from the old Madison Street Jail to one of the new facilities. The buses took different routes and each bus was flanked by both marked and unmarked police units.

While Sheriff Arpaio thought the parade was a roaring success not everyone was tickled pink by the method of his movement. Many prisoners complained that the parade was humiliating, degrading and inhumane. Many activists agreed.

Sheriff Arpaio defended the moving method saying, "This isn't a publicity stunt, this is normal wear. What do you want me to do, put them in tuxedos to move them?"

The propaganda fed to a gullible Phoenix public, who have long applauded Arpaio's antics (he is the most popular elected official in the state), was that none of the prisoners were in view of the general public. But the pictures splashed across the internet meant they

might as well have been.

Neither does Arpaio's philosophy fit the world view. A not-so-gullible Irish High Court is reconsidering the wisdom of extraditing one of its citizens to stand trial in Arpaio's domain.

Patrick Colleary, a Catholic priest, has fought extradition to Arizona for three years. Colleary is accused of having sex with a teenage boy during his tenure in Scottsdale, Arizona in 1978. Similar charges against Colleary were dropped in January, 2003.

The High Court's extradition ruling was to be delivered on April 22, 2005. Then pictures of Sheriff Joe's "Walk-A-Con" were introduced. Colleary's lawyer had the good fortune to encounter a cab driver who showed him the pictures the day before the ruling.

Colleary's attorney, David Myers, said that after seeing the pictures, "The

prosecutor then realized that there was a serious issue of perjury on behalf of the people of Maricopa County."

An affidavit was produced in which the Maricopa County Attorney's Office had assured everyone that, "Inmates wear the underwear under their ordinary jail clothing and it's in no way used to inflict humiliation on the prisoners."

When pressured to explain the photos, the Maricopa County Attorney's Office could only reply, "That these prisoners were...paraded semi-nude through a downtown section of Phoenix is...not a practice that this office can defend."

How does Sheriff Joe feel about his fiasco? "I don't see what the problem with pink underwear is," he said. "The pictures were taken on county property..."

Sources: *The Arizona Republic*, *KPNO-CBS 5 News*, *The New York Times*

South Carolina Jury Awards \$28.5 Million For Diabetic Jail Prisoner's Death

A South Carolina jury has awarded \$28.5 million to the family of a mentally ill diabetic man who died from insulin deficiency while imprisoned at the Sumter County Detention Center. The verdict against Eastern Health Care Group, the jail's contract medical provider in 2001, included \$7.5 million in punitive damages.

Reverend Ronald Huggins, a 43-year-old pastor and clergyman, was arrested on Christmas Day 2001 for indecent exposure. Along with diabetes, Huggins suffered from schizophrenia and had been exhibiting bizarre behavior for several days. He was treated at the Tuomey Regional Medical Center and released three times in the two days prior to his arrest.

At the jail Huggins was placed in the drunk tank with no clothes, blanket, pillow, or bed. Jail personnel failed to perform an intake medical screening but did find his medical discharge from the previous day, which indicated he needed medication. According to the lawsuit, the document was forwarded to the jail nurse.

Even so, Huggins was left alone in the drunk tank for the next 24 to 36 hours. During several shift changes Huggins was

observed naked at least 70 times but no staff ever interacted with him, witnesses testified. He died from insulin deficiency at about 12:15 a.m. on December 27.

"He died on a tile floor with no one to care for him, no one thinking of him," said attorney Edward Bell, III, who represented the family. "This case is the death of a man that was profoundly mistreated."

Bell said Eastern violated its own policies, which included screening incoming prisoners, providing 24 hour medical care to the jail, and never leaving a mentally ill prisoner unattended.

Prior to the trial, Tuomey Hospital, the emergency room doctors, and the jail settled for \$1.7 million. Eastern, the only defendant left at trial, is solely responsible for the \$28.5 million award. Along with Bell of the Bell Legal Group in Georgetown, South Carolina, attorneys C. Carter Elliot Jr. and Eugene C. Fulton, Jr. assisted with the case. See: *Estate of Huggins v. Eastern Health Care*, Sumter County Court of Common Pleas, Case No. 03-CP-43-1217.

Sources: *Lawyers Weekly USA*, *AP*, *myrtlebeachonline.com*

Seventh Circuit Reinstates \$100,000 Award In Indiana Failure-To-Protect Suit

by Michael Rigby

The U.S. Seventh Circuit Court of Appeals has reinstated a prisoner's \$100,000 award against two Indiana prison employees, overturning a district court's reversal of the jury verdict.

On September 9, 1998, Robert Pierson, 51, was attacked by fellow prisoner Jeremy Wilkinson while he slept. Wilkinson, 19, bludgeoned Pierson with brass locks stuffed in a sock, lacerating his head and knee and crushing his left testicle. Pierson underwent surgery to remove the damaged testicle and spent a month in the prison hospital.

Pierson and Wilkinson were both living in "E" dorm, a meritorious housing assignment at the Indiana State Prison, when the assault occurred. Eligibility requirements for assignment to E dorm include at least 10 years with no prison misconduct violations constituting a serious security threat and at least 1 year in the general population.

In the six months prior to his arrival at the prison, Wilkinson had been imprisoned at the Benton County Jail. There he had a history of violent conduct, which included wrenching a toilet from the wall and hiding a nightstick in his cell. Consequently, the sheriff sent along a letter labeling Wilkinson an "ESCAPE AND ASSAULT RISK" when he was transferred to the prison.

Yet, upon his arrival, unit team manager Dawn MacMillan and casework manager Charles Wood placed Wilkinson directly in E dorm. Inexplicably, Wilkinson remained in E dorm after he was cited for possessing a weapon five months later, even though prisoners with a prison disciplinary conviction are typically removed from E dorm.

After the attack Pierson sued MacMillan, Wood, classification officer William Hartley, and guard Terrell Triggs in federal district court claiming they violated his Eighth Amendment rights by failing to protect him from Wilkinson. Representing himself at trial, Pierson lost his claims against Hartley and Triggs, but prevailed against Wood and MacMillan. The jury assessed compensatory damages in the amount of \$50,000 each against MacMillan and Wood. See: *Pierson v. Hartley*, USDC ND IN, Case No. 00-CV-539 (May 21, 2002). [See *PLN*, June 2004, p. 30].

Three months later, the district court granted defendants' motion for judgment as a matter of law and set aside the verdict reasoning that "the jury instructions had 'provided the jury with an insufficient understanding of the nature of prison officials' constitutional obligation to protect one inmate from another.'" Pierson appealed.

The Seventh Circuit reversed and remanded with instructions to reinstate the jury's verdict. Initially, the Court noted it was "troubled" by the district court's suggestion that it set aside the verdict because the jury received inadequate instruction. "Courts generally may not grant judgment as a matter of law on an issue not raised in the pre-verdict motion," the Court held, "and the defendants here did not raise any issue with the instructions." "Just as importantly," the Court discerned "no error in the legal standard that the jury applied."

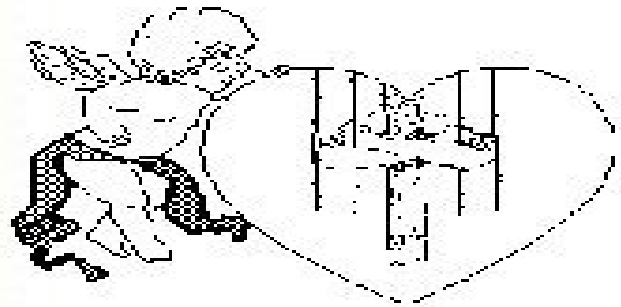
To establish an Eighth Amendment claim against prison officials, a prisoner must show the officials were deliberately indifferent to a substantial risk of serious harm. A finding of deliberate indifference necessitates that the official was aware of a risk, yet consciously disregarded it. "Knowledge of a risk can be shown if an official was exposed to information from which the inference could be drawn that a substantial risk exists, and he or she also draws the inference." These elements of deliberate indifference were adequately covered in the jury instruction, the Court ruled.

Moreover, the Court held, the jury heard sufficient evidence from which to conclude that MacMillan and Wood knew Wilkinson

posed a substantial risk to other prisoners. Among other things, the jury heard evidence suggesting MacMillan and Wood read the sheriff's letter; the jury could have inferred that MacMillan and Wood knew of Wilkinson's weapon's infraction; and MacMillan and Wood both knew Wilkinson did not meet the eligibility requirements for assignment to E dorm.

Additionally, "the jury could have also found that MacMillan and Wood, knowing that Wilkinson posed a substantial risk of harm, disregarded that risk first by assigning Wilkinson to the dorm and then by allowing him to remain following his weapons conviction." The Court further noted that MacMillan herself testified that it was uncommon for a prisoner to remain in E dorm following that kind of violation. "Such inaction in the face of a substantial risk is sufficient to demonstrate deliberate indifference under the Eighth Amendment," the Court concluded. See: *Pierson v. Hartley*, 391 F.3d 898 (7th Cir. 2004). ■

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Political Patronage In Hiring Illinois Prison Wardens?

Julie Wilkerson was a Rend Lake College associate music professor and band director making under \$40,000 annually when she was hired as an assistant warden at Indiana's Big Muddy River Correctional Center at a salary of \$65,000 a year. Two other newly-minted Illinois assistant wardens were formerly an auto-parts store manager and a farmer who sold irrigation equipment on the side. None of the three had any detention training or experience. What did they have in common, other than being given high-paying, senior positions in the corrections department? They were all contributors to Democratic political campaigns. For instance, Wilkerson contributed \$500 to Democratic Secretary of State Jesse White in 2002 and another \$1,500 three months before being hired as an assistant warden.

Although Dede Short, spokesperson for the corrections department, claims that there is no quid pro quo in the hirings, federal officials have subpoenaed the hiring records of the state Departments of Corrections, Transportation and Child Welfare to investigate a possible pattern of patronage-based hiring. At least eight prison wardens are known to have made contributions. Of the eight, seven were made wardens after Governor Rod Blagojevich took office, two of whom had not previously worked for the corrections department.

Meanwhile, guards are becoming concerned about the quality of the senior personnel in the prisons.

"We've recently witnessed the meltdown at FEMA when political hirees replace career professionals in that federal agency and the tragedy that occurred in New Orleans as a result of the inexperience of people who had been put in positions of power," said Bill Maupin, regional director of AFSCME Council 31, which represents prison guards. "Without commenting on any one particular person's qualifications, it's our concern that we're witnessing a similar set of issues arising in the Illinois Department of Corrections."

Illinois is also suffering from a decline in the number of guards over the past eight years. The decline in some position has resulted in as much as a 45% lower guard-to-prisoner ratio. The decline is being caused by the current and former governors' attempts to save money by not filling state job openings. This decline has

made the prisons more dangerous, according to Maupin.

This also illustrates the importance of deposing prison official defendants about their education and professional training backgrounds during litigation. All too often courts defer to the purported "professional expertise and judgment" of prison

officials merely by virtue of the fact that they have a job in the prison system. Exposing that that "professional experience" was bought with campaign contributions or is otherwise non-existent may help litigants advance their claims. ■

Source: *Illinois Times*.

Texas Federal District Judge Throws Out VitaPro Convictions

by Matthew T. Clarke

In another bizarre twist to an already bewildering prosecution history, on September 9, 2005, Texas federal district judge Lynn Hughes, by judicial fiat, acquitted Andy Collins, the former executive director of the Texas Department of Criminal Justice (TDCJ), and Yank Barry, the Canadian ex-con owner of VitaPro, of the bribery-related charges a jury convicted them of four years ago. Collins and Barry were never sentenced. VitaPro manufactures a soy-based protein meat substitute that was purchased by TDCJ and fed to prisoners.

In 1995, George W. Bush was governor of Texas and TDCJ was in the middle of a multi-billion dollar rapid expansion phase that more than quadrupled its prisoner capacity to 150,000 in seven years. To facilitate the rapid expansion, special "emergency" purchasing contracts that sidestepped the state bidding requirements were authorized. Thus, under then-TDCJ executive director Collins, multi-million-dollar no-bid contracts were allowed. VitaPro received a \$33.7 million no-bid contract to supply its inedible meat substitute to TDCJ kitchens.

Amidst the then-breaking prison procurement scandal, the freshly-retired Collins gave an interview published in the May 1996 issue of *Texas Monthly* magazine. In the interview, Collins stated that people well above him in the state government were involved in the VitaPro scam and that he would take them down with him if he was indicted by the State of Texas. As the executive director of a department of State government, the only person in the Texas state government over Collins was then-Texas Governor George W. Bush. Texas never indicted Collins.

However, in January 1998, with one day left until the statute of limitations

expired, a federal grand jury indicted Collins and Barry on the bribery-related charges. The conspiracy was uncovered when Collins associate, Patrick Graham, was caught extorting \$150,000 from a woman to set up the escape of her husband, a Texas prisoner. The escape plot included unwitting help from Collins, and the ensuing FBI investigation led to the discovery of the VitaPro scam.

Trial started in 2000 but was halted when Hughes expressed his shock that the primary prosecution witness was a convicted felon. Patrick Graham was indeed convicted--convicted of prison-construction-and-procurement-related fraud--including the VitaPro bribery and juvenile prison construction scams in Louisiana.

In August 2001, after the presidential election, trial resumed and a jury found Collins and Barry guilty of four counts each of charges related to Barry giving Collins two \$10,000 bribes to secure a no-bid contract for TDCJ to buy \$33,700,000 worth of VitaPro that had Texas paying more for an inedible Canadian soy substitute than it did for real Texas beef. They faced up to 65 years in prison and a \$1,750,000 fine. However, neither Collins nor Barry was sentenced in the ensuing four years. Instead, the court reporter allegedly suffered a nervous breakdown and was unable to complete the appellate record [*PLN*, Nov. 2003, p. 12]. Collins and Barry remained free on bond and were allowed to travel to exotic foreign locations.

Judge Hughes's explanation for the abrupt acquittal was a lack of credibility of the prosecution's main witness, Patrick Graham.

"Graham had a secret deal with the United States Attorney for the Eastern District of Louisiana that--in exchange for

his testimony in numerous cases--the U.S. Attorney would not prosecute him for his crimes in Louisiana and would even seek a sentence reduction for his crimes in other states," according to Hughes. "With this motivation, Graham conveniently knew all sorts of information about nefarious dealings in other districts." The testimony of the Graham brothers, Patrick and Michael, helped convict former Louisiana Governor Edwin Edwards and former Houston, Texas, Mayor Fred Hofheinz of corruption charges related to prison construction and procurement. Edwards was convicted of federal racketeering charges and sentenced to ten years in prison. Hofheinz plead guilty to failing to report himself as a victim of an extortion attempt in exchange for prosecutors dropping felony bribery charges against him.

Hofheinz and the Graham brothers were partners in the N-Group, a private prison venture that hired Collins after he retired from TDCJ. The failure of N-Group led to the indictment of Patrick Graham for antitrust violations and a \$35-million-dollar judgment against him in an investor lawsuit Hughes presided over.

Hofheinz had testified against Collins in the grand jury investigation of the VitaPro scam and Patrick Graham was carrying a card that identified him as a representative for VitaPro when he was arrested for the escape conspiracy. Thus, one possibility that Hughes seems to have overlooked is that Graham, whose company employed Collins after he retired from TDCJ and who was a card-carrying VitaPro representative, might have actually known about the VitaPro bribery scam. Apparently the jury found him to be credible, even though they knew about his sordid past. Furthermore, it is *passe* for the government to use co-conspirators, felons, criminals and other miscreants as witnesses, hardly the shocking development Hughes feigned it to be.

The order acquitting Collins and Barry is appealable, but Hughes also granted them a new trial should the order be reversed on appeal. Thus, the best outcome the prosecutor can hope for is having to try the case again.

The U.S. Attorney Chuck Rosenberg has not decided whether to appeal the order or not. See: *United States v. Collins*, US DC, SD TX, Case No. H-98-18. The court's ruling is available on PLN's website. ■

Sources: KPFT 90.1 FM (The Prison Show), Houston Chronicle.

Alabama Work-Release Prisoners Working But Not Getting Paid

by Gary Hunter

Prisoners in an Alabama work-release program have been working without getting paid. Problems have come mostly from prison employees who have hired prison workers then defaulted on their debt.

Prisons located in Decatur, Birmingham and Loxley posed the greatest problems. A 2004 audit noted several questionable practices. Based on an antiquated policy allowing prison employees and their relatives to use prison labor most work-release prisoners were being paid late or not being paid at all. Though the policy was discontinued in 2003, two employees still owed prisoners money at the time of the audit. One owed \$1,500 and the other \$700.

Another questionable practice included a \$5.00 charge to transport prisoners to and from work. The state netted \$2.6 million from the work-release ride service.

Work-release prisoners were often checked out of custody for days on end even though they weren't being put to work. It wasn't mentioned exactly what they were doing.

The audit also addressed questionable implementation of medical fees. Work-release prisoners were charged \$3

co-payments if they initiated a medical visit. If they failed a drug test they were fined \$25.

Some prisoners in the Birmingham facility were required to pay for 100% of their medical care. Regulations provide that prisoners with \$500 in their accounts have "an option of using free-world medical and dental facilities at their own expense." However, the warden of Birmingham prison was forcing prisoners, with \$300 or more on the books to pay for private medical care.

Then Alabama prison Commissioner Donal Campbell transferred the Birmingham warden after the audit. While he was not specific about the reason for the transfer, he did say it resulted from complaints about money.

The audit says, "It appears that the Department of Corrections does not have specific legal authority to charge [certain] fees," that they were collecting.

Brian Corbett, spokesman for the prison said that problems raised by the audit had been flagged and addressed. But Corbett said that he was unsure what the audit meant by the word "appears." ■

Source: *Birmingham Post Herald*

Sweetheart Deal For Pharmacy Supplying Saratoga County Jail

O'Brien's Pharmacy in Ballston Springs has a pretty good deal in supplying the Saratoga County Jail in New York with prescription drugs for prisoners. The county, which paid O'Brien's \$247,000 in FY 2004, has been paying the average wholesale price plus a \$2.60-per-prescription filing fee in accordance with a 1992 policy. By contrast, the county's nursing home and nearby Warren County Jail put their prescription drug purchasing out on bids. Warren County pays 8% below average wholesale and has no filing fee.

How did O'Brien's get such a sweetheart deal? It could be because O'Brien's contributes to Saratoga County Sheriff James D. Bowen's re-election campaign. In 2005, the amount contribute by O'Brien's was \$1,100.

Jack Murray, Saratoga County au-

ditor, said his staff checks the bills submitted by O'Brien, stating that they rarely find an overcharge and sometimes find undercharges. However, they are checking against a policy that may allow overcharging in general.

Bowen said O'Brien's is used because it is close to the jail and able to make quick deliveries. However, he said he would look into the possibility of putting the prescription drug purchases out on bid.

"If there is a way to save money, I'll have to talk with Larry [Cleveland, Sheriff of Warren County]," said Bowen.

County Administrator David Wickerman also said he would look into the possibility of bidding on the prescription drugs. ■

Source: *The Saratogian*.

Illinois Prison Official, Parole Board Member Indicted For Corruption

On December 9, 2005, a Lee County, Illinois, grand jury returned indictments against former Illinois Department of Corrections official Ron Matrisciano and former Illinois Parole Board member Victor Brooks. Matrisciano was indicted for five counts of official misconduct and two counts of wire fraud while Brooks faces one count each of official misconduct and wire fraud. The charges stem from Matrisciano's testimony at the December 2002, parole hearing for and Brooks's vote to release Harry Aleman, who had been convicted of the 1972 murder of Teamsters official Willie Logan and was, according to prosecutors, a mob hit man. Aleman was acquitted in his first trial, but retried and convicted after prosecutors proved that he had bribed the judge. The board voted 10-1 not to grant parole at the 2002 hearing.

According to the indictment, Matrisciano testified that Brooks was a "model prisoner" who would not be a threat if released. Soon after the 2002 hearing, Matrisciano was laid off for budgetary reasons and the DOC's second-highest official was fired for having given Matrisciano permission to testify at the hearing. Matrisciano has also been charged with perjury for falsely representing his support as the DOC's official position, then lying under oath in a deposition during the investigation by claiming he made it clear to the Prisoner Review Board (PRB) that his position supporting Aleman was personal.

Matrisciano was entitled to a lower-ranking DOC position after he was laid off, but was placed on paid administrative leave on March 2, 2004, when he got the new posting. He is suing the DOC over the incident.

Brooks allegedly voted in Aleman's favor in exchange for Matrisciano helping his son, Nicholas, land a job in Las Vegas. Nicholas Brooks is a singer with some success and local renown, having sung the national anthem at Cubs and Bears games. He is currently residing in Las Vegas.

Summing up the state's case, Attorney General Lisa Madigan stated the basis for the charges.

"How Harry Aleman had access to a high-ranking IDOC official and why a member of the PRB would vote for his release are serious questions that have been raised," said Madigan. "We allege that

public corruption is part of the answer."

Aleman, who came up for parole again on December 7, 2005, is "mad, very mad" that the DOC fired, then rehired, then demoted, then suspended his friend Matrisciano for testifying in his favor.

"You're saying anybody who speaks on my behalf gets into trouble? ... No one can talk for me or they get into trouble right away?" asked Aleman. ■

Sources: *Sun Times*, *Associated Press*

Louisiana Work-Release Prisoners Used by Sheriff in Chop Shop

by Gary Hunter

Louisiana sheriff Ronald "Gun" Ficklin faces 22 counts on charges of conspiracy, trafficking in motor vehicles with removed or altered vehicle identification numbers (VINs), removing or altering VINs, aiding and abetting the possession of a firearm by a convicted felon, misprison of a felony for not reporting a felon with a firearm, and mail fraud.

The charges stem from a scheme that put state prisoners to work in a local car theft operation. Ficklin's friend and convicted felon Barry Edward Dawsey ran the illegal business out of B & D Auto Sales in St. Helena Parish. When Dawsey was apprehended in a stolen pickup truck police discovered the gun and sheriff Ficklin's badge inside.

Dawsey pleaded guilty in 2004 and is currently serving a 3-year sentence. James Jackson, Mitchell Tidwell and Kevin Simmons also admitted involvement in the scam and pleaded guilty in federal court.

Ficklin was originally arrested in February 2005 on a 10-count indictment issued by a federal grand jury. He was released after a detention hearing and posting a \$25,000 bond. Twelve more counts were added as the investigation continued.

Ficklin is accused of fraud for billing the Louisiana Department of Public Safety and Corrections (DOC) \$140,000 when he employed DOC prisoners in Dawsey's chopshop between October 2000 and September 2001. The DOC claims it also paid the St. Helena Parish Sheriff's office nearly \$250,000 during that same time.

Over half of Ficklin's charges are for mail fraud. His attorney, Frank Holthaus calls the charges "sad."

"I think mail fraud is as abused as was hooliganism," said Holthaus. "In the Soviet Union, hooliganism was the way people the government didn't like were charged with a vague crime no one had to define. It's similar to mail fraud in the United States."

Ficklin's son-in-law, Cori Leigh Clark, and the son of Ficklin's girlfriend, Alton Hoyt McNabb II, are charged with witness tampering, conspiracy and retaliation after attacking Louisiana State Police Sgt. Dennis Stewart on July 30, 2005. Stewart assisted in Ficklin's investigation.

Ficklin is the third consecutive St. Helena Parish sheriff to be indicted. If convicted he could face up to 128 years in prison. ■

Source: *The Advocate*

Wrongfully Convicted Texas Prisoner Finally Receives \$118,000 in Compensation

by Matthew T. Clarke

In 1988, a 17-year-old Josiah Sutton was convicted in a Texas court of a rape he did not commit and sentenced to twenty-five years in prison. Sutton spent close to five years in prison before new DNA tests performed in 2003 proved the tests previously performed by the discredited Houston Police Department crime lab were false. Those

false results had virtually assured his conviction.

The 25-year-old ex-high-school-football player was released from prison in March 2003. Initially, it took many months of negotiations with the Texas Board of Pardons and Paroles before they recommended Sutton for a pardon based upon innocence instead of the lesser

pardon they wanted him to receive. Texas Governor Rick Perry signed the pardon in May 2004.

The pardon based on innocence should have cleared the way for Sutton to receive compensation for the long years of wrongful imprisonment. However, in 2003, Texas amended the compensation laws to require that the district attorney of the district of conviction sign off any compensation, which is fixed by statute at \$25,000 per year of wrongful imprisonment and capped at \$500,000. [PLN, June 2005, p.23]. Chuck Rosenthal, Harris County District Attorney, refused to issue a letter approving any compensation for Sutton.

It took over a year of negotiations between Sutton's lawyers and Rosenthal before Rosenthal agreed to issue a letter stating that he would not oppose Sutton's receiving the compensation. However, Rosenthal still refused to acknowledge that Sutton was innocent.

Despite having been proven innocent, Sutton has had a hard time since he was released. The criminal record of his false conviction has haunted him, with potential employers and landlords refusing him jobs and housing on that basis. He has also been influenced by the culture of immaturity and misogyny common in Texas prisons.

"Four and a half years of the most important years of this young man life were taken and [he was] put behind bars," said state Senator Rodney Ellis, D-Houston. "He has had a hard time since he came out because he was expected to act like an adult, but was not equipped to be one. He needs counseling and assistance, not just money."

"I am out of prison, but I am hardly free," said Sutton in a letter to Rosenthal pleading for him to approve compensation. "Most of my days are spent worrying about where my next meal will come from and trying to find transportation from one place to the next. My efforts to get my life on track have been filled with disappointment and frustration."

Indeed, the price of wrongful convictions goes way beyond the paltry payout of compensation. Sutton, qualifies for \$118,749.97. The first check, for \$60,000, was mailed to him on September 30, 2005. Hopefully, it will mark the beginning of a new life for this victim of wrongful prosecution and conviction. ■

Source: *Houston Chronicle*.

CONMED Not Using Licensed Nurses In Maryland Jail

Attempts to get jail medical services on the cheap may have backfired for Maryland's Queen Anne County. CONMED, a private jail medical services company, has a contract to provide medical services at the county's 80-bed jail and 11 other Maryland jails. CONMED does this by hiring off-duty Emergency Medical Technicians (EMTs).

According to CONMED official Ron Grubman, "You're dealing primarily with 18- to 30-year olds, most of whom aren't staying any longer than 30 days."

Apparently, they also aren't receiving adequate medical services during their brief stays. According to state Board of Nursing Executive Director Donna Dorsey, there have been complaints about the quality of the jail's medical services and the jail should have been using licensed nurses to provide the health care. Dorsey disagrees with Grubman's claim that EMTs can handle most of the medical treatment needed at jails.

"It's nothing against them," said Dorsey. "But an EMT is licensed to do ambulance care, pick people up and treat

them before they get to a hospital. They're not licensed to work in an institution."

However, jail Warden LaMonte Cook counters that such a move would more than double the jail's medical costs from \$200,000 a year to an estimated \$421,000. This would severely affect the property tax rate.

"This is a half cent on the tax rate!" Commissioner Gene Ransom, D-Grasonville, cried. "This is ridiculous!"

"We're not changing the rules," counters Dorsey. "CONMED is not complying with the [already existing] rules."

Before budgeting the additional money for FY 2005-2006, the County Commissioners intend to ask the Maryland Association of Counties to lobby the state to reduce the requirements for jail health care providers. The county then might require additional certification of EMTs or guards to provide jail medical services. That sounds like a cure that could be worse than the disease--going from under-qualified EMTs providing health care to unqualified guards doing it instead. What's next? Prisoners providing their own medical services? ■

Source: *Capital Gazette*.

Los Angeles Jail Pays \$375,000 To Assaulted "Keep Away" Prisoner

Los Angeles County, California, should pay \$375,000 to a former prisoner who was severely beaten after being improperly celled with his assailant, the County Claims Board recommended on December 8, 2005.

On May 13, 2002, prisoner Martin Davis was transported from the Men's Central Jail to the Clara Shortridge Foltz Criminal Courts Building to testify against another prisoner, Joseph Allen. Davis and Allen were designated as "keep aways," meaning they shouldn't be placed together in the same cell.

After testifying Davis was placed in a holding cell to await transfer back to the jail. Sometime later Allen was also placed in the same cell. Allen recognized Davis sleeping on the floor and attacked him with his feet.

Davis spent the next week in the hospital, where he remained in a shallow coma for the first three days. Davis was

released from custody shortly after returning to the jail.

The County Claims Board noted that a jury could reasonably conclude that Davis's civil rights were violated by the failure to carry out the Sheriff's keep away policy. In addition, a neuropsychologist retained by the County determined that Davis suffered a closed head injury with residual short-term memory impairment. It is unknown if that would impact his ability to testify against others in the future.

The \$375,000 settlement includes \$200,000 in damages for Davis and \$175,000 for his attorneys' fees and costs. In making the recommendation the Board observed that a jury award could exceed the recommended settlement amount and that the County had already spent more than \$111,000 defending the case. See: *Davis v. County of Los Angeles*, Los Angeles Superior Court, Case No. BC 295561. ■

Washington Ex-Cons Can't Be Denied Voting Rights Because of Unpaid LFOs

On March 27, 2006, Judge Michael Spearman, of the Superior Court of King County, Washington held that withholding voting rights from released felons, solely because they owe legal financial obligations (LFOs) is unconstitutional.

Plaintiffs Daniel Madison, Beverly DuBois, and Dannielle Garner, have all been convicted of felonies in Washington State. They all have unpaid LFOs related to their convictions, for which they were denied the right to vote in state elections, pursuant to RCW 9.94A.637(1)(a). In 2004, they filed suit claiming that they were being unlawfully discriminated against because of their indigency.

Judge Spearman recognized that Art. IV Sec. 3 of the state constitution and RCW 29A.04.079 lawfully worked to deprive those convicted of felonies of their right to vote until that right was restored to them under RCW 9.96.010 and 9.94A.637(4). He also recognized that prerequisite to such restoration was the felon's satisfaction of all LFOs pursuant to RCW 9.94A.637(1)(a).

Judge Spearman found that the right to vote is a fundamental right, the deprivation of which normally can occur only if that is necessary for the furtherance of a compelling state interest. But since the plaintiffs were felons whose voting rights had been lawfully rescinded, he held that the state only had to show that such was rationally related to a legitimate interest.

Even under rationality review, however, Judge Spearman found that the plaintiffs had been unlawfully discriminated against. Since RCW 9.94A.637(1)(a) allowed the restoration of voting rights to only those felons who had paid their LFOs in their entirety, it discriminated against those who, because of their poverty, could not pay their LFOs off quickly. Judge Spearman held that this wealth based discrimination violated the plaintiffs' right to equal protection of the laws under the 14th Amendment to the U.S. Constitution. He also held the same to have violated their rights to equal privileges and immunities and equal voting power under Art. 1 Sec. 12 and 19, respectively, of the Washington state Constitution.

Based upon the foregoing, Judge

Spearman granted summary judgment to the plaintiffs, holding that RCW 9.94A.637(1)(a) was unconstitutional. See: *Madison v. State of Washington*, King

County Superior Court, Case No. 04-2-33414-4. The ruling is available on PLN's website. The Washington Supreme Court has granted review. ■

New York Prisoner Awarded \$25,000 For Assault

On April 12, 2005, a Bronx, New York, jury awarded \$25,000 to a man who was severely beaten by other prisoners in the mental health section of the Riker's Island jail complex.

The 18-year-old plaintiff was imprisoned at Riker's Island for a robbery that he was later acquitted of. Following the death of his grandmother, the plaintiff was transferred--at the direction of a physician--to a dormitory in the George Motcham Detention Unit (GMDU), the Island's mental health unit. As he stowed his belongings, a group of GMDU prisoners attacked and stabbed the plaintiff and robbed him of his property. He suffered lacerations to his back and face that required 53 stitches to close.

The plaintiff sued the City of New York in state court claiming the jailers as-

signed to the dormitory were negligent in their supervision. The guards contended the plaintiff caused his own injuries when he attacked another prisoner, Robert Chambers, after arguing with him about the phone. The plaintiff denied he had argued with Chambers, and Chambers testified on the plaintiff's behalf at trial. The plaintiff further alleged the guards had given the other prisoners razor blades and had conspired with them to steal the property of other prisoners and divide the spoils.

Following a three-day trial, the jury awarded the plaintiff \$25,000.

The City was found 70% liable and Chambers 30%. The plaintiff was represented by Andrew F. Plasse of Manhattan. See: *McCollum v. City Of New York*, Bronx County Court, Case No. 014847/1996. ■

\$232,700 in Attorney Fees Awarded In Colorado Censorship Settlement

by Bob Williams

The United States District Court for the District of Colorado on April 26, 2005, awarded \$232,700 in fees and costs after a Settlement Agreement was reached over the rejection of numerous magazines and books by the Colorado Department of Corrections (CDOC).

Several publishers and prisoners sued the CDOC when magazines and books were rejected without legitimate substantive basis. [See: *PLN*, Sep. 2000, p. 25.] After nearly five years of discovery and wrangling, a Settlement Agreement was reached whereby most of the publications were allowed in and new rules were formulated governing censorship and appeal procedures. CDOC prisoners were, however, blindsided by the Agreement's allowance for rejection of all sexually explicit material which the CDOC has extended to

material in both pictorial and written form. [See: *PLN*, May 2005, p. 28.] The plaintiffs moved for \$712,695 in attorney fees and \$51,259 in costs (\$763,954 total).

With the plaintiff's stipulated as prevailing parties under the Prison Litigation Reform Act (PLRA) and entitled to fees under 42 U.S.C. § 1988, the Court reduced the fee request to an award of \$185,390 for attorney work by Wheeler Trigg Kennedy LLC, based on PLRA mandated 150 percent of the maximum hourly rate paid federal public defenders (hence \$169.50 per hour). The firm also received \$21,810 in costs awarded. An additional \$25,500 was awarded to Mark Silverstein, the Colorado ACLU's Legal Services Director. See: *New Times, Inc. v. Ortiz*, USDC D.Colo. Case No. 00-F-612. ■

Second Circuit Holds PLRA Fee Cap Inapplicable To “So-ordered” Stipulated Dismissals

by Bob Williams

In a case of first impression, the United States Court of Appeals for the Second Circuit has held that the fee cap provision of the Prison Litigation Reform Act (PLRA), which limits attorney fees to 150 percent of a prevailing prisoner's monetary judgment, does not apply to stipulated dismissals pursuant to F.R.Civ.P. 41 where the court enters the perfunctory “so-ordered” and the case is closed.

In 1994, Ramon Torres filed a 42 U.S.C. §1983 complaint against New York state guards claiming excessive force during an interrogation about a fire at the Auburn Correctional Facility. His 1997 second amended complaint clarified that Torres was verbally threatened with racial slurs, punches in the face, choked, severely beaten until he lapsed into unconsciousness, and dragged back to his cell by guards Eugene Cross and Douglas Ricci.

Torres was later treated for a broken nose, two black eyes, and multiple contusions and lacerations. He sued for \$200,000 in compensatory damages, \$100,000 in punitive damages, and attorney fees and costs.

On January 22, 2001, two weeks before trial was to commence, Torres was served with an Offer of Judgment, pursuant to F.R.Civ.P. 68, to settle the complaint for “\$1,000 plus costs and reasonable attorneys’ fees accrued to date.” The cover letter stated that “fees [were] a separate consideration from damages,” that the defendant’s were “willing to compensate [Torres] for the reasonable costs and attorneys’ fees expended to date,” and most importantly that the fees were “not to be calculated as a percentage of the total amount [of the settlement offer].” Two days later Torres accepted the offer and asked the clerk of the court to “enter Judgment in accordance with the Offer.” On May 23, 2001, the settlement agreement, as memorialized in a “so ordered” Stipulation of Settlement and Order of Dismissal, was entered. No separate judgment was ever entered pursuant to F.R.Civ.P. 58, only the perfunctory “so-ordered” dismissal pursuant to F.R.Civ.P. 41.

The parties clashed over fees for two years. Torres had sought \$66,429.25.

Though the defendants earlier stipulated in writing that fees were not to be calculated as a percentage of Torres’ award, they now claimed the PLRA percentage fee cap applied to “so-ordered” stipulations. Torres countered that the stipulation was a contract, the language of the settlement and conduct of the parties showed no intent to have the PLRA apply, and if it did apply it was unconstitutional as violating equal protection (which was rejected on a rational basis review).

On February 19, 2003, the Court entered a six-page order awarding \$1,500 in attorney fees, determined as 150 percent of Torres’ award, pursuant to the PLRA’s fee cap [42 U.S.C. § 1997e(d)] applied to successful prisoner civil rights litigation.

On appeal the Court looked to the language of the PLRA provision and noted that § 1997e(d)(2) applied when “a monetary judgment is awarded.” Further, § 1997e(d)(1)(A) limits awarding fees to cases where “the fee was directly and reasonably incurred in proving an actual violation of the plaintiff’s rights protected by statute.” With no other legislative history or elaboration, the Court reasoned the PLRA was inapplicable since (a) no F.R.Civ.P. 58 judgment was entered; (b)

the stipulation of dismissal was pursuant to F.R.Civ.P. 41(a)(1)(ii) and did not require court approval; and (c) the stipulation expressly disclaimed liability for guards’ violations of Torres’ rights and thus the fees were not “directly and reasonably incurred in proving an actual violation” of Torres’ rights.

Grasping for straws, the state argued that “so-ordered” stipulations should be treated like consent decrees and thus regardless of the PLRA, Torres would have been entitled to fees as a “prevailing party” pursuant to 42 U.S.C. § 1988. Presumably the state then intended to apply the PLRA to the prevailing party status.

In rejecting this position, the Court found that a “so-ordered” stipulation does not carry with it “sufficient judicial imprimatur” to warrant treatment as a monetary judgment for PLRA purposes. There was no evidence the court even read the Settlement. There was no express provision whereby the court retained jurisdiction to monitor compliance. The stipulation was akin to private settlement agreements that “do not entail the judicial approval and oversight involved in consent decrees.” See: *Torres v. Walker*, 356 F.3d 238 (2nd Cir. 2004). ■

Settlement Permits Free and Gift Publications to Connecticut Prisoners

Prisoners in the Connecticut Department of Corrections (CDOC) can now receive free and gift publications that were previously banned under Administrative Directive 10.7, according to the terms of a March 18, 2004, settlement agreement.

A.D. 10.7 prohibited prisoners from receiving publications paid for or donated by a third party—whether from a family member, friend, charitable organization, or government entity. The banned publications included books, magazines, newspapers, advertising brochures, flyers, and catalogues.

Todd Morrison, a prisoner at the MacDougall-Walker Correctional Institution, had challenged the directive in the U.S. District Court for the District of Connecticut on the grounds that it violated his constitu-

tional rights under the First Amendment. The suit was dismissed without prejudice following the settlement agreement.

Under the settlement, prisoners may now receive “free hardcover or paper bound publications and/or educational, legal, religious or other similar publications, provided the publications are in new condition, mailed directly from a publisher, book club or book store, and all other security and space limitation requirements” are met. The CDOC also agreed to enforce the settlement agreement in all prisons under its control and to post notice of the new policy in all housing areas and libraries.

Morrison, who filed the lawsuit pro se, was also awarded \$250 in costs. See: *Morrison v. Lantz*, USDC D CT, Case No. 3:02CV1146(DFM). ■

Texas Prison Slaves No Savings for Direct Marketing Firm; Data Mining Results in \$ 15 Million Settlement Fund

by Michael Rigby

A class action lawsuit involving thousands of women who received threatening letters from prisoners employed to process data for a private company has settled for amounts ranging from \$100 to \$250,000.

In 1994, Metromail, a Texas-based direct marketing company, contracted with the Texas Department of Corrections (TDC) to have prisoner's process names, addresses, and other personal information the company collected and then sold to bill collectors, telemarketers, and others without the consumers' knowledge or consent. By using the free labor of Texas prisoners the company paid one-third to one-half less than commercial rates.

But the savings came at a price. While entering data at the Wynne Unit in Huntsville, convicted rapist Hal Parfait came across the address of Beverly Dennis, an Ohio grandmother. Dennis had filled out a Metromail survey promising "just free coupons" with "no gimmicks." Unfortunately, Ms. Dennis got more than she bargained for.

Parfait wrote the grandmother a sexually explicit 12-page letter in which he offered to make her "sexual desires and fantasies become a fulfilled reality." Parfait also said he wanted "to be there to rub in your Neutrogena" and that, while he could only express his desires "in letters at the moment; maybe later, I can get over to see you." At the time Parfait was scheduled to be released in September 1998.

In 1996 Dennis sued Metromail for breach of contract, fraud, and violating her privacy rights. The lawsuit soon swelled into a class action involving 20,000 women in Ohio, California, Illinois, and New York. "I'm being bombarded with calls from furious consumers from all over the country," Dennis's attorney, Mike Lennet of the Cuneo Law Group, said at the time.

Nearly 10 years later, in the week of December 9, 2005, the case finally settled, according to recordonline.com. Beverly Dennis reportedly accepted \$250,000 for the trauma she endured, while other plaintiffs apparently settled for \$100. At least some plaintiffs received \$500 settlements. The exact amounts paid out and the number of plaintiffs receiving payments

were not reported. The payments were from a \$15 million fund created as part of the settlement; Metromail also agreed to stop using prisoners to process consumer information.

Metromail had provided the personal information of about 1.3 million people to prisoners. Dennis's lawsuit revealed that Metromail had also been amassing information about young children, which it sold to anyone over a 1-900 phone number for \$3 a minute. The fallout resulted in

"Kids Off Lists" legislation at the federal and state levels.

Metromail additionally used Texas prisoners to process data for Days Inn, Six Flags, L'Oreal, Time-Life, Phillip Morris, R.J. Reynolds, Coca-Cola, and *Seventeen* magazine. See: *Dennis v. Metromail Corp.*, USDC WD TX, Case No. 1:1996-cv-00314., ■

Sources: *recordonline.com*, *Business Wire*, *motherjones.com*

New York Prisoner Awarded \$4,000 For Assault

On May 23, 2005, a New York court of claims awarded \$4,000 to a state prisoner who suffered a head injury when another prisoner attacked him.

While imprisoned by the State Department of Correctional Services in Elmira, New York, William Crenshaw was attacked by another prisoner. During the June 8, 1998, altercation, the assailant struck Crenshaw in the back of the head with a broom. Crenshaw sustained a laceration that required 4 stitches. An MRI and a CT scan produced normal results.

Crenshaw sued the State of New York alleging it failed to provide adequate security at the prison. He claimed he suffers from residual headaches and a residual scar under his hairline. A prison

nurse estimated the scar was 1.25 inches long. Crenshaw sought damages for past disfigurement and past and future pain and suffering.

Judge Ferris D. Lebous ruled in Crenshaw's favor and awarded him \$4,000 in damages plus prejudgment interest dating to the May 10, 2004, liability verdict. The award included \$1,500 for past pain and suffering, \$1,500 for future pain and suffering, and \$1,000 for past disfigurement. At the earlier liability trial, the State was found 100% liable for Crenshaw's injuries.

Crenshaw was represented by Manhattan attorney Andrew F. Plasse. See: *Crenshaw v. State Of New York*, Binghamton Court Of Claims, Case No. 98862. ■

Forced Masturbation States Privacy Claim

The Eleventh Circuit Court of Appeals has remanded for further proceedings a prisoner's civil rights complaint that alleged he was forced to strip and masturbate by a female guard, and was then retaliated against for reporting her nefarious activities.

Boxer X, a prisoner at Georgia's Smith State Prison, sought relief under 42 U.S.C. § 1983 for acts committed by Sgt. Angela Harris between July and November 2003. Boxer complained that on July 5 his food was cold and his tray dirty. Harris said she'd get him a new tray if he did her a "favor," namely to show her his penis while she watched through the flap in the cell door. When Boxer refused,

Harris promised retribution.

Incidents of this nature continued for several months. Sometimes Boxer refused, other times he complied. Boxer received two disciplinary reports on August 1, 2003 for failure to follow instructions and exposure/exhibition, following an instance of refusing to perform for Harris.

On August 28, Harris offered to not write Boxer disciplinary reports if he performed for her without question. Between September to November Harris approached Boxer's cell six times, demanding that he strip naked and perform sexual acts of self-gratification. Boxer complied. His subsequent grievances against Harris were denied, and Boxer filed suit in

December 2003.

The district court dismissed Boxer's compliant under 28 U.S.C. § 1915(a). On appeal, the Eleventh Circuit said prisoners have a right to bodily privacy, holding that right involves a "special sense of privacy in their genitals" and noted that "involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating."

Thus, if Boxer's allegations are proven true, he has stated a violation of his privacy right.

The appellate court then joined other circuits in recognizing that severe or repetitive sexual abuse of a prisoner by a prison official stated a cause of action. Boxer, however, failed to meet the appeal court's standard for such an Eighth Amendment violation. In reaching this conclusion, the Eleventh Circuit held "that a female prison guard's solicitation of a male prisoner's manual masturbation, even under the threat of reprisal, does not present more than *de minimus* injury." Such injury is required under the appellate court's Eighth Amendment requirement that an injury can only be "objectively sufficiently serious" if there's more than *de minimus* injury.

The appeals court found that Boxer specifically claimed he was punished for complaining about Harris through the grievance process. Boxer, however, did not show Harris was responsible for denying him disciplinary hearings; thus, no due process claim occurred.

Boxer's lawsuit was reversed in part and affirmed in part. See: *Boxer X v. Harris*, 437 F.3d 1107 (11th Cir. 2006). ■

Illinois Prisoner Raped By Guard Settles For \$15,000

On July 2, 2005, a prisoner who was raped by a guard settled her lawsuit against the Illinois Department of Corrections (IDOC) for \$15,000.

While imprisoned at the Dixon Correctional Center on May 26, 2000, the plaintiff, Rose Marie Smith 51, was raped by an unknown male guard. According to the lawsuit the guard entered Unit 59--an all female cellblock--during the night and ordered the plaintiff to leave her cell. The guard then took her to a shower area, where he beat and raped her.

After the plaintiff reported the rape, IDOC Internal Affairs investigator Regina Marshall attempted to cover up the assault, the lawsuit claimed. Consequently, the guard was not identified, no action was taken to protect the plaintiff, and no changes were made to policies or procedures to protect other female prisoners.

The plaintiff sued the IDOC and several guards and prison officials--including Marshall--under federal and state law in the U.S. District Court for the Northern District of Illinois. The plaintiff's claims under 42 U.S.C. § 1983 alleged violations of her Eighth and Fourteenth Amendment rights including unnecessary and wanton infliction

of pain and deliberate indifference to her need for protection. The plaintiff's state claims alleged assault and battery, sexual abuse, and intentional infliction of emotional distress, negligence, and due process violations.

The plaintiff's lawsuit further noted that her attacker was allowed into the housing area without a female guard present, even though numerous female prisoners in the IDOC have been previously raped by male guards.

The defendants agreed to pay the plaintiff \$15,000.00 in damages in exchange for dismissal of the lawsuit. The plaintiff was represented by Alan Mills and Margaret Byrne of the Uptown People's Law Center in Chicago. See: *Smith v. Sternes*, USDC ND IL, Case No. 02-C-50178. ■

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As seen in Oprah's O Magazine



News in Brief:

Afghanistan: On July 10, 2005, four captured Arab guerrillas escaped from the Bagram Air Base where they were being held and tortured by United States military forces. They were the first political prisoners to escape from the torture camp since it was opened in 2001 shortly after the US invasion of the country. The US did not identify who they were, how long they had been held captive, etc.

Colorado: On December 12, 2005, a federal jury convicted Colorado state prisoners Shawn Shields, Vernon Templeman, Carl Pursley and Wendell Wardell, of retaliating against a witness stemming from their beating of an unidentified Canon City prisoner who had testified against the men who were earlier convicted of obtaining thousands of dollars in fraudulent income tax returns from the Internal Revenue Service. The defendants represented themselves pro se in the case.

Ecuador: On March 21, 2006, prisoners at a prison in Quito burned down the prison which was designed to hold 350 but which held 900, to protest their living conditions. One prisoner died during the blaze, which destroyed 70 percent of the prison. Seven prisoners and two firemen were treated for smoke inhalation. The fire took three hours to extinguish, in part because prisoners inside the prison fired on fire workers trying to put out the fire.

England: Drug addicted prisoners at the Saughton prison have been having free associates throw the carcasses of dead animals stuffed with drugs over the walls of the prison. Some prisoners have complained that the tactic has left the prison yard "looking like an animal morgue."

Florida: On March 3, 2006, the privately run Polk Juvenile Correctional Facility in Polk City closed its school due to persistent mold problems caused by a leaking roof, bad plumbing and spotty air conditioning. The prison houses 205 children prisoners and employs 33 teachers and administrators of the Polk County school district, 19 of whom have filed workers compensation claims alleging they have suffered respiratory problems working at the prison due to mold. The school was closed for two months in 2005 for similar mold problems. Prison officials claim the building is not repaired due to a shortage of money from the Juvenile Justice System which is responsible for the prison.

Illinois: On May 12, 2006, John Spires, 50, a prisoner at the Dixon Correctional

Institution took his female therapist hostage at knifepoint in a treatment room for the mentally ill at the prison. After 25 hours of negotiation, Spires surrendered and the therapist was released unharmed. Family members said that Spires, who has been in prison since 1986 on charges of raping four girls and was found mentally ill but guilty and sentenced to 60 years in prison, had grown despondent after the death of his son two years ago and several adverse court decisions. Prison officials faxed a handwritten letter from Spires to the *Chicago Tribune* which was one of his demands.

Iowa: In March, 2006, Waterloo police officer Richard Knief, 47, was acquitted of having sex with a 19 year old female prisoner of the Black Hawk county jail. In September, 2005, Knief took the woman, who has been addicted to methamphetamine since she was 13, to a police training center where they had sex and he returned her to the jail. Knief admitted that he had sex with the woman but a jury acquitted him because Knief was a city employee, and the statute criminalizing sex between staff and prisoners only prohibits it between state and county employees and prisoners, not city employees.

Iowa: On September 21, 2005, Carrie Masden, 21, and Paul Vance, 38, employees of the Muhlenberg County Humane Society were charged with aiding in the escape of prisoners James Crouch and Dennis Wilburn by driving them to the home of Crouch's brother and leaving them there. The prisoners were work release prisoners employed at the animal shelter and nominally under the supervision of Masden and Vance.

Israel: On January 3, 2006, Internal Security Minister Gideon Ezra signed a contract with Africa Israel Investment for the construction and opening of Israel's first private prison which is slated to open in 2009. Africa Israel is a diamond mining firm with no prison experience. They have hired US based Emerald Corrections as consultants for the project. Pini Cohen, the chairman of Africa Israel, promised that the new prison would have factories in it so prisoners "can make money and support their families while carrying out their sentences." A lawsuit has been filed challenging the legality of privatizing prison services.

Kansas: On March 27, 2006, Travis McBride, 28, an Atchison county jail guard, was sentenced to 30 days in jail and one year of probation for having sex

with jail prisoner Sheena Kley, 18. McBride claimed the sex was consensual and apologized to his wife and family and jail co-workers for making "the worst mistake of my life." Kley has filed a tort claim as a prerequisite to suing the county for what she claims was a rape.

Kentucky: On July 13, 2005, Avery Roland, 26, and Michael Talbot Jr., 24, prisoners at the Kentucky State Reformatory attempted to escape the prison by hiding in a dumpster and then being loaded into a garbage truck. The plan failed when the men were, instead, crushed to death by the garbage truck. Police and prison officials searched for the would be escapees for over a day before their bodies were found in a landfill.

Kyrgyzstan: On October 18, 2005, prisoners at the prison colony in Bishkek, rioted to demand better living conditions, forcing the evacuation of all employees. At least 3 prisoners were killed before riot police regained control of the prison.

Louisiana: Kerry Washington, 39, died in the Orleans parish jail on April 29, 2006 after a scuffle with guards. The cause of death remains unknown. It took over two weeks before the sheriff's office notified Washington's family of his death as they repeatedly told family members Washington had been released.

Louisiana: On July 14, 2005, sergeant Vanessa Turner, 33, an employee at the Louisiana State Penitentiary in Angola was arrested and charged with malfeasance and conspiring to introduce contraband into a penal institution. Warden Burl Cain said she accepted \$100 from a prisoner to give to another prisoner and assisted in smuggling two ounces of marijuana into the prison inside a condom.

Mexico: On March 12, 2006, Alejandro Ferrer Perez, 26, the leader of a gang known as the Aztecas, was killed by his fellow gang members at the prison in Ciudad Juarez, 6 days before he was due to be released from prison. This caused a rebellion among the prisoners in which another 8 prisoners were killed and 43 wounded. This follows a riot in December, 2005, that left seven prisoners dead.

Michigan: On August 15, 2005, Pontiac jail prisoners Jahmail Dillahunty, 23; Michael Rutherford, 36; Maki Ragland, 20 and his brother Joseph Ragland, 17, escaped from the local courthouse by overpowering a guard and taking his pistol and keys. All four men were later recaptured the same day

and face additional escape charges.

Michigan: On March 16, 2006, Dr. Rafael Mercado Combalacer, 64, was sentenced to six months in jail after pleading guilty to sexually assaulting and grabbing the genitals of a 40 year old male prisoner at the Ernest C. Brooks Correctional Facility in Muskegon. Combalacer was employed by the state Department of Mental Health and then employed under contract by the Department of Corrections. In addition to the six months in jail, Combalecer was also sentenced to 18 months probation, a \$420 fine and a \$10 monthly probation fee. His psychiatric license was also suspended. The victim complained to prison officials that Combalecer fondled him during a therapy session and also sent him sexually explicit letters. The victim told the sentencing judge: "I thought the guy was trying to help me, and then he put his hands up my shorts."

New York: On March 9, 2006, Michael Regan, a part time Alleghany county deputy prosecutor was fired when it was discovered that he had attended a meeting of the New Century Foundation in Virginia. The foundation is a white supremacist organization.

Ohio: On October 19, 2005, Jessie Collins, 31, a prisoner at the Warren Correctional Institution and his wife Pamela, 35, were indicted on charges of illegal conveyance of drugs into a prison after Pamela was arrested on September 15 attempting to smuggle 10.5 grams of marijuana into the prison. Pamela was the fifth visitor at the prison to be charged with smuggling drugs in 2005.

Pennsylvania: On September 28, 2005, the federal government announced the arrest of almost 24 members of a Colombian drug ring that imported cocaine into the US. Two of the ring leaders, Jose Escobar Orejuela and Jorge Figueroa, 46, allegedly ran the operation from their

federal prison cells in Pennsylvania.

South Carolina: On September 29, 2005, James Turner, a state prisoner employed in a community work program, allegedly stole a sheriff's car from the sheriff's office where he was cleaning carpets, fled to Florida and is now accused of killing one woman and stabbing another at a motel. Turner was about four months from being released on the sentence of violating parole on domestic violence charges when he fled. Newberry county sheriff Les Foster defended the use of prison slave labor by saying "You always have certain issues with inmates,..." Police later arrested Donna Turner, James' ex wife, and charged her with giving him a cell phone.

South Carolina: Stephen Stanko, 37, a former prisoner who authored *Living in Prison: A History of the Correctional System with an Insider's View*, was arrested in 2005, a year after his release and charged with the murder of Laura Ling, 43, his roommate, and Henry Lee, 74, and the rape of a teenage girl. He had previously been convicted of kidnapping. Stanko will go on trial later this year. It is unknown if he is working on a sequel to his book.

Texas: On August 13, 2005, Jose Jaime-Martinez, 38, a prisoner at the Federal Correctional Institution in Beaumont was stabbed to death by unidentified prisoners.

Texas: On October 11, 2005, a 1998 Ford van owned by the Tennessee Department of Corrections but on loan to the Texas Department of Criminal Justice lost control and flipped near the town of Waynesville. The two guards in the truck, Danny Phillips, 59, and James Harding, 52, received modest injuries. No prisoners were being transported at the time. TDCJ officials claim a shortage of vehicles has forced them to borrow transport vans from other prison systems.

Vermont: On March 25, 2006, Stephen

Bedell, 42, became the first person to be convicted of smuggling heroin into a detention facility in Vermont after pleading guilty to smuggling three bags of heroin to a female prisoner at a prison in South Burlington in 2002. He was sentenced to 2 ½ to 3 years in prison.

Virginia: On May 13, 2006, Trenton Holliman, 27, escaped from the Western Tidewater Regional Jail by exiting through a door that had been left open while he was in a dayroom using the telephone. Holliman turned himself in 8 hours after he escaped. Jail officials say the escape occurred because the jail is in the midst of switching to a new, more elaborate electronic security system and in the meantime jail guards are using manual locks and keys to let prisoners in and out of their cells and common areas. This was the jail's first escape in 14 years.

West Virginia: In June, 2005, Logan county magistrate Danny Wells was sentenced to seven years, three months in federal prison after being convicted of taking money from criminal defendants to keep them out of jail or prison. John Nagy, Wells' court bailiff, was sentenced to six months in prison after pleading guilty to lying to FBI agents about his knowledge of the corruption. ■

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The Warehouse Prison, by Dr. John Irwin, 318 pp., softback, Roxbury Publishing Company, 2005

Reviewed by John E. Dannenberg

Taking California's Solano State Prison as a model, author John Irwin exposes the warehouse concept of California's prisons and its debilitating effect on prisoners and their struggle for reintegration. Dr. Irwin, conflating his unique perspectives as both a San Francisco State University Professor of Criminology and a former prisoner at Soledad State Prison, personally examines and analyzes the inner workings of prisons as well as the impact of the warehouse system on prisoners and society. As entertainingly written as it is poignant, this book offers incredibly realistic introspection into every aspect of the prison experience. It is recommended reading for prisoners, their families and the public, who all pay for yet jointly suffer from the hopelessness of the current retributive warehouse incarceration model.

Chapters 1 and 2 recount the swing to the imprisonment binge of the past few decades, seeking ever harsher punishment. Incisive histories of early English and American prisons, replete with the development of the convict code and social structure, chronicle the encroaching demise of the early rehabilitative model.

Focusing on (by working within) Solano State Prison, Professor Irwin examines in Chapters 3 and 4 the physical plant as well as the administrative regimens and guard culture that permeate the atmosphere. He details extant prisoner programs, including educational, vocational and voluntary self-help activities. The inner workings of Solano are examined with respect to race, social structure and prisoner adaptation.

Chapter 5 goes outside Solano, reviewing supermax prisons, life in a Security Housing Unit (SHU) and the severe psychological and social impairment devolving from this experience. The details

of SHU living are mandatory reading for those who don't know its brutal effect. The harm from such stressors is chronicled in Chapter 6, covering in grim detail the damage to prisoners' self esteem, sexual orientation, anger and sense of justice.

Return to society, "reentry," is discussed with respect to both SHU discharge and general population releases. The impossibility of success that attaches to being unceremoniously dumped from total lockup (e.g., supermax SHU) into mainstream society is revealed in actual prisoner testimonials. Indeed, the whole book is replete with quotations from prisoners Professor Irwin met during his years of research.

In Chapters 8 and 9, Professor Irwin defines the "New Dangerous Class" of released prisoners and their impact on the "war on crime." He discusses the recent trend towards job discrimination against ex-cons and its counterproductive effect on the government's attempted "war on

poverty." Irwin waxes political, blaming the conservatives for a national trend of vindictiveness, ultimately spawning the long-term demise of civil rights and the rise of the Prison-Industrial Complex. Professor Irwin's conclusions are couched in despair: "The rich will keep getting richer ... and the poor, particularly, the non-white poor, will continue to get prison."

The Warehouse Prison concludes with an afterword by Criminologist Barbara Owen (California State University, Fresno), who discusses the unique problems attending women prisoners. This sobering discussion recounts the additional debilitation attending sexual pressures, pregnancy, and the loss of children, dignity, and physical safety.

The book includes detailed subject, author, and reference indexes, making it a valuable research tool. This is Professor Irwin's second carceral sociology book, following his 1970 classic, *The Felon*. ■

Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 915 15th St. N.W., 7th Floor, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. FAMM-gram, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rul

ings, administrative developments and news about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 881, Seattle, WA 97423.

November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.

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The Celling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 Pages. \$19.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

Everyday Letters For Busy People, by Debra Hart May, 287 pages. \$15.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters 1048

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$11.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

Spanish-English/English-Spanish Dictionary, 60,000+ entries, Random House, \$5.99 Two sections, Spanish-English and English-Spanish. All entries listed from A to Z. Hundreds of new words. Includes Western Hemisphere usage. 1034

Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. & Canada, by Jon Marc Taylor, 341 pages. \$24.95. Includes contact info & outlines courses offered by over 250 education providers. Info on high school, vocational, paralegal, law, college and graduate courses. One of a kind prisoner resource. 1047

The Citebook, 21st ed., by Tony Darwin, Starlite, 306 pages, \$41.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

Deposition Handbook, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$29.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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Actual Innocence: When Justice Goes Wrong and How To Make It Right, updated pb., by Barry Scheck, Peter Neufeld and Jim Dwyer, 432 pages. \$9.99. Two of O.J.'s attorney's explain how defendants are wrongly convicted on a regular basis. Detailed explanation of DNA testing and how it works to free the innocent. Devastating critique of police and prosecutorial misconduct and the system that ensures those abuses continue. 1030

Roget's Thesaurus, 717 pages. \$5.99. Over 11,000 words listed alphabetically linked to over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and identifies informal and slang words. 1045

Webster's English Dictionary, Newly revised and updated. 75,000+ entries. \$5.99. Includes tips on writing and word usage, and has updated geographical and biographical entries. Includes latest business and computer terms. 1033

Capital Crimes, by George Winslow, 360 pages. \$19.00. Explains how economic policies create and foster crime and how corporate and government crime is rarely pursued or punished. 1024

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$17.00. Documented and has first hand reporting on law enforcement's war on the poor. Covers paramilitary policing and SWAT teams, the INS and prisons. 1002

The Perpetual Prisoner Machine: How America Profits from Crime, by Joel Dyer, 318 pages. \$19.00. Exposes how private prisons, banks, investors and small companies profit from the prison industrial complex, and prison growth adds to revenue & profits. 1025

Crime and Punishment In America, by Elliott Currie, 230 pages. \$12.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

Worse Than Slavery: Parchman Farm & the Ordeal of Jim Crow Justice, by David Oshinsky, 306 pgs \$14.00. Analysis of prison labors roots in slavery. Focuses on prison plantations and self sustaining prisons. Must reading to understand prison slave labor today. 1007

States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World, by Danny Cox & John Hoover, 256 pages, \$14.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

BOP Occupational Training Programs Directory, 124 pgs. \$10.00. Directory listing vocational and education programs available to prisoners in every federal prison. Includes contact info for BOP national, regional and CCM offices, and BOP facilities. Invaluable if considering a training or education transfer. 1053

Criminal Injustice: Confronting the Prison Crisis, by Elihu Rosenblatt; South End Press, 374 pages. \$18.00. A radical critique of the prison industrial complex. 1009

Marijuana Law: A Comprehensive Legal Manual, by Richard Boire, Ronin, 271pages. \$17.95. Examines how to reduce the probability of arrest and successful prosecution for people accused of the use, sale or possession of marijuana. Invaluable information on legal defenses, search and seizures, surveillance, asset forfeiture and drug testing. 1008

ALL BOOKS ARE SOFTCOVER EXCEPT *PRISON MADNESS*

Hepatitis and Liver Disease: What you Need to Know, 2004 Rev Ed, by Melissa Palmer, MD, 470 pages. **\$16.95**. Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow and exercises to perform. 1031 ☐

All Things Censored: Mumia Abu-Jamal, ed. by Noelle Hanrahan, 303 pgs. **\$14.95**. Includes 75 articles by Abu-Jamal. Attacks capital punishment & critiques the dehumanizing prison system. 1040 ☐

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$13.95**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson; Lawrence Hill Books, 368 pages. **\$16.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016 ☐

The Politics of Heroin: CIA Complicity in the Global Drug Trade, April 2003 Rev Ed, by Alfred McCoy; Lawrence Hill Books, 734 pages. **\$32.95**. Latest Edition of the scholarly classic documenting U.S. government involvement in drug trafficking. 1014 ☐

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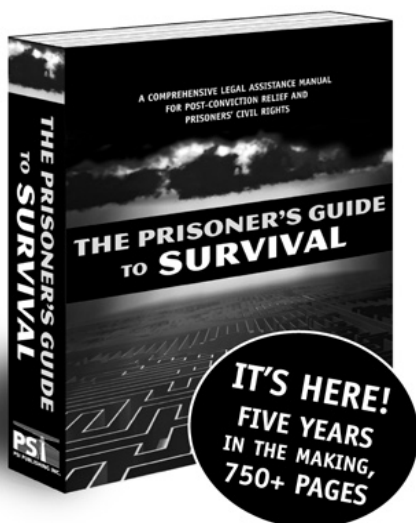
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Dedicated to Protecting Human Rights

August 2006

Guards Rape of Prisoners Rampant, No Solution in Sight

by Gary Hunter

Psychologists will quickly tell you that rape is not about sex. It's about power. It's about imposing one's will on another. It's about masking feelings of inadequacy with intimidation – about artificially inflating one's low self esteem by abusing someone else. Sex is just a symptom. So it's little wonder that so many prison and jail guards, when entrusted with a modicum of power, succumb to the temptation to sexually assault the prisoners under their care.

Incident after incident reveals a national epidemic of authority run amok in the hands of abusive detention facility employees, who have insufficient supervision and even less self control. In just one

case, first degree sexual misconduct, indecent liberties and second-degree custodial misconduct are among the charges facing as many as eight King County Jail guards in Seattle, Washington.

In an unfolding investigation that one source has termed a "culture of harassment," two guards, Louis Gano Laurencio, 45, and Cedric Darnell McGrew, 40, were arrested on May 6, 2005, while a third was arrested later that month and charges are pending against a fourth. All were placed on administrative leave. The investigation began in April 2005 when Laurencio and McGrew were accused of having sex with a 27-year-old female prisoner. An ensuing search of one guard's home indicated there might be multiple victims.

That suspicion was verified when photos of nude women and "stacks of sexually explicit letters written by female inmates" were found in the locker of one of the guards. The investigation revealed that the two tag-teamed the victim, with one having sex with her while the other stood watch.

The female prisoner said McGrew approached her with sexually explicit requests immediately upon her arrival at the jail. He once asked her if her breasts were real over a loudspeaker. She also accused him of offering her and another female prisoner alcohol and marijuana in return for a "show." When she accused Laurencio of taking pictures of her breasts with a digital camera, a search of his locker verified her claim. Events escalated over time until McGrew and Laurencio forced the woman into an isolated room where they took turns sexually assaulting her.

Investigators even heard the two

guards incriminate themselves on tape after the victim agreed to wear a wire. Never suspecting the sting, one guard was recorded saying, "let's do it right now." McGrew was charged with first-degree custodial sexual misconduct while Laurencio was charged with second-degree custodial sexual misconduct.

Detectives originally thought the investigation would involve only the two. But more misconduct was revealed when an unidentified third guard was named in a sexual assault that had occurred two years earlier. He was implicated by one of the letters found during the search and detention of McGrew and Laurencio, and was accused of forcing a female prisoner to perform oral sex. He is under investigation but has not yet been charged. A fourth King County guard, Harland D. Richmond, 36, the son of a retired member of the sheriff's command staff, was charged on February 9, 2006 with engaging in sexual activity with two female prisoners in exchange for drugs, food and other favors. He is accused of fondling the two women in separate encounters on October 21, 2005, and then engaging in sexual conduct with one of them that night.

Brigitte Sarabi, executive director of the Oregon-based Western Prison Project, said, "There's no way sexual contact between someone incarcerated and the person guarding them can be consensual. The power differential is too great. You can't say no. It is flat-out prisoner abuse."

"You'll have these women coming in, some of them strung out on drugs. They're hungry – starving – and the diet in the

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Prisoner Rape Rampant (cont.)

jail doesn't provide enough calories for them while they're coming down," said a source close to the investigation. "They'll give a [sex] show for a candy bar." Many women prisoners are drug addicts who have worked in the sex industry to support their habits.

In March 2006, King County officials, apparently unable to resolve the problem of guards having sex with prisoners, asked for help from The Moss Group, a Washington, D.C.-based consulting firm, to deal with the issue of sexual misconduct at the jail. The FBI has opened an investigation of the jail related to civil rights violations. The criminal cases against Laurencio, McGrew and Richmond are still pending.

Just as Washington State is only the tip of the United States, the "culture of harassment" referred to above is just the tip of an insidious iceberg of moral malignancy metastasizing throughout our nation's prisons. No state is immune and no vaccine available as prisoners are preyed upon by their supposed protectors.

Alabama

In June 2005, Derrick Burton, 21, and Brian Fuller, 22, were fired from their jobs as Chambers County jail guards and charged with custodial sexual misconduct. Alabama officials were tight-lipped about the aggressive six-month investigation that led to the dismissal of the former guards. Each was accused of exchanging personal items with female prisoners for sexual favors.

As in other states, sexual conduct between guards and prisoners is illegal in Alabama. Burton was charged with two counts of sexual misconduct while Fuller was charged with one. If convicted, both men faced up to 10 years in prison on each count. Instead they took plea bargains. Fuller was sentenced on October 19, 2005 to three years, of which all but 90 days was suspended, plus three years probation. Burton pled guilty and was sentenced on February 27, 2006 to a 30-month suspended sentence and 100 hours of community service work. Earlier in 2005, female prisoners at the jail had filed a lawsuit claiming that guards provided personal items in exchange for sex acts.

Chad Little, a former guard at the Fairhope jail, was accused of repeatedly

raping Shaunna Crocker, a 22-year-old female prisoner. Crocker tearfully testified that Little forced himself on her four or five times while she was held at the jail. According to her testimony Little first raped her on June 18, 2003. "That was the first day I have ever been raped in my life," she said. Little, however, insisted that the sex was consensual.

Because Alabama hadn't criminalized sex with prisoners at the time that he sexually assaulted Crocker, Little was charged with criminal ethics violations for using his office for "personal gain."

On March 24, 2004, Crocker and her husband, Michael, filed a lawsuit against Little for the sexual abuse and for damaging their marital relationship. Michael Crocker also testified that he was threatened by Fairhope Police Lt. L.G. Brower, who tried to get him to stop complaining about the department. The lawsuit went to trial in May 2005, and a federal jury ruled against the Crockers. Little received pretrial diversion on the misdemeanor ethics violation in September 2005.

Arizona

Kathleen Liden, 44, pleaded guilty in July 2004 to having a sexual relationship with a minor while she worked as a guard at the Adobe Mountain School, a juvenile correctional facility. Liden was convicted of unlawful sexual contact with an incarcerated youth and attempted unlawful sexual contact with an incarcerated youth; her 16-year-old victim was serving a one-year sentence for violating his probation when Liden molested him. She was sentenced in November 2004 to three years in prison.

Another juvenile detention guard, Mike Hollingsworth, was sentenced on October 25, 2004 to four months in jail and three years probation after being convicted of child prostitution. In June 2004 Hollingsworth offered candy, cigarettes and a soda to a young girl in custody as an enticement for her to expose her breasts. Judge Janice Sterling reprimanded Hollingsworth, saying, "You were the officer of this court. I could not imagine a worse setting in which you could have committed these offenses." Hollingsworth admitted his mistake and begged for mercy, saying he needed to support his family. He was allowed to participate in work-release while he served his short sentence.

Kevin Richard Carlisle, 40, was arrested on July 29, 2005 for kidnapping and sexual assault of a 16-year-old detainee.

Prisoner Rape Rampant (cont.)

Carlisle was a 15-year veteran with the Bureau of Immigration and Customs Enforcement (ICE). The girl told Phoenix police officers that Carlisle first touched her inappropriately on July 14 after he had handcuffed her and placed her in the back seat of his car. Later, Carlisle took her to an ICE detention facility, where he was captured on video when he escorted the girl to an isolated room and touched her inappropriately again.

Carlisle denied any wrong-doing, saying he only ran his fingers around the girl's waistband. However, Phoenix police Sgt. Lauri Williams said that Carlisle's search procedure "certainly wouldn't fall into any policy of any law enforcement agency I know." Carlisle was freed on \$15,000 bond and placed on paid administrative leave; the criminal charges against him are pending.

California

Sexual assault charges were filed on July 26, 2004 against two law enforcement officials in Riverside County, California. Sheriff's Deputy John Burns and correctional deputy Joseph Bessette were accused of having illegal sexual contact with multiple female prisoners at the Indio Jail. A third guard, Ricardo Barrios, was also implicated but was cleared due to insufficient evidence.

Riverside County Sheriff Bob Doyle discovered the guards' misconduct by accident. Burns and Bessette were placed on paid administrative leave and investigated by a special team – they were accused of having sex with nine female prisoners at the jail between December 2002 and May 2004. Some of the women stated they engaged in the sex acts in exchange

for clothing, blankets and toiletries, or to avoid mistreatment. One of the prisoners, Rebecca Bateman, 28, filed suit against the former guards on January 12, 2006. Her attorney, Daniel M. McGee, stated, "Why are there male jailers in control and supervising female inmates?"

Ironically, the jail's investigative team itself was placed under investigation for forcing the guards to submit to questioning and a polygraph test while refusing them the right to have either counsel or a union representative present. A petition filed by Burns and Bessette requested that all documents, notes, interviews and polygraph results be excluded, alleging they were illegally obtained. Their criminal cases have not yet gone to trial.

The Ventura Youth Correctional Facility for girls is also under fire – as many as a dozen guards at the prison face accusations of coercing sex from prisoners in exchange for special favors.

A 20-year-old Yorba Linda woman, formerly incarcerated at the facility in Camarillo, raised the alarm in December 2004 when she claimed she was sexually assaulted in 2003 and 2004. She also accused the guards of bringing jewelry, extra food and other gifts to cooperative prisoners. Six guards were placed on administrative leave during an investigation, although apparently no criminal charges were filed.

Five years ago, five employees at the same Ventura facility were ousted for having sex with prisoners. That two-year investigation also led to the suspension of the school's top three administrators.

National experts have published several damaging reports that criticize the California Youth Authority's tendency to warehouse and drug their wards rather than counsel them. Daniel Macallair, executive director of the San Francisco-based Center on Juvenile Criminal Justice, insists that "this is stuff that's been going on for years.... You've got a system used to operating without a lot of accountability."

Four current and former juvenile prisoners at the Herman G. Stark Youth Correctional Facility in Chino filed suit against prison guard James Shelby and others in December 2004. The minors claimed that Shelby pressured them to perform sex acts and ordered beatings by other prisoners. Shelby was also accused of rewarding compliant prisoners with contraband items, including TVs and cell phones. He was placed on paid leave dur-

ing an investigation.

In the lawsuit filed by the juveniles, *Ruelas v. State of California*, a Superior Court judge ruled in December 2004 that California law prohibited the prisoners from bringing federal § 1983 claims against the Youth Authority itself, but allowed the case to go forward against Shelby and other staff members.

An unrelated lawsuit, filed on January 6, 2005, accused Corrections Corporation of America (CCA) guard Louis Johnson of raping Nereyda Escalante, 32, who was incarcerated at a Department of Homeland Security detention facility in Otay Mesa, California.

The complaint named both Johnson and CCA and stated Escalante was assigned to a room where she would fill bags of candy for other detainees. "Upon entering the room defendant Johnson closed the door. Inside the room ... out of view of security cameras ... Johnson violently pushed plaintiff to the floor, pulled her pants and underpants down, and forcibly raped her...."

The complaint went on to say that Johnson repeated the incident the next day "in the same manner." The sexual assaults took place on December 15 and 16, 2004. CCA spokesman Steve Owen stated that Johnson was put on paid administrative leave. Owen would not comment further on the case except to say, "Our company has zero tolerance for any inappropriate conduct from our employees."

However, records from the U.S. Bureau of Immigration and Customs Enforcement reveal four complaints made by prisoners in 2004 against the CCA prison. In 2003, one male prisoner sued a prison employee whom he accused of forcing him to have oral sex. CCA reached a settlement with the prisoner in that case.

According to Stephen Waldman, Escalante's attorney, the lawsuit against Johnson and CCA was settled in October 2005 under confidential terms. (See: *Escalante v. CCA*, USDC, D CA Case No. 05-CV-0022WQH).

And on July 28, 2005, Jasper Ayala, a former lieutenant at the California Prison for Women, was sentenced to nine months in jail for having sex with a female prisoner. Ayala pleaded no contest to two felony charges; he reportedly coerced the prisoner to perform a sex act, and she provided investigators with DNA evidence from the sexual encounter. Ayala was allowed to serve his jail sentence on weekends.

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Colorado

Prison guard Melanie Ochoa, 32, was freed on \$10,000 bond after being charged with felony sexual conduct in a penal institution. Ochoa, who worked at a privately-operated community corrections facility in Denver, was arrested on February 5, 2005. She was accused of having sexual contact with a 31-year-old male prisoner in October 2004. Ochoa pled guilty on June 15, 2005 to official misconduct, and was sentenced to two years supervised probation and 100 hours of community service.

Perfecto Hajar, a lieutenant at the Arkansas Valley Correctional Facility in Crowley County, Colorado, was charged on May 31, 2005 with felony sexual assault, sexual misconduct in a penal institution and misdemeanor official misconduct. Hajar, 51, a former Crowley County sheriff's official, had been arrested on March 1, 2005 and released on bond the same day. Though details were sparse it was reported that Hajar illegally and intentionally inflicted sexual assault on a prisoner after coercing him to perform sexual acts.

Hajar entered into a plea agreement in which the sexual misconduct charges were dropped; in January 2006 he pled guilty to a charge of introducing contraband into a penal facility and received two years probation, 50 hours community service and ten days home confinement.

Connecticut

State Judicial Marshal Jemar Smith, 27, was arraigned on January 28, 2005 and charged with two counts of sexually molesting a 19-year-old female prisoner. Three sexually explicit letters discovered in the woman's property prompted the investigation.

Smith met his imprisoned paramour in October 2003. The two became close during subsequent meetings as she made court appearances between Dec. 2003 and May 2004. In a written statement the woman admitted that Smith grabbed her breast while she was in a courthouse holding cell. He also caressed her beneath her clothing as she returned from court, according to the warrant. The woman said the contact was consensual.

Smith further admitted corresponding with two other female prisoners but both women told police there had been no physical contact. Smith, a six-year veteran, was suspended with pay on September 28,

2005 and released on a \$10,000 non-surety bond. On May 2, 2006 he pled no contest to one count of unlawful second restraint and received six months in jail.

Florida

Kenneth Joyner, a St. Lucie County sheriff's deputy, was fired in March 2005 after an investigation confirmed that he had tried to coax a male prisoner into exposing himself and engaging in sexually explicit correspondence and conversation.

Joyner, a four-year veteran, initially denied the charges but broke down when he was told that his conversations had been recorded. Amid a lot of long sighs, Joyner admitted, "I was an idiot." He has appealed the loss of his job despite a finding by the internal affairs office that he violated the code of ethics for public employees, engaged in conduct unbecoming an officer and lied under oath.

Craig Mandel Hall, 35, was a booking guard at the Orient Road Jail in Hillsborough County, Florida. He was later incarcerated there. Hall was arrested after a 25-year-old female prisoner accused him of forcing her to have sex several times between December 2004 and January 2005. On May 8, 2005, Hall was imprisoned himself.

Lisa Haber, spokeswoman for the Hillsborough County Sheriff's Office, said, "We started an internal affairs investigation and as a result they were able to gather enough evidence to charge him. He is in a position of custodial authority, and ... she is telling us that it was not consensual." The woman worked as a trusty in the jail at the time. Hall, who was eventually released on \$50,000 bond, is facing an August 7, 2006 jury trial on four counts of sexual misconduct with a prisoner.

Gregory Louis, 38, a Hernando County jail guard, was arrested on November 30, 2004 and charged with sexually assaulting Kim Hines, a 17-year-old female prisoner. Twice.

According to a Hernando County sheriff's report, Louis approached Hines as she stepped out of the shower, backed her against a sink and fondled her. He repeated the incident a few days later, the report indicates.

The jail, which is run by CCA, lacks adequate space for correctly housing juvenile offenders, leaving many vulnerable to attack. Louis, who previously had been named CCA's workhouse employee of the

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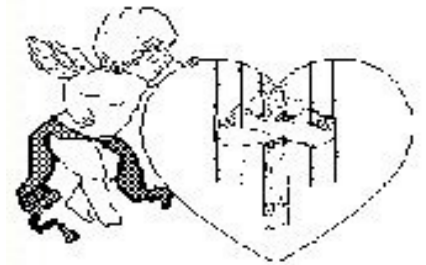
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Prisoner Rape Rampant (cont.)

month in February 2003, was freed on \$20,000 bond. He subsequently pled guilty and was sentenced to six months in jail.

Ajmo Jolicoeur, 22, a guard at the Homestead Correctional Institution, was charged on June 16, 2005 with raping an unnamed female prisoner. While working the midnight shift in the prison, Jolicoeur reportedly threatened the woman with confinement in close custody if she didn't comply with his demands for sex. She eventually succumbed to his threats. Jolicoeur would send her to the empty communal showers late at night, where he raped her repeatedly from June through August 2004.

On August 17, 2004 the prisoner tested positive for pregnancy. Jolicoeur resigned the same day. On March 8, 2005 the woman gave birth to a baby girl; DNA tests proved the guard's paternity. Faced with this incontrovertible evidence, Jolicoeur pled guilty to one count of having improper sexual relations with a prisoner and received an 18-month sentence.

Christopher Michael Byrd, 33, a nurse at the Bay County jail annex, was arrested on July 16, 2005 and charged with sexual misconduct with a prisoner. Byrd, who is married, was accused of having a female prisoner sent to the annex unescorted. Once the prisoner arrived she and Byrd engaged in foreplay while she disrobed. The two then had sex on an examining table in the medical unit. Byrd and a jail supervisor were fired in connection with the incident. The Bay County facility is run by CCA.

Georgia

Beverly Elaine Simmons, a deputy with the Thomas County Sheriff's Office, was arrested on October 18, 2005 and charged with sexual assault on a person in custody and violation of oath of office.

After a two-month investigation that involved the Georgia Bureau of Investigation (GBI), it was determined that Simmons indulged in at least three sexual encounters with her prison paramour. "They confronted the officer and during the interview process she confessed and owned up to the accusations," stated Thomas County Sheriff's Captain John Richards. Simmons was released on her own recognizance; the charges were still outstanding as of July 2006, and she faces up to 10 years in prison if convicted.

Illinois

On June 17, 2005, juvenile prison guard Thomas P. O'Donnell, 40, was charged with aggravated criminal sexual abuse and official misconduct. O'Donnell worked at the St. Clair County Juvenile Detention Center, where he was accused of bringing his 14-year-old victim candy and cookies before getting into bed with the boy and touching him inappropriately on April 20, 2005. The boy's family has since filed a lawsuit seeking over \$1 million in damages. O'Donnell was released after posting 10% of a \$150,000 bond; the criminal charges and civil lawsuit filed against him are pending.

Timothy Gregory, a guard in Tazewell County, Illinois, resigned on November 4, 2005 after admitting to sexual misconduct with a female prisoner. The guard was in "direct supervision" of the woman with whom he was involved. Evidence indicates that the two had multiple meetings in unmonitored areas of the Tazewell Justice Center. Charges of custodial sexual misconduct and official misconduct were eventually filed by the state attorney's office; on March 13, 2006, Gregory pled guilty to official misconduct and was placed on probation for 24 months.

Sheriff Robert Huston stated, "I was extremely unhappy about this incident.... None of us here wants to see this department tarnished by this incident." Note to Sheriff Huston – it's too late!

Pause for the Cause

To this point the article has largely written itself. The facts are more revealing than any commentary this author can offer. But it seems appropriate to pause momentarily and remind the reader that, despite the redundant use of the words "sex" and "rape," this article is not about sexual abuse. It's about the abuse of power. Sex is the symptom of a deeper social disease, a deviancy that goes beyond the uniforms of jail and prison officials to sexual abuse that is condoned by those who wear judicial robes.

Illinois is located in the center of this country and is central to this article, as the attitude of its jurists is central to the problem of indifference to sexual abuse enabling the abusers. Illinois will be revisited at the end of this article because the Illinois justice system literally reflects our ill justice system.

Had the crimes detailed above involved ordinary citizens, prosecution

would have been swift, high bonds and pre-trial incarceration automatic, and lengthy prison sentences upon conviction the norm. The raped prisoners would be treated as victims with the attendant rights that goes with status of "good victims." Instead, because prison and jail guards are involved, a certain amount of leniency is afforded. Too frequently law enforcement – and judicial – officials favor fraternity over justice.

PLN has always encouraged its readers to see the other side of the coin. While its writers, many of whom are imprisoned, may at times seem biased, the facts speak for themselves. In some cases, including the following additional examples, they literally cry out for justice.

Louisiana

On June 11, 2004, four guards at the privately-operated Basile Detention Center were indicted for illegal sexual contact with female prisoners. Kenneth L. Stevenson, Sr., Frank Lenoir, Horace Edwards and Jeffrey Collins were accused of malfeasance in office; the indictments followed four days of testimony from investigators, other guards and 22 witnesses. Their accusers were female prisoners from Alabama who had been temporarily relocated to Louisiana to relieve overcrowding, and the investigation was initiated by the Alabama DOC.

A court order issued in April 2003 required the Alabama DOC to reduce its prison population. Alabama officials reached an agreement with LCS Corrections Services, and sent more than 200 women to Louisiana lockups. LCS, a for-profit company founded in 1990, is based in Lafayette and operates various prisons in Louisiana.

LCS employees Edwards and Collins were fired immediately. Stevenson and Lenoir were placed on administrative leave. On July 1, 2004 all four men pleaded not guilty to the charges. "There is definite misconduct that did occur, and we will follow through with it," said Evangeline Parish District Attorney Brent Coreil. Edwards pled guilty on Oct. 31, 2005 and received a two-year prison sentence, which was suspended; he was placed on probation and ordered to pay a \$1,500 fine. Court records do not reveal the disposition of the charges against the other three defendants.

Previously, in July 2003, another LCS guard, Todd Daniel Arnold, 22, was charged with having sex with a female

prisoner at the Pine Prairie Correctional Center. He was released on \$7,500 bond, pleaded guilty on March 18, 2004, and sentenced to three years suspended to probation and a \$1,000 fine. Two years prior to that incident the former warden of the Evangeline Parish Jail was convicted on two counts of malfeasance in office for extorting sex acts from family members of prisoners. Michael J. Savant, 48, was sentenced to serve six months in jail and placed on three years probation.

On February 11, 2004, Bossier Parish sheriff's employee William Olan Wise, 26, was charged with two counts of malfeasance in office for engaging in sexual activities with a female parish prisoner. Wise was accused of taking the 21-year-old woman out of her housing area and touching her inappropriately on two occasions. "This was not consensual in the sense that Mr. Wise was the initiator and aggressor it appears in this case," stated sheriff's spokesman Ed Baswell.

Wise pled no contest to one of the malfeasance charges on December 16, 2005 and was sentenced to three years in prison, which was suspended; he was placed on probation and ordered to pay a \$1,000 fine. The other charge was dismissed.

Maine

Dawn Chambers, 44, a former employee at the Penobscot County jail, was sentenced on July 21, 2005 to two years in prison for having sex with a prisoner. The Penobscot Superior Court found the petite blonde guilty of engaging in sexual relations on January 30 and February 2, 2005 with a 27-year-old prisoner who

worked with her in the jail's kitchen.

The prisoner claimed that Chambers smuggled drugs into the jail to trade for sex. "My client vigorously denies drug smuggling," said Chamber's attorney. All but 30 days of Chamber's sentence was suspended; however, because sex between prisoners and jail employees is a felony in Maine, she is now required to register as a sex offender for the next ten years.

Maryland

Emmanuel Deris, 35, a guard at the Baltimore County Detention Center, was arrested on August 29, 2004 and charged with illegal sexual contact with a female prisoner. According to the victim, Deris had forced her to perform a sex act on him. Then, in a separate incident, the guard put his hands down the woman's pants.

Deris was charged with a second-degree sex offense, a fourth-degree sex offense and second-degree assault. He posted a \$35,000 bond the day after he was arrested; he had worked at the jail about 18 months.

Michigan

Scott Kevin Andrews, 45, a guard at the St. Clair County jail, was charged on February 24, 2005 with fourth-degree criminal sexual conduct.

Andrews, a 20-year jail employee, was accused of inappropriately touching a female prisoner on January 17, 2005. His arraignment took an unusual twist when, for unexplained reasons, magistrate Keith Bankston censored the proceedings. In St. Clair County arraignments are public domain, and are

usually televised via closed circuit monitors in the courthouse hallway. Andrew's arraignment was not broadcast. Chief Judge Cynthia Platzer said she would investigate the matter.

Andrews was released on a \$2,500 personal recognizance bond. He pleaded guilty on May 2, 2005 and received three years probation.

Kenneth W. Sanders, 42, another St. Clair County jail guard, was charged with felony sexual assault and attempted sexual assault on March 4, 2005.

In a second investigation on March 15, Saunders was accused of sexually assaulting a female prisoner in the St. Clair County jail. Represented by attorney Malcolm Floyd, the 7-year veteran pleaded not guilty to the charges. If convicted of the multiple felonies Saunders faced up to five years in prison. Instead he took a plea bargain, and was sentenced on June 20, 2005 to 180 days in jail and three years probation.

David R. Dorland, 44, a former Antrim County jail guard, was convicted on one count of second-degree attempted criminal sexual conduct and two counts of gross indecency. Dorland pleaded guilty on September 19, 2005 after admitting to sexual contact with as many as nine female prisoners.

Judge Thomas Power sentenced Dorland to 40-60 months in prison, which exceeded state sentencing guidelines. Power justified the excessive time by saying the legal limits "do not adequately address the abuse of authority that occurred here. When I send somebody to jail, I certainly don't send them for the purpose of being molested."

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As seen in Oprah's O Magazine



Prisoner Rape Rampant (cont.)

Dorland traded favors for sex from female prisoners. His attorney, Joseph Aprea, stressed that all the guard's relationships were consensual. Dorland will still be required to register as a sex offender. [See the February, 2006, issue of *PLN* for a more extensive expose on the Michigan DOC's culture of rape.]

Missouri

Randall Nester, 37, a probation officer in Johnson County, Missouri, was sentenced on April 7, 2005 to 30 months in prison on corruption charges. The sentence was imposed after Nester pled guilty to four counts of sexual misconduct.

In January 2003 a woman accused Nester, a five-year veteran of the Johnson County DOC, of touching her inappropriately. The resulting investigation produced more victims who accused the probation officer of groping them in his office and during home visits. Nester had threatened to return the women to jail if they refused his sexual advances. "If that's not an abuse of authority, I don't know what is," said Jackson County Circuit Judge Edith Messina. "I don't know what message you were sending these women, but their lives are no less important than anyone else's."

Johnson County subsequently released one victim who had been re-imprisoned by Nester after she rejected his advances.

Nevada

After giving birth in January 2004, Korinda Martin and the father of her child, Randy Easter, appeared before District Judge Stewart Bell – but not to declare nuptials. On January 5, 2005 Easter pleaded guilty to a felony charge of

voluntary sexual conduct with a prisoner. Martin pleaded no contest to conspiracy to commit a crime, a misdemeanor.

Easter had impregnated Martin in 2003, when she was a prisoner at Southern Nevada Women's Correctional Center and he was a guard. The prison was operated by CCA, Easter's employer; it has since reverted to state control.

According to Gerald Gardner of the Nevada Attorney General's office, Easter was actually victimized by Martin, who was known to initiate relationships with guards in exchange for favors. Both Martin and Easter were sentenced to probation in April 2005.

New Jersey

Sean Higgins, 30, a guard at the Union County jail in Elizabeth, New Jersey, was indicted on March 31, 2005 on five counts of sexual assault, 19 charges of official misconduct and 15 counts of sexual contact. He was accused of groping himself and fondling 11 female prisoners in exchange for cigarettes, candy or other favors. "Our investigation with Union County Police detective's uncovered evidence supporting charges that this corrections officer betrayed his badge and uniform and took advantage of females entrusted to his care for his own selfish sexual gratification," stated prosecutor Theodore J. Romankow.

Attorney Robert T. Norton said his client would plead not guilty. Higgins, who faces up to 20 years in prison if convicted, was freed on \$75,000 bond on the 39-count indictment. His trial date is pending.

Demi-Anne Varchi-Little, 25, a guard with Somerset County's Sheriff's Office, was charged on June 20, 2005 with second-degree official misconduct and fourth-degree criminal sexual contact after she was caught red-handed engaged in sex with prisoner Christopher Capparelli, 26. Varchi-Little was a kitchen supervisor when she and Capparelli slipped into an office for about an hour on April 8, 2005. While the two were otherwise occupied another guard walked in and caught them.

After an internal affairs investigation Varchi-Little was arrested, charged and released on \$10,000 bail. The case has not yet gone to trial.

In March 2005, Jeannette Zayas, 39, a former guard at the Federal Correctional Institution in Fairton, New Jersey, pleaded guilty to engaging in sex with a gang-affiliated prisoner known only as

"A.O." Zayas admitted to having five or six intimate encounters with A.O. over a four-month period, including sexual acts in one of the prison bathrooms. She sent him letters and photos, and let him use her cell phone. Zayas also updated A.O. on prison procedures and prisoner movements.

She was sentenced on September 12, 2005 to three months in prison and ordered to pay a \$1,000 fine; Zayas was allowed to remain free on bond until ordered to report to a federal facility to begin her sentence.

New Mexico

Roosevelt County Deputy Gary Adkins, 47, was charged in mid-July 2005 with criminal sexual penetration of Ashley LeMier, 24, a jail prisoner. The incident allegedly occurred on July 1, 2005 when "the deputy took an inmate out of the jail and drove her to an isolated area, where he engaged in some sexual acts," said Peter Olson, communications director for the New Mexico Dept. of Public Safety.

On July 6, 2006, Adkins was sentenced to five years on the felony charge. According to District Attorney Matt Chandler, Adkins' semen was found on the passenger side of the patrol car he used when he removed LeMier from the jail and sexually assaulted her. "This is not a case of consensual and nonconsensual sex," stated Ninth Judicial District Judge Ted Hartley, who sentenced Adkins. "It's an absolute violation of the law. We cannot allow this to happen as a society. I don't care who enticed who. I don't care who started it."

New York

Nicholas Defonte, 47, was arrested at work on March 29, 2005 and charged with illegally having sex with a female prisoner under his care. According to witnesses, between July and December 2001 Defonte frequently had sex with his captive victim as another prisoner stood lookout. The guard was once caught kissing and groping the woman in the kitchen freezer. The complaint also disclosed that the prisoner had performed oral sex on Defonte and that he would sometimes hide under a table and perform sex acts on her.

Defonte, who was married with children, worked at the Metropolitan Correctional Center in New York at the time of his arrest. He was charged with five counts and released on his own recognizance.

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Defonte was acquitted of two charges and convicted of three, including two sexual assaults and making false statements, following a jury trial held from March 29 to April 3, 2006. He has not yet been sentenced.

Aaron S. Sklener and his father, James F. Sklener, both guards at Albion Correctional Facility, were arrested on March 30, 2005 in connection with sexual contact with an 18-year-old prisoner.

Aaron, 33, was charged with misdemeanor second-degree sexual abuse and official misconduct based on accusations of touching a female prisoner "in an intimate area." "Because she is incarcerated, she can't consent to any sexual acts with a corrections officer," said Investigator Michael Notto of the State Police Criminal Investigation Bureau. He went on to say that when the victim came forward, "so did other inmates."

James Sklener tried to cover for his son; as a result he was charged with felony third-degree intimidating a victim or witness and misdemeanor official misconduct. "He called her into the hallway and made threats in an attempt to coerce her into not cooperating with the investigation," said Notto. "He made threats implying that if she cooperated, he would retaliate against her."

The younger Sklener was released on his own recognizance. His father was issued a court appearance ticket.

Ohio

Twelve prison guards at the Scioto Juvenile Correctional Facility have been charged with various counts of physical abuse, sexual abuse and endangerment of young prisoners. Five indictments were handed down on December 7, 2004, including against guard Cardinal B. Paige, 47, who was indicted on one count of illegal use of a minor in nudity oriented material (later dismissed) and one count of sexual battery. The charges involved different prisoners, one age 16 and the other age 20.

Paige pleaded guilty in early April 2005 in order to avoid a jury trial. "He claims that he had been enticed by the girls," said prosecutor Dave Yost. One incident amounted to a "live performance for one." Paige received 60 days in jail, which he was allowed to serve on weekends. The judge postponed the start of Paige's sentence so he could first take a vacation.

Matthew Gordon, another guard at

the Scioto Juvenile Correctional Facility, is being sued by 19-year-old Jessica Penny, a former prisoner who accused him of forcing her to perform oral sex while she was in an isolated cell on suicide watch on February 14, 2003. Yes, on Valentine's Day.

Gordon served less than six months following convictions for sexual battery and attempted sexual battery. Penny's lawsuit, filed by attorney Benson Wolman, asks for monetary damages and an apology from Ohio Gov. Bob Taft. The suit is still pending. (See: *Penny v. Gordon*, USDC SD OH, Case No. 2:05-cv-00147-EAS-TPK).

Oklahoma

On October 19, 2004, Latimer County Sheriff Melvin Holly, 64, was arrested and held in the Muskogee County Jail on federal charges of making a false statement and witness intimidation. FBI agents had interviewed Holly on Sept. 15, 2004 regarding charges of sexual assault brought by three Latimer County prisoners. All three said Holly forced them to have sex. One said he served her moonshine; another stated he told her she would "end up dead ... floating face down in a river" if she told anyone.

Jail prisoner Rebecca Preston claimed that Holly had her accompany him as a date to a meeting of the Oklahoma Sheriffs Association. Holly denied all of the charges.

However, on August 16, 2005 Holly was convicted of having sex with four prisoners, sexual contact with four others, improperly touching three employees, improperly touching the teenage daughter of an employee, threatening to kill a prisoner if she revealed their relationship and lying to federal authorities. The jury deliberated just over four hours before handing down

guilty verdicts on 14 of the 15 counts filed against the former sheriff.

Holly, a 40-year veteran of the sheriff's department, had lost his bid for re-election in July 2005. His attorney, Warren Gotcher, criticized the tearful testimony of the victimized prisoners, saying, "These women are dope makers, dope sellers, dope users." U.S. Attorney Sheldon Sperling, however, noted that "Under state law, a female prisoner cannot consent to sex with a law enforcement officer. Why? Jailers have absolute control over prisoners' lives." "Responsible law enforcement officers govern themselves accordingly," he added.

Holly was sentenced to 25 years in federal prison. Fifteen women, including the daughters of two female jailers, subsequently filed suit against the county as a result of Holly's sexual abuse. Two of the cases were settled in November, 2005 for \$185,000.

Oregon

Michael Boyles, 50, a former juvenile probation officer for the Oregon Youth Authority, was sentenced to 80 years in prison after being found guilty on October 13, 2005 of having sex with at least



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Prisoner Rape Rampant (cont.)

five teenage boys during his eleven years in office.

Boyles was convicted on 45 counts of sexual abuse. The four-week trial revealed testimony from parents, victims and caregivers ranging back to 1995. It was also revealed that Boyles had been supplying some of the boys with drugs.

When the judge considered granting Boyles a third postponement, eight people came forward to make statements against him. No one spoke in his defense. Some urged that he be placed in general prison population where he would experience "prison justice," but the judge said that decision was not his to make. Boyles now faces civil lawsuits filed by his victims. At least one victim has committed suicide since Boyles raped him.

Pennsylvania

Common Pleas Judge Donna Jo McDaniel has been busy for months, hearing testimony from thirteen former Allegheny County jail guards. The guards were implicated in a sex-for-favors scandal that resulted from an investigation of contraband being smuggled into the jail.

George V. DiDomenicus, 52, was the first to be sentenced on January 12, 2005. Judge McDaniel gave him 23 months in jail and three years probation. The former guard entered a plea of guilty on October 12, 2004 to two felony counts of institutional sexual assault and two felony counts of attempted sexual assault.

Mr. D., as he was known to the prisoners, used a gym bathroom to have sex with at least two female prisoners between September 2002 and August 2003. The frequency of the sexual offenses figured heavily into his sentence.

"Had this been a one-time occurrence, the court would have considered probation," said Judge McDaniel.

John Pastor, 54, a former president of the guard's union and Mr. D's partner in crime, pleaded guilty to a single count of misdemeanor sexual assault. Joseph Addison, 55, was sentenced to 16 to 96 months on May 25, 2005 for five counts of indecent assault and one count of attempted indecent sexual assault. His no-contest plea came in exchange for reducing the charges from felonies to misdemeanors.

A jury found LeShawn Walker, 33, guilty on four counts of institutional

sexual assault for having sexual relationships with numerous female prisoners over a five-year period. He was sentenced in July 2005 to 2½ to 7 years on each count, to be served consecutively, for a total sentence of 10-28 years.

"Probation was within the mitigated range," said defense attorney Wendy Williams. "It just shows you can't go to trial." Or, possibly, it shows that prison guards shouldn't sexually assault prisoners.

Charles Richard Miller, 35, received three years probation in exchange for a guilty plea to one charge of institutional sexual assault. A second count was dropped.

A total of thirteen cases were scheduled to be heard by Judge McDaniel. The trials for guards William Woznichak, Darrel K. Hill and DePaul Smith were postponed; Smith is the only guard charged with sexual assault of a male prisoner.

Guard Roy Baldinger joined DiDomenicus, Miller and Pastor in entering a guilty plea. Guards Robert Veatch, Donald Stupka, Robert Virgili and Brian Vat Dusen were acquitted. Veatch had been accused of offering a female prisoner \$200 to perform a sex act; the disgruntled woman filed charges after he refused to pay.

County Jail Warden Ramon Rustin acknowledged that a policy of allowing male guards to oversee units housing female prisoners was a contributing factor to the numerous incidents of sexual misconduct.

Daniel T. Rogers, 49, a guard at the Westmoreland County juvenile jail, pleaded guilty on June 22, 2005 to three counts of institutional sexual assault. Prisoners first reported Rogers in May 2004 for partially undressing an 18-year-old to ensure "her bra was of an approved type." He later returned to her cell with pizza and caressed her. On June 9, 2004, Rogers intimately fondled and kissed a 16-year-old girl who was being released. He resigned on June 29, 2005 after admitting to a three-month relationship with a 19-year-old prisoner the previous year.

Judge Rita Hathaway dropped several charges against Rogers in exchange for the guilty plea. He must receive sex offender counseling and pay a \$15,000 fine in addition to serving a seven-year prison sentence.

Theodore E. Woodson, 33, a "materials handler" at the Federal Detention Center in Center City, Pennsylvania,

pleaded guilty on March 22, 2005 to having sexual relations with two female prisoners and sexual contact with a third woman. He was sentenced to four months in prison and three years supervised release.

And on February 9, 2005, Corinne Mazzuca, 49, a former counselor at the Lackawanna County prison in Scranton, found herself awaiting sentencing after pleading no contest to having sex with a prisoner. As the former jail director of community programs, Mazzuca's actions were considered obstruction of the law. She had been suspended in September 2004, and at the time claimed that she and the prisoner she was accused of having a relationship with were "just friends." Her attorney requested that she receive probation.

Tennessee

In McNairy County, Sheriff Tommy Riley was indicted on October 24, 2004 and charged with official misconduct and other offenses in connection with facilitating the escape of Sheila Kirk, a female prisoner who was released from the county jail almost eight months before completing her sentence. Riley had ordered Kirk's release so she could have an abortion after she became pregnant by one of his deputies, Johnny Carter. Carter pled guilty to a sex-related charge and three counts of introducing contraband into the jail, and is serving a six-month sentence. On October 26, 2005, following a hung jury in his first trial, Riley was convicted of a felony charge and sentenced to three years probation.

Texas

On May 10, 2004, Clint Wade Weaver, a guard at the Haltom City jail, was sentenced to five years in prison after pleading guilty to sexually assaulting three female prisoners. The women were serving misdemeanor offenses in the Haltom jail in 2000, and said Weaver demanded sex in return for favors and shortened sentences.

Weaver pleaded guilty to two counts of sexual assault and one count of violating civil rights in February 2004. He previously had been sentenced to two years probation in 2002 on a misdemeanor count of official oppression.

Weaver, who worked in the jail from October 1999 to April 2001, had asked for probation. District Judge Scott Wisch declined the request, stating, "You were

a public servant. I'm supposed to believe you're a moral person, but where was the morality when you were trading sex for jail release?"

Prison guard Michael Miller, 35, was sentenced on July 2, 2004 to 12½ years in federal prison and required to pay \$207,175 in restitution to a woman he raped at a prison work camp. Miller was a guard at the Federal Medical Center in Carswell when the incident occurred.

The victim, Marilyn Shirley, a 47-year-old mother of two with five step-children, said "justice was served," and stated she was satisfied with the sentence. She also obtained a \$4 million jury award in a lawsuit stemming from the incident.

Agapita Martinez, 31, and Roque Ybarra, 29, resigned as Reeves County jail guards in early January 2005. They were indicted on charges stating they "intentionally engage[d] in sexual contact by touching the genitals [of a male prisoner] with intent to arouse or gratify" their sexual desires.

The two guards were employed at the RCDC III prison unit, which is run by the private prison company GEO Group. Readers may better remember the company by its former name, Wackenhut Corrections. The charge against Martinez was later dismissed; Ybarra received a five-year deferred adjudication sentence on June 10, 2005 and was placed on probation.

Steven Bradley Grisham, 35, a guard at the Bi-State jail in Bowie County, was arrested in February 2005 for having sex with a female prisoner. Grisham was accused of assaulting the woman in an office at the jail on February 8, 2005. The investigation began the next day and he resigned a week later.

The Bi-State jail is run by Civigenics, a private prison company based in Massachusetts, and Grisham was a CiviGenics employee. He pled guilty on April 25, 2006 and was sentenced to two years probation and a \$2,000 fine.

Polk County Sheriff's Deputy Daniel Adams, 28, was arrested in late April 2005 and charged with violation of civil rights of a person in custody for engaging in sexual activity with a female prisoner. Hired only a year earlier, Adams was released on \$5,000 bond and faces up to two years in prison and a \$10,000 fine if convicted. His trial is set for September 5, 2006.

On October 18 and 19, 2005, KPRC TV reported a rapidly growing problem in the Texas Dept. of Criminal Justice,

namely romantic relationships between guards and prisoners. Records revealed nearly 1,200 guard/prisoner liaisons over the past five years.

"It's a serious problem," said John Moriarty, the TDCJ's inspector general. The news report by KPRC resulted from an on-camera sting operation in which a female guard was caught by undercover police in southwest Houston. The woman had agreed to smuggle heroin and cell phones into a Texas prison.

According to Moriarty, the majority of infractions involved female guards having sexual relationships with prisoners. But federal law prohibits restricting female guards from working in male prisons.

Virginia

In January 2005, Newport News Police began investigating a sheriff's deputy accused of having sex with a female prisoner. Sheriff Charles E. Moore eschewed an internal investigation to avoid the appearance of impropriety.

Investigators described a relationship between Sgt. Bruce Anthony Trader, 44, and a 22-year-old female trusty that occurred in November 2004. Trader, who resigned on January 6, 2005, was charged with carnal knowledge of a prisoner, a class 6 felony, and released on bond. Under Virginia law a conviction could have carried up to five years in prison; however, the charge was reduced to misdemeanor assault on April 25, 2005 and Trader received a 12-month suspended sentence.

This is simply one of numerous incidents in Virginia prisons and jails. On January 20, 2004, Michael D. Steele, a guard at the Virginia Peninsula Regional Jail, sexually assaulted an unnamed female prisoner housed in the jail's medical unit. Steele reportedly took the woman, who suffered from epilepsy, to a shower and watched her bathe. A short time later he entered her cell and forced her to perform oral sex.

Steele was charged with forcible sodomy; he pled guilty in December 2004 to unlawful carnal knowledge and was sentenced to 12 years in prison. His victim filed a civil suit against Steele and the jail, seeking \$2.3 million in damages. "There's a higher standard when you're in law enforcement," stated the woman's attorney, David M. Lee. "If you lock people up and take away their freedom, you have to protect them."

Sheron Montrey, 29, incarcerated at the Pocahontas Correctional Unit in

Chesterfield, discovered in October 2005 that she was two months pregnant. Montrey had been incarcerated since 1995. She told prison officials that the pregnancy was the result of sexual intercourse with an unnamed prison guard, and claimed that she and the guard had sex at least a dozen times over a six-month period. The guard, Montrey said, promised her money and other favors in exchange for sex. "But all I ever got over the past year was \$195 and this baby," she complained.

Another prisoner, Joan Elizabeth Carter, 38, reported that the guard had approached her on several occasions with sexual suggestions but never acted on it. A third prisoner said she had complained about being sexually harassed by the same guard, but her complaints were ignored. All three women were transferred to other facilities. The accused guard no longer works at the prison.

Former deputy sheriff Eric Mayo was found guilty on two counts of carnal knowledge of a prisoner following a jury trial in February 2004, and was sentenced to six years in prison. Mayo had sexually assaulted two female prisoners between April and September 2003 when he was employed at the Alexandria facility; the women were part of a work-release program. "I could have been kicked out of the program if I didn't do what he told me to do," said one of the victims.

One woman, referred to as Jane Doe in a lawsuit filed against Mayo, was molested after he ordered her to accompany him to a movie theater. According to the complaint, "While at the theater, defendant Mayo ordered Ms. Doe to perform oral sex on him, and she obeyed." Mayo took the other prisoner to a motel to have sex.

"He wore the badge, he carried the gun, he held the keys and he had the

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Prisoner Rape Rampant (cont.)

power,” said Assistant Commonwealth Attorney Tim Callahan. “He had the power and he abused that power by preying on young women who were at their most vulnerable.” Donal Allen, Mayo’s attorney, offered a typical defense that attacked the victims’ credibility. “The only evidence in this case has been brought in by convicted felons,” he said. Which is true – convicted felons who were sexually abused by his client, that is.

Washington

Correctional Services Corp. (which has since been bought out by GEO Group) and five of its employees were named as defendants in a lawsuit involving a prisoner who said she was sexually harassed as she awaited immigration charges.

The suit, filed on November 1, 2004 by Marisela Manzo Torres, 27, claimed that a Lt. McIntyre brushed against her “so that his arms or other parts of his body would touch her breasts.” She also said that the guard repeatedly frequented her cell at night and “shined a flashlight over her body,” saying “show me.” Ms. Torres said she complied for fear of retaliation. McIntyre is currently facing charges from another prisoner whom he beat severely on July 5, 2005.

A second guard, identified only as Twogood, is alleged to have engaged in sexually explicit banter over the intercom in Ms. Torres’ cell. The lawsuit was settled under confidential terms in January 2006.

Washington’s Franklin County Jail is also under fire for sexual abuse of prisoners. One guard resigned and another was suspended following a female prisoner’s complaint of sexual abuse.

The woman told reporters that she was twice forced to perform oral sex with one guard in August 2005, when he threatened to forestall her October release. She also claimed she witnessed other female prisoners doing “strip shows” for the guard’s entertainment. According to Sheriff Richard Latham, the investigation into the prisoner’s allegations of sexual abuse involved “a couple [of] officers not following rules.”

Wisconsin

In October 2005, three DOC employees at the John Burke Center of the Taycheeda Correctional Institution (TCI)

were suspended based on allegations ranging from simple sexual contact to sexual intercourse.

According to police, the men admitted participating in sexual behavior. Dwight Helsell, 47, was charged with five counts of second-degree sexual assault involving two female prisoners. The incidents occurred between February 1 and August 22, 2005. One woman was 25 and the other 26; both worked with a maintenance crew as part of a work placement program. Helsell was a TCI maintenance supervisor when he engaged in sexual contact with the women, which including oral sex.

Andrew Metzen, 35, was charged with two counts of misconduct and two counts of second-degree sexual assault by a corrections officer after admitting to both oral sex and intercourse with the same female prisoner, which took place in the facility’s maintenance garage and in Helsell’s office.

John Patterson, 50, was charged with three counts of sexual assault; he was accused of fondling, kissing and having sexual contact with both of the women.

Edward Wood, 49, faced one count of sexual assault. He told detectives he gave each prisoner a can of beer and twice squeezed one of the women’s buttocks.

The female prisoners said the sexual contact was consensual. Helsell, Metzen and Wood were released on \$5,000 signature bonds. Metzen pled guilty on February 7, 2006 to two charges of misconduct in office and was sentenced to six months (which he could serve at a county jail of his convenience) and two years probation; he was also ordered to write a letter of apology to the Taycheedah staff. Patterson pleaded guilty on April 12, 2006 to three counts of fourth-degree sexual assault in exchange for three years probation. Wood pled no contest to one charge on Dec. 20, 2005 and received a \$250 fine. Helsell is scheduled to go to trial in October 2006.

On April 6, 2006, guards Heather A. Bartosch, 28, and Christine R. Roberge, 39, were charged with second-degree sexual assault for having sex with the same prisoner at the Oakhill Correctional Institution. Bartosch had a relationship with the prisoner from 2004 through 2005, while Roberge had oral sex and intercourse with the prisoner in June and July 2005. It was also

discovered that Warden Deirdre Morgan delayed contacting her superiors or police for four months after she learned of the guards’ sexual misconduct. Both Bartosch and Roberge, who resigned, were released on signature bonds; their cases are pending in Dane County Court.

Christine D. Brown, 46, a food service worker at the Stanley Correctional Institution, made her first court appearance in Chippewa County Court on December 6, 2005. A complaint filed the previous month charged Brown with sexual assault against a prisoner. Brown had been under investigation since June 14, 2005, when another guard saw the kitchen worker cooking something other than food with a prisoner in a room at the rear of the kitchen. When her co-worker walked in, Brown and the prisoner were hugging and kissing.

She was charged with two felony counts of second-degree sexual assault. In April 2006 Brown pleaded no contest to felony sexual assault and four misdemeanors, and received 45 days in jail and 18 months probation. The assistant DA in the case, Wade Newell, agreed to the lenient sentence because “the inmate said it was consensual.”

Since the Wisconsin state law criminalizing sex between correctional employees and prisoners was passed in September 2003, it has been used to bring sexual assault charges against nine defendants, including those listed above.

Wyoming

On June 27, 2005 criminal charges were filed against Jeremy Michael King, a former Platte County jail control clerk [see *PLN*, July 2006, p. 30, “Guard Out On Bond, Woman He Allegedly Raped Jailed Beyond Her Sentence”]. King was charged with three counts of criminal sexual misconduct involving Kizzy Robinson, a Jamaican prisoner convicted of federal drug offenses.

County Attorney Eric Alden, who filed the charges, was worried that King was just “the tip of the iceberg. There might be more charges against more people,” he said. His concern stemmed from a \$1.5 million lawsuit filed against the county by three women, including Robinson, who claimed that guards used over-the-counter drugs, prescription drugs and other contraband to solicit sexual favors from female prisoners.

And, in fact, two other jail employees were later charged in connection with the sex scandal, including Glenn Dunham and Andy Eastman. King was acquit-

ted by a jury on March 1, 2006, while Dunham and Eastman have yet to go to trial. On the same day as King's acquittal, Amnesty International released a report which found that many states don't adequately protect women in prisons and jails from being sexually abused.

Conclusion: Illinois Again

On February 27, 2004, the U.S. Seventh Circuit Court of Appeals ruled that guards are not responsible when prisoners rape other prisoners. (See: *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir., 2004), amending and superseding the original ruling at 359 F.3d 510 (7th Cir. 2004) [*PLN*, June 2004]). The U.S. Supreme Court then tacitly approved that appellate opinion by denying a petition for certiorari.

Anthony Riccardo, incarcerated at Illinois' Centralia Correctional Center, pleaded with Lt. Larry Bausch not to house him with gang member Juan Garcia. Rausch wouldn't listen, and within two days Garcia was forcing Riccardo to perform oral sex.

Riccardo sued and was eventually afforded a jury trial. After weighing the facts and evidence the jury awarded Riccardo \$1.5 million in damages based on the deliberate indifference of Lt. Rausch.

The state appealed and the Seventh Circuit reversed the lower court, reasoning that prisons are dangerous places and Riccardo's situation did not place him in substantial risk of harm. Therefore, the appellate court held, Rausch was not deliberately indifferent to Riccardo's pleas.

Although this Seventh Circuit case involved a prisoner being raped by other prisoners, the court's logic can equally be applied to sexual abuse of prisoners by prison employees. The ruling in *Riccardo v. Rausch* is an apt barometer of the importance that judges place on protecting prisoners from rape, regardless of who is molesting them. As such, it can be considered a form of "judicial deliberate indifference" to the sexual assault of incarcerated citizens.

The erosion of constitutional rights almost always begins with prisoners, who are the most marginalized and politically vulnerable population in our society. But this erosion seldom stops until it eats away at the liberties of everyone the Constitution was written to protect.

Although most Americans are appalled by sexual assault, there seems to be

significantly less sympathy for prisoners who are raped as opposed to non-incarcerated rape victims. Due to the "tough on crime" rhetoric that has been pounded into the American public for decades, the sexual abuse of prisoners at the hands of their keepers has become, if not tacitly condoned, certainly not a matter of public concern.

But it should be. According to the U.S. Department of Justice, Bureau of Justice Statistics, a report released in July 2005 found there were an estimated 8,210 allegations of sexual misconduct against prisoners in 2004. Of those, 42% involved sexual misconduct by staff members and 11% percent involved sexual harassment by staff – over 4,300 incidents involving prison and jail employees nationwide. An estimated 2,090 incidents were substantiated (not including on-going investigations). And that's in just one year alone. And just what was reported.

Yet it is extremely difficult to hold prison and jail guards accountable for sexual misconduct. Prisoners who allege rape or sexual abuse are routinely disbelieved; their very status of being incarcerated works against their credibility. When there is an investigation it's often done by other law enforcement officials who may have sympathy for the corrections employee – one of their own – who has been accused. And when allegations of sexual abuse are substantiated the staff member is often placed on paid leave, which amounts to a paid vacation.

If charges are filed the bond is often set fairly low due to the suspect's status as a corrections official. Due to credibility issues with prisoner victims and witnesses, and lack of cooperation from other guards due to a pervasive "code of silence," prosecutors tend to offer lenient plea bargains such as short prison or jail terms. And even then, as indicated in many of the examples listed above, guards convicted of sexual assault are frequently placed on probation, allowed to serve jail time on weekends, or offered pretrial diversion, work release or other perks.

It is only in the most egregious cases that prison and jail staff members receive serious punishment for rape and sexual abuse. Indeed, the justice system appears to be "soft" on sex-related crimes only when such crimes are committed by corrections employees. And only recently is this entrenched attitude beginning to

change. For example, the Prison Rape Elimination Act (PREA) was signed into federal law on Sept. 4, 2003. On the state level, all states now have laws that criminalize sex between prisoners and guards.

It should be noted that the offenses enumerated in this article are far from exhaustive; indeed, many had to be excluded due to space limitations. We also did not generally rehash cases and incidents we have reported in the past. A review of the topic "Sexual assault" in *PLN*'s indexes and website gives a glimpse into how pervasive the practice is. Many more have gone unreported and undetected. That *PLN* does not have enough pages to report them all speaks as loudly as the article you have just read. ■

Sources: *Amarillo Globe News*, *Atlanta Journal Constitution*, *Antelope Valley Press*, *Arizona Republic*, *Augusta Chronicle*, *Associated Press*, *Baltimore Sun*, *Bangor Daily News*, *Buffalo News*, *Chippewa Herald*, *Columbia Tribune*, *Columbus Dispatch*, *Dallas Morning News*, *Denver Post*, *Fort Worth Star-Telegram*, *Houston Chronicle*, *Journal Sentinel*, *Kansas City Star*, *KIRO-TV*, *KPRC-TV*, *Las Vegas Review-Journal*, *Los Angeles Times*, *Lufkin Daily News*, *Miami Herald*, *Mobile Register*, *newjersey.com*, *News Herald*, *New York Post*, *Odessa American*, *Palm Beach Post*, *phillynews.com*, *Pittsburgh Post-Gazette*, *Press-Enterprise*, *Pueblo Chieftain*, *Sacramento Bee*, *Salt Lake Tribune*, *Seattle Post-Intelligencer*, *Seattle Times*, *SP Times*, *Star Tribune*, *Texarkana Gazette*, *themilwaukeechannel.com*, *The New Mexican*, *The Oklahoman*, *The Oregonian*, *The Reporter*, *Times Dispatch*, *Times Herald*, *Topeka Capital-Journal*, *Tribune Review*, *Union Tribune*, *Virgin Daily Press*, *WBAY-TV*, *IMP-TV*, *The Hartford Courant*, *The Tennessean*.

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From the Editor

by Paul Wright

The sexual assault of prisoners is one of the largest problems in American prisons and jails today (the lack of adequate medical care is probably the biggest). As regular readers of *PLN* know, we have had extensive and ongoing coverage of prison rape issues since our inception in 1990. This has included in depth stories on sexual assaults in particular states, legislation, litigation, organizing and much more around the topic.

I edit the News in Brief column for each issue of *PLN*. In doing so, I try to aim for a diverse geographical and issue selection of articles. Alas, the sexual assault of prisoners is so common I could probably put out a 20 page monthly magazine dealing with nothing but that one topic. Since I try not to have too much of any one subject in the News in Brief column, my sexual assault news pile slowly grew to the point that I thought doing a feature story on it would be a good idea.

This story focuses on the sexual assault of prisoners by staff. At this point all states and the federal government criminalize sex between prisoners and staff. However, as previously reported, when enforced these laws are characterized by lackluster prosecutions, dismissed charges, light sentences and a general disregard for the victim. About the only time American politicians, judges and prosecutors treat rape as a joke is when the victim is a prisoner. One thing to keep in mind while reading this article is that for the most part it does not duplicate (with two minor exceptions) any prior *PLN* coverage of sexual assaults of prisoners by staff and it is news from around the country: 28 states. Day in and day out, in all 50 states prisoners are being sexually assaulted by their keepers. This is not meant to be a laundry list of rape but rather to expose the depth and breadth of the problem.

Stop Prisoner Rape is an organization dedicated to stopping the sexual assault of prisoners (I am on their advisory board). This has long been one of *PLN*'s goals as well and we work together with SPR on this topic, their quarterly column in *PLN* is one means of doing this.

Public education and awareness of the issue is an important first step in this process. While congress has enacted the Prison Rape Elimination Act as a tiny, tepid first step to governmental recognition of the problem, many other congressional

actions, such as the Prison Litigation Reform Act, prevent meaningful steps to more decisively halt sexual assaults in prison. As legislators campaign for office on the backs of sex offenders they are silent about the sex offenders in their employ or what they have done to give them de facto impunity.

PLN is back on its regular publishing schedule so readers should be getting each issue around the first of the month.

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tended under the new rates). Our website has every issue of *PLN* in PDF format, plus all articles in a searchable database, thousands of case summaries and articles that have never appeared in print, the full text of thousands of prison and jail court decisions; a brief bank of pleadings, settlements and unpublished court rulings, and a whole lot more. Everything is set up so it can be easily printed out and sent to prisoners by mail as they do not have direct internet access. See our ad on page two for more details.

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Prisoner Rape Is Torture

by Stop Prisoner Rape

The U.S. has arrived at a critical moment of truth in addressing the sexual violence that plagues its prisons and jails. The failure of Departments of Corrections nationwide to prevent sexual abuse behind bars and to adequately respond to those who have been victimized is receiving national and international attention. Finally, this type of violence is beginning to get recognized for what it is: a serious human rights violation.

According to the Universal Declaration of Human Rights, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood." While incarceration inherently places limits on a prisoner's freedom, it does not take away all human rights. For example, prisoners retain their absolute right to be free from torture, including sexual violence, at all times.

The passage of the Prison Rape Elimination Act (PREA) in 2003 has brought unprecedented scrutiny to the problem of sexual violence behind bars and has led some corrections officials to conclude that they can no longer dismiss sexual violence as an inevitable byproduct of prison life.

As part of the implementation of PREA, this fall, the Bureau of Justice Statistics (BJS) will be conducting the first-ever survey of prisoners to document the

prevalence of sexual violence in prisons nationwide. Stop Prisoner Rape (SPR) has worked hard to influence the BJS to ask straightforward questions and to ensure that prisoners are able to respond honestly and with full confidentiality to this survey. At SPR, where letters from survivors of prisoner rape arrive in the mail every day, we already know that prisoner rape is a human right crisis of staggering magnitude. The BJS research efforts are nevertheless pivotal as the lack of data about the prevalence of this form of violence has been used for far too long by corrections officials to minimize and marginalize the problem.

In addition to these surveys, the National Prison Rape Elimination Commission, a bipartisan, federal body created under PREA, is holding public hearings around the country and, in early 2007, will be releasing national standards for the prevention of prisoner rape. SPR has been able to bring more than a dozen brave prisoner rape survivors to these hearings to recount first-hand the shocking human rights violations they endured while incarcerated directly to the Commissioners.

At the conclusion of the National Prison Rape Elimination Commission's work, a review panel will be ranking – and holding hearings with – the best and worst performing detention facilities in the country. Human rights organizations worldwide, including SPR, have

used the technique of “public shaming” successfully for decades. Not surprisingly, in its interactions with corrections officials nationwide, SPR has found that this process of ranking facilities, and especially the fear of being identified as one of the nation’s worst prisons, has galvanized prison officials to take PREA seriously.

In addition to PREA-related efforts to highlight prisoner rape, the independent Commission on Safety and Abuse in America’s Prisons also held hearings throughout 2005-2006 that examined the high levels of violence in U.S. prisons and jails. Its final report, *Confronting Confinement*, highlighted a number of shortcomings in U.S. corrections facilities that contribute to this violence, including the rampant sexual abuse of prisoners. *Confronting Confinement* included a series of recommendations, focusing on issues such as the importance of external oversight and accountability in making prisons safer. Margaret Winter, Associate Director of the ACLU National Prison Project, succinctly described what prisons and jails need, “light, light, and more light.” (*Confronting Confinement* is available at www.prisoncommission.org.)

The international community is also increasingly highlighting the problem of sexual violence in U.S. detention facilities as a violation of basic human rights principles. Under international human rights law, the sexual assault of prisoners, whether perpetrated by corrections officials or by prisoners with the acquiescence of corrections staff, is recognized as torture. The U.S. has ratified two treaties

that expressly prohibit torture: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR). (For more information about these treaties, visit www.ohchr.org.)

The CAT requires that each nation take action to prevent acts of torture within its jurisdiction. Under the CAT, torture can never be justified and a country may not return a person to a jurisdiction where he or she may be tortured. To monitor the treaty’s implementation, the CAT created the U.N. Committee Against Torture (the CAT Committee).

Having ratified the CAT, the U.S. is required to submit a report to the CAT Committee every four years. In June 2006, the CAT Committee convened in Geneva to review the Second Periodic Report of the U.S., detailing its efforts to comply with the CAT.

Recognizing how important it is for the CAT Committee to receive information from independent sources for this review, SPR and other human and civil right organizations submitted “shadow reports,” highlighting how the U.S. has failed to comply with the treaty.

SPR provided the only shadow report focused exclusively on the continued and widespread sexual abuse of incarcerated men, women, and youth in detention. The report, entitled *In the Shadows*, examined the systemic conditions that contribute to sexual violence behind bars, the plight of those prisoners most vulnerable to sexual exploitation, and the legal provisions that would help combat sexual assault in

custody but are not effectively enforced. The report offered recommendations to remedy this acute human rights crisis. (*In the Shadows* is available at www.spr.org.)

After considering the U.S. Second Periodic Report and the various shadow reports it received, the CAT Committee issued its Concluding Observations on May 18, 2006. Among other things, it recommended that the U.S., “design and implement appropriate measures to prevent all sexual violence, in all its detention centers ensure that detained children are kept in facilities separate from those for adults,” and amend the Prison Litigation Reform Act (PLRA) so that victims of torture in custody can seek justice through the courts.

The other key human rights treaty, the ICCPR, provides that all people, including prisoners, have a broad range of civil and political rights. Like the CAT, the ICCPR also prohibits torture, cruel, inhuman or degrading treatment. The Human Rights Council (formerly the U.N. Commission on Human Rights) has established mechanisms for reporting human rights violations to the Council and for public procedures which examine, monitor, and report on the implementation of the ICCPR.

In July 2006, the Human Rights Council will review U.S. compliance with the ICCPR. In advance of the session, the Council has identified two critical questions that echo the concerns raised by the CAT Committee: What measures has the U.S. taken to protect prisoners in federal or state prisons from rape, abuse or other acts of violence? Why does the Prison Litigation Reform Act (PLRA) bar claims based on emotional and psychological mistreatment that are unaccompanied by

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Prisoner Rape Is Torture (cont.)

physical injury.

In keeping with its isolationist posture, the U.S. intentionally prohibits human rights organizations and individuals whose human rights have been violated from using the most powerful tool available under international law – the ability to submit complaints of abuse directly to the bodies that monitor these treaties.

Under what is known as an Optional Protocol to the ICCPR, and Article 22 of the CAT, the Human Rights Council and the CAT Committee have the authority to call upon a complainant's country to investigate and respond to claims of abuse. The U.S. refuses to consent to have individual complaints of rights violations heard under either treaty, thereby narrowing the protections that these treaties are intended to offer. As a result, a prisoner who has been sexually assaulted is limited to the prison grievance process and the increasingly restrictive U.S. legal system to press their case.

In its periodic report to the CAT Committee, the U.S. government claimed that when "unfortunate instances" of sexual abuse in prison occur, they are promptly and thoroughly investigated and referred for prosecution. Insisting that the legal system "affords numerous opportunities for individuals to complain of abuse and to seek remedies for such alleged violations," the U.S. argued that its refusal to permit direct communications from individuals to U.N. monitoring entities was justified.

As the many prisoners who write to

SPR make clear, sexual abuse in prison is more than an "unfortunate instance;" it is an epidemic that many corrections officials choose to ignore. While the Prison Rape Elimination Act was a positive step forward in shedding light on this human rights crisis, it is not enough. The domestic legal system fails to protect prisoners from sexual assault, and survivors of prisoner rape are habitually denied legal recourse.

International human rights law is an essential, but still neglected, tool for promoting social justice domestically.

Ohio Woman Raped by Guard Awarded \$625,000

On September 15, 2005, a federal jury in Columbus, Ohio, awarded \$625,000 to a woman who was fondled and digitally raped by a guard at the Ohio Reformatory for Women (ORW).

In November 1996, while serving a 1-year sentence at ORW for stabbing her husband, plaintiff Michelle Ortiz was accosted by an unnamed male guard who grabbed her right breast. The next day Ortiz reported the incident to acting case manager Paula Jordan. Jordan instructed Ortiz to write a statement about the incident, but Ortiz refused. Jordan then instructed Ortiz to defend herself if it happened again and had her returned to her cell.

The next day Ortiz was again assaulted. She reported the incident to a security supervisor, who then assigned Rebecca Bright to investigate. Bright told Ortiz not to discuss the matter with other prisoners while the investigation was pending. She did anyway. Bright subsequently had Ortiz placed in segregation for two days.

International treaties provide a uniquely powerful moral and legal standard for the definition of every person's inalienable rights, and for their enforcement. These universal standards also have the strength to endure national, state and local efforts to weaken human rights protections. However, until U.S. government officials and the general public acknowledge that prisoner rape is a breach of the human rights standards to which this country has committed to adhere, there will be no outcry to stop this violence. ■

Ortiz sued Jordan, Bright, and the assailant. She claimed the offending guard entered her cell while she was sleeping and ran his hand over her breast and crotch area. At trial she further claimed she was digitally raped. Ortiz contended Jordan violated her Eighth Amendment rights by failing to protect her from the guard and that Bright violated her Fourteenth Amendment rights by placing her in segregation.

After deliberating for 5 hours, the jury awarded Ortiz a total of \$625,000. The verdict included \$250,000 in compensatory damages and \$100,000 in punitive damages against Jordan, and \$25,000 in compensatory damages and \$100,000 in punitive damages against Bright.

Ortiz was represented by John J. Ricotta of Cleveland. See: *Ortiz v. Voinovich*, USDC D OH, Case No. 2:98-CV-01031. ■

Source: *The Ohio Trial Reporter*

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European Court of Human Rights Voids UK's Blanket Bans On Prisoner Voting

by Matthew T. Clarke

On October 6, 2005, the European Court of Human Rights issued a Grand Chamber Judgment holding that Britain's blanket ban on incarcerated prisoners voting in elections violated Article 3 of Protocol No. 1 of the European Convention on Human Rights (Article 3). The court, which was specifically set up in 1950 to enforce individual rights under the convention, is independent of the European Union.

On February 11, 1980, John Hirst, a British national, pleaded guilty and was convicted of manslaughter on the ground of diminished capacity. He was sentenced to life imprisonment, but released on parole on May 25, 2004. Several years prior to his release, Hirst began proceedings in the High Court, claiming that his disenfranchisement under section 3 of the British Representation of the People Act of 1983, violated his right to vote under the European Convention on Human Rights. This blanket ban on voting rights for incarcerated prisoners affected around 48,000 other similarly-situated prisoners. The ban did not include pre-trial detainees, those imprisoned while on remand, those imprisoned for contempt of court, or those imprisoned for failing to pay a fine. It also did not affect prisoners after their release from prison, even if they were still on parole.

The Divisional Court heard and rejected Hirst's claims. His appeal was also rejected. He then filed an application with the European Court of Human Rights on July 5, 2001. On March 30, 2004, a Chamber of the court unanimously held that there had been a violation of Article 3, but no separate issues arose under Articles 10 and 14. The government appealed the case to the Grand Chamber of the court.

The Grand Chamber began its opinion with a rundown of the state of prisoner's voting rights in Europe. Thirteen countries, including Britain, prevent convicted prisoners from voting, thirteen countries do not disenfranchise prisoners, and twelve countries have some restrictions on prisoner voting. The court also noted that Canada had recently struck down prisoner disenfranchisement (*Sauvé v. Canada*, 1992, 2 SCR 438) while the United States had upheld California's

blanket disenfranchisement in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

The challenged law was an undebated re-enactment of the Representation of the People Act of 1969, which substantially dated back to the Forfeiture Act of 1870. That Act, in turn, reflected the "civic death" forfeiture of rights by convicted felons from the time of King Edward III. During the 2000 re-enactment of the Representation of the People Act, the government argued that disenfranchisement was a proper enhancement of punishment for a convicted felon.

The Grand Chamber specifically rejected "the notion that imprisonment after conviction involves the forfeiture of rights beyond the right to liberty and especially the assertion that voting is a privilege not a right." It reiterated that there is "no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion. The Grand Chamber allows that restricting disenfranchisement to prisoners convicted of specific notorious crimes might be allowable under the Convention. However, that question was not before it at this time. It affirmed that the blanket disenfranchisement violated Article 3 and that there were no separate issues under articles 10 and 14.

The Grand Chamber also upheld the award of attorney fees and personal expenses and increased them to 23,000 Euros and 200 Euros, respectively. This did not include attorney fees for the local court representation, which had been paid for by British legal aid. No other damages were awarded. A copy of the judgment is available on the *PLN* website. See: *Hirst v United Kingdom* (No 2), Application No. 74025/01, European Court of Human Rights (Grand Chamber), 6 Oct. 2005. 📄

Other Sources: *Guardian (U.K.)*; *BBC*; *European Court of Human Rights Press Release*.

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Michigan DOC Improperly Calculated Sentences and Released Prisoners; Officials Fired and Demoted

by Gary Hunter

Prisoner release procedures in the Michigan Department of Corrections (DOC) suffer from serious flaws, according to the Intake Processing Unit (IPU). The IPU undertook an audit and review of the way the DOC determined prisoner release dates, and issued its findings in an October, 2005 report. The IPU tested the process by examining release records, and concluded that five serious problems prevented proper release calculations and resulted in some prisoners being released too early while others were held too long.

The Michigan DOC currently houses approximately 50,900 prisoners, and their sentencing information is stored in two databases. The Offender Management Network Information System (OMNI) contains all initial data with regard to a prisoner at intake, such as the length of sentence, type of sentence, etc. This data is transmitted electronically to the Correction Management Information System (CMIS), where central records office staff are responsible for calculating prisoners' release dates.

The CMIS database includes comprehensive data on prisoners incarcerated in the DOC, community placement, boot camp, and on parole. The IPU's investigation of the integration and implementation of OMNI and CMIS by the central records office staff revealed the following problems.

First, the IPU found that CMIS miscalculated release dates for prisoners with consecutive sentences. It determined that between October 2003 and August 2004, seven prisoners were released from 39 to 147 days early. Subsequent to the IPU's findings, a double-check by DOC uncovered 15 more prisoners who had been erroneously released. The release discrepancies ranged from almost three years early to over a year late. The IPU used four methods available to the central office staff for computing release dates; all four methods yielded different results even when used on the same subjects. The audit concluded that CMIS was not correctly programmed to process release dates with respect to complex sentences.

Second, the IPU discovered that CMIS had insufficient data-edit control.

That is, invalid data could be entered and accepted by the CMIS database. Neither did CMIS accurately reflect corrections. The IPU revealed 813 sentences in which the sentencing date preceded the offense date. For 29,400 sentences the corrected date preceded the offense date. The IPU concluded that the CMIS data editing process and its data dictionary were seriously flawed.

Third, data provided by the courts was not always accurately entered into CMIS. Nor did any form of information verification exist within the computer system or within the central records office procedures. For six of 12 cases identified by the IPU as needing verification, no attempt was made by the staff to contact the courts for accuracy. This negligence, coupled with the inaccurate input of release date adjustments, resulted in at least two errors in the 30 records checked.

Fourth, DOC had no method of conducting audit trails. Consequently, sources and accuracy of information, computations and adjustments of prisoners' sentences could not be verified.

Fifth, the IPU concluded that DOC had not completely ensured the integrity of OMNI or CMIS for security purposes. This allowed access to confidential information by unauthorized persons, and changes in the system could not be tracked back to the person who had made them.

For the sake of accuracy it should be noted that only raw figures were used in the audit report. Because these numbers cannot be compared to a total figure, the actual percentage of error can't be determined from the report. It is also noteworthy that DOC agreed with all five of the IPU's findings, stating that the problems identified by the auditors were primarily due to an aging computer system and multiple sentencing law changes. The corrections department said it intends to fully implement the auditor's recommendations by June 2007.

In another procedural failure related to early releases, a separate investigation revealed that 40 Michigan prisoners were prematurely freed due to improper parole revocation hearing policies, including one who subsequently committed three murders.

Patrick Alan Selepak, 27, was released on parole in June 2005; he returned to prison five months later on a parole violation for assaulting his girlfriend. Prison officials failed to hold a hearing within 45 days, and Selepak was freed on Jan. 10, 2006 despite having pending charges. The Michigan Supreme Court had ruled in 2003 that the DOC was not required to release prisoners who weren't provided hearings within 45 days, and Selepak's release violated departmental policy. A month after he was let out of prison Selepak and his fiancé, Samantha Bachynski, 19, allegedly murdered Scott Berels and his pregnant wife, Melissa, and later shot and strangled Winfield "Fred" Johnson. Had Selepak not been erroneously released he would have still been incarcerated at the time of the killings.

State Sen. Alan Sanborn sharply criticized the DOC, saying that while parole officials "didn't pull the trigger they provided the access so that these animals could get the gun." He told DOC director Patricia L. Caruso that her employees were culpable and should be terminated. Following a three-month investigation Caruso obliged, firing parole supervisor Larry Baran. Baran had reportedly lied about his knowledge of the 45-day policy and had urged parole officials to conceal the Supreme Court's ruling from parole officers.

Another parole supervisor, Daryl Cantine, was forced to retire early under pressure. Cantine's supervisor, Carol Duncan-Smith, the administrator of Field Programs for the parole department, was demoted due to inadequate oversight and management of her subordinates. Lastly, Selepak's first parole officer, Martin Awe, received a ten-day unpaid suspension; Awe had failed to test Selepak for alcohol use, which was a condition of Selepak's parole since he had a known alcohol problem.

"Our mission is to protect the public and I know that you feel we have failed in that," DOC Director Caruso told lawmakers. "And I would be hard-pressed to argue with you." To prevent another failure by the parole supervision unit that had been responsible for monitoring Selepak, Caruso abolished the unit in May 2006. "There was an apparent lack of leader-

ship, rampant misuse of discretion and very little supervision by the individuals responsible for overseeing that office," she said.

Such actions did not appease everyone, however, including House Speaker Craig DeRoche and Republican Party Chairman Saul Anuzis. "We must remember that innocent human beings died because of this foul-up," stated Anuzis. "Simply letting people off for early retirement is not the proper course of action. I reiterate my call for Gov. Granholm to

ask for the resignation of Director Patricia Caruso." Governor Granholm declined to fire Caruso.

Selepak's serial murder spree generated widespread media attention that resulted in a larger investigation into the DOC's practices related to parole revocation hearings. It was discovered that within the previous year, 40 other prisoners were improperly released after they didn't receive timely revocation hearings. All have since been accounted for – 23 were returned to custody, one died,

seven were returned to parole, eight are no longer under parole supervision and one is a fugitive. Besides Selepak, several others had committed crimes following their improvident releases, ranging from robbery to sexual abuse of a child; one remained at large for almost a year. In May 2006 Selepak pled guilty to first degree murder and other charges. He faces a life sentence. ■

Sources: *Lansing State Journal, Detroit News, Detroit Free Press.*

California Valdivia Attorneys Awarded \$6.5 Million For 12 Years Work

by John E. Dannenberg

The attorneys who labored twelve years to overturn the California Department of Corrections and Rehabilitation's unconstitutional practice of snatching parolees off the streets and incarcerating them without due process of law [i.e., bed vacancy-driven "recidivism"] (see: *PLN*, January, 2003, p.16; April, 2004, p.24; March, 2005, p.1) were, at the end of the day, on September 17, 2004, awarded \$6.5 million in fees and costs for the "excellent results" they achieved.

The court's (U.S.D.C. (E.D. Cal.)) justification of "reasonable attorney fees" was both glowing and withering. The court noted that the attorneys took plaintiff Valdivia's original complaint to class action status and achieved a statewide Stipulated Order for Permanent Injunctive Relief in December 2003 (finalized in March 2004). In evaluating the attorneys' fee requests for 24,000 hours in labor plus \$617,784 in expenses, the court's eventual hourly compensation worked out to be \$217 for the 30,000 hours they had actually documented. Payment was ordered by November 15, 2004, with interest per 28 U.S.C. 5 1961 from March 9, 2004.

The court went on to note that the attorneys had developed new law (post *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), clarifying parole violators' rights; had retained five expert witnesses; had videotaped 137 parole revocation hearings; had analyzed hundreds of thousands of documents from many of the 140,000 class members; and had successfully defended against numerous defense motions to dismiss or other frustrate the prisoners' due process rights.

The wrongs corrected by counsels' tireless efforts included "the lack of probable cause hearings at the time of

arrest, lack of adequate notice of charges and rights, use of forms and documents that many parolees could not read or understand and which improperly state the applicable legal standards, failure to provide counsel to parolees when due process rights required appointment of counsel, undue restrictions on counsel's access to information and compensable time where counsel was appointed, failure to identify and assist parolees with mental illness and other functional impairments, failure to allow parolees to present witnesses and to confront witnesses against them, failure to provide a prompt final revocation hearing, and operation of an administrative appeal system that was fundamentally unfair."

Chief Judge Emeritus Lawrence K. Karlton's conclusion was understated: "In light of the lengthy, complex and hard-fought nature of this litigation, the number of hours claimed by Plaintiffs' Lead Counsel is reasonable. The time expended is also justified by the excellent results achieved."

As to the hourly rate, the court weighed both the Prison Litigation Reform Act fee cap (\$169.50/hr) versus the 42 U.S.C. § 1988 standard for prevailing local rates. The Settlement represents a compromise respecting the high degree of skill and experience of plaintiffs' counsel.

The winning Lead Coun-

sel -- to whom all California prisoners owe a deep debt of gratitude include San Francisco firms Rosen, Bien & Asaro, LLP (Michael Bien, Holly Baldwin, Ernest Galvan), Bingham, McCutchen LLP (Karen Kennard, Kristen Palumbo) and the venerable San Quentin Prison Law Office (Donald Specter, Director). See: *Valdivia v. Schwarzenegger*, U.S.D.C. (E.D. Cal.) No. S-94-0671 LKK/GGH. ■

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Problems Continue In Maryland Prisons and Jails

by Michael Rigby

A battle is raging in Maryland over how best to improve prison safety. Some advocate hiring more guards and medical personnel. Others want to expand prisoner rehabilitation services. Neither side seems to be considering the possibility that both are needed. Meanwhile, violence, neglect, and contraband are on the rise.

"I'm going to kill you," prisoner Brandon T. Morris, 20, told guard Jeffery A. Wroten as he pointed the guard's own gun at his head, according to court papers filed in Washington County on March 20, 2006. "Please don't, please don't," Wroten begged just before Morris fatally shot him in the face.

Morris had been admitted to the Washington County Hospital in nearby Hagerstown after reportedly stabbing himself in the abdomen with a needle. Wroten, 44, was the lone employee guarding Morris when the January 26, 2006, incident occurred. After the shooting, Morris, who was serving an 8-year sentence at the Roxbury Correctional Institution for assault, robbery, and a weapons conviction, commandeered a taxi and led police on a 5-mile chase before crashing into a concrete barrier. Morris has since been transferred to the state's supermax prison in Baltimore. His trial is set to begin July 31, 2006. Prosecutors are seeking the death penalty.

In the wake of the shooting, the state Department of Public Safety and Correctional Services (DPSCS) decided to temporarily assign two guards for every hospitalized prisoner. Some argue the measures should have been implemented long ago and should be permanent. "These are issues we've talked about time and time again," said Mike Keifer, a former guard at the Maryland Correctional Training Center (MCTC). "It seems like we haven't been able to scream loud enough that we need more staff." State officials acknowledge that 670 of approximately 7,000 guard positions are currently vacant.

Responding to the incident, Governor Robert Ehrlich announced on March 15, 2006, that his supplemental budget proposal included \$5.5 million to fund 160 new guard positions. But, he contends, Wroten's death "had nothing to do with staffing levels." Rather, Ehrlich says, the key to safer prisons is expanding reha-

bilitation programs like Project Restart, a broad plan that includes mental health services, drug treatment, anger management classes, and educational programs. "Programs like this one create a safer environment," Ehrlich said. They reduce recidivism and keep prisoners who want to better themselves occupied and out of trouble, he added. The Project is currently being tested at two prisons, but legislators have refused to expand the program until its effectiveness is proven.

While politicians debate funding issues, life in Maryland prisons remains precarious. At the Maryland House of Correction (MHC) and the MHC Annex in Jessup, for instance, violence is endemic. Two MHC guards were reportedly attacked by 3 prisoners and stabbed on March 29, 2006. One was treated at a local hospital and released; the other was hospitalized in fair condition. At the Annex--a separate walled and razor-wired enclosure inside the MHC compound--a 26-year-old prisoner was stabbed to death on May 26, 2005; another was fatally stabbed in January 2006. A month later, in February 2006, a series of 4 stabbings in 4 days led to a month-long lockdown. Hours after the lockdown was lifted, another prisoner was stabbed. In an earlier incident at the Annex, prisoner Lorenzo Hazel died after being attacked by 3 prisoners in January 2002. He was stabbed 85 times.

Other Maryland prisons are no safer. At the Maryland Correctional Institution (MCI) in Jessup, prisoner Robert Lee George III, a parole violator, was stabbed to death on December 7, 2004, his birthday. His attacker, William Anthony Goines, 22, was sentenced in March 2006 to an additional 15 years in prison. Another prisoner was stabbed several times at MCI-Hagerstown on March 21, 2006. The prisoner, who was serving a 3-year sentence, was admitted to the hospital in stable condition. A fatal stabbing also occurred at the state-run Baltimore City Detention Center on March 14, 2006. Anthony Conway, imprisoned on burglary and theft charges, died after being stabbed in the neck the day before.

In another episode of violence, 17 maximum security prisoners allegedly attacked guards at the North Branch Correctional Institution on January 6, 2006. "The inmates threw batteries, chairs, and

fans at the officers," said Major Priscilla Doggett, a spokeswoman for the DPSCS. "They also punched and kicked them." The melee involved 5 guards and lasted about 10 minutes. One guard suffered a head injury and required surgery. Two others were treated for minor injuries. The incident provoked criticism from guards. "We're insisting on an immediate investigation of correctional officer staffing levels compared to the inmate population," said Ron Smith, a union representative. "They've cut so many jobs that the lives of every correctional officer in every facility in the state of Maryland is in jeopardy."

Ironically, there were plenty of guards when it came to the brutal deaths of Ifeanyi A. Iko and Raymond Smoot. Iko was killed by guards at the Western Correctional Institution during a cell extraction in April 2004. Smoot was stomped to death by a gang of guards at the Baltimore Central Booking and Intake Center in May 2005. Eight guards were fired and 3--Dameon Woods, 33, James Hatcher, 43, and Nathan Colbert, 42--were indicted on second degree murder charges in August 2005. Smoot's family filed a lawsuit on January 20, 2006, seeking \$130 million in damages. [See *PLN's*, July and October 2005, for more on the deaths of Iko, Smoot, and Hazel.]

Officials are also battling an influx of contraband. It's an urgent matter, they say, because much of the prison system's violence stems from disputes over unpaid drug debts and struggles by gangs to control the black market trade in contraband. And there's plenty of it. In a 10-month review of contraband reports by the *Baltimore Sun* ending April 30, 2005, a surprising amount of drugs, weapons, and other contraband was noted. Examples include 109 packs of heroin found on one day at the Maryland Transition Center and 25 packs on another; 192 cell phones; 463 weapons; and mounds of tobacco (banned in Maryland prisons since 2001). Other finds include raw and crack cocaine, bottles of liquor, pornographic videos, tattoo guns, and "1 pet frog."

Like violence, prison guards and union representatives claim the contraband problem is due to insufficient staffing. But corrupt guards also play a role. In November 2005, for example, a guard was caught trying to deliver mari-

juana and ecstasy tablets to prisoners at MCI-Jessup. Another guard was charged that same month when marijuana was discovered in her car in the parking lot of the Jessup women's prison. Consequently, new rules now prohibit guards from bringing in ice chests, back packs, and duffel bags; more food than they can eat during their shift; beverages other than factory sealed bottled water; large amounts of cash; cell phones, electronic devices, and tobacco.

Short-staffing is also blamed for problems occurring in county jails, though apathy and indifference likely play an equal part. The death of Joseph McGee, 38, at the Howard County Jail is one example. While being transported to the jail on August 30, 2005, after being arrested on theft charges, the police cruiser transporting him collided with another vehicle. At the jail McGee was examined in the infirmary and given Tylenol, the prison cure all. The next day he was spitting up blood and complained of throbbing pains in his chest, said his sister, Annie McGee. She recalled her brother saying: "I ask for medical attention and they say: 'You're fine. We're short on staff.'" After she complained to jail officials McGee was placed in the infirmary and given more Tylenol. He was never taken to the hospital. On September 4 at 9:15 a.m. McGee complained that he couldn't move his legs. A nurse finally responded at 9:30, but by then he had stopped breathing. McGee was pronounced dead when he arrived at the hospital more than an hour later. The medical examiner's report cited bronchopneumonia, an enlarged heart, and mucous-coated lungs weighing 2-3 times their normal weight.

Two other Howard County prisoners committed suicide in 2005. Three deaths is an alarming number for a jail with an average prisoner population of 200. But if the attitude of jail personnel is anything like that of County council member Charles C. Feaga (R), it's no wonder. Feaga said it's hard to care for prisoners because many are drug addicts who "bring the problems on themselves. We can't treat them like you do every individual who's brought into hospital." Apparently not even when

they're involved in a serious automobile accident. James E. Crawford, attorney for the McGee family, said they plan to file a \$5 million wrongful death suit against the county for inadequate medical care.

In other news, a guard at the Cecil County Detention Center was accused in November 2005 of selling cigarettes to prisoners for up to \$50 a pack. The deputy, Scott D. Lewis, 30, is charged with malfeasance in office, delivering contraband into a correctional facility, and theft. Several weeks earlier, on October 19, 2005, a Carroll County jailer was charged with sexually assaulting a minor. Police say Correctional Officer 3rd Class Joe Torres Hernandez, 62, sexually abused the now 17-year-old girl between August 1999 and July 2002. Hernandez was the county's 2004 Correctional Officer of the Year.

And at the Jennifer Road Detention Center, a woman delivered a baby alone in her cell on December 1, 2005. "I was screaming so much my whole body was trembling. Everyone could hear it," said Kari Parsons, 25, of her November 26, 2005, delivery. "I was screaming and praying for God to help me." Parsons - made numerous requests for medical attention, but jail medical personnel--employees of the notoriously inept Correctional Medical Services--told her she wasn't going into labor. (CMS also recently took over prisoner medical care for the DPSCS. See *PLN*, February 2006 for more.) Unable to lie down, Parson's finally squatted near the toilet and braced herself against the wall. "I felt down there and I felt my uterus open. I felt his head," she said. Holding the infant's head, she jumped to the cell's bare mattress and pushed. The baby, a boy, came out onto the green plastic cover. "He slid right out of me," she said. Paramedics were called when jailers looked into her cell and saw the newborn. Parsons had been

imprisoned for violating her misdemeanor theft probation. "It was ridiculous and totally inappropriate for the detention center to do what they did," said her attorney, Michael May. There's no word on whether jail officials think the incident was related to inadequate staffing, complications associated with treating drug addicts, or just plain old incompetence. But the smart money is on the latter. ■

Sources: *Associated Press, The Daily Record, The Waynesboro Record, baltimoresun.com, newsday.com, wjla.com, hometownannapolis.com, washingtonpost.com, washingtontimes.com, herald-mail.com, centredaily.com, wjz.com, and thewbalchannel.com.*

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Pennsylvania Correctional Industries Overcharges Customers, Stockpiles Cash, Fails Mission

by Matthew T. Clarke

On September 13, 2005, Jack Wagner, the Pennsylvania Auditor General issued a report on his audit of Pennsylvania Correctional Industries (PCI). The audit covered, the period of July 1, 2000, through February 18, 2005, and was generally critical of PCI. Jeffery A. Beard, the Secretary of Corrections, agreed that the audit was a fair assessment of PCI overall.

PCI operates manufacturing and service facilities at 18 prisons, employing 213 staff members and over 1,600 prisoners. Its FY 2004 expenses were \$32.1 million with FY 2004 profits of \$1.4 million. Products include: signs, vehicle license plates, apparel, personal care items, containers, bags, furniture, food, and household items such as linens and cleaners. Services include: laundry, printing, engraving, vehicle restoration and freighting.

Wagner found that PCI overcharged its customers for its products when compared to similar products produced by other prison industries or products available through a private supplier. He noted that, despite general customer satisfaction with the quality of the goods and services, PCI sales had fallen by 25 % over the audit period. He found that this overcharging costs the taxpayers money and that money was being allowed to stockpile in a large, \$32 million fund that was not being used by PCI to improve its products, develop new products or improve its sales. Therefore, Wagner recommended that a law be enacted allowing PCI to return the \$32 million to the general revenue fund.

Operations' profits for PCI dropped during the audit period from \$8.5 million in FY 2001, to \$5.6 million in FY 2002, to \$3.1 million in FY 2003, ending with \$1.4 million in FY 2004. This occurred despite the fact that PCI uses a captive labor force paid between 19 cents and 42 cents an hour with an average prisoner pay of 59 cents an hour, including production bonuses. How could this happen? Wagner found that it was chiefly caused by insufficient planning, lack of marketing and a failure to train or provide incentives for sales staff. A more likely reason is the bloated bureaucracy and civilian staffing of PCI which is not paid slave wages. The audit did not include the additional

security staffing required for PCI operations. PCI also failed to track prisoner's success following their release; so it could not determine whether its work programs reduced recidivism.

PCI does not even track costs by product or service, making it impossible to determine the difference between costs and prices. No wonder PCI was running 14 of its 23 plants at a loss. The biggest money losers over the audit period were Coal Township furniture production shop (\$1.7 million in losses), Camp Hill freight transportation center (\$1.3 million in losses), Mercer sign and engraving operation (\$1.3 million in losses) and Albion vehicle restoration center (\$1.3 million in losses). Albion hasn't shown a profit in more than eight years.

One problem that led to inefficiencies is the decentralization of production control. Each production manager makes decisions independent of the other production managers, resulting in a lack of production uniformity and effectiveness. PCI's policy manual calls for centralized quality control, but ignores production control. Thus, the policy, which--like most of PCI's policies--is fifteen years old, is largely responsible for the inefficiency.

The inept bureaucracy of PCI showed up not only in its continuing operation of money-losing businesses without attempting innovations to make them profitable, but also in its sales force's training and work ethic. Sales personnel at PCI have little incentive for good performance and no possibility of advancement in what is essentially a dead-end job. Therefore, there is a large turnover of sales personnel leaving their positions for higher-paying jobs elsewhere. There are no commission incentives for sales. Thus, sales personnel have no reason to seek new customers or even keep in regular contact with current customers. Most current PCI customers reported less than one sales personnel contact a year. Most potential PCI customers reported never having heard of PCI. This explains why, despite overall favorable customer appraisals of PCI products and services, sales declined drastically throughout the audit period. Such a flawed sales scheme would never be tolerated in private enterprise.

When the auditor compared PCI prices with that of similar prison-made goods made in other states, PCI's prices were generally higher. When compared to similar goods available from a private importer/supplier of prison goods, they were much higher. Thus, PCI goods, despite their general high quality, were not competitively priced and PCI's profitability would have suffered greatly were it not for its largest customer, the Department of Corrections (DOC). Every audit of prison industries has concluded that the private sector which does not use prison slave labor can produce goods cheaper and usually at better quality than those made by prison industries.

PCI improperly gave a \$2 million rebate to the DOC, then improperly disguised the subsidy through irregular accounting. The DOC had a budget shortfall in FY 2002. A direct transfer of funds was not authorized by law. Therefore, PCI developed a 10% retroactive rebate for DOC. It then booked the rebates as increased administration costs, distorting the true costs of production for the goods. PCI did not inform its other customers of its preferential pricing treatment of the DOC.

In summarizing PCI's performance during the audit period, Wagner said, "PCI did not meet its mission to serve prisoners, state agencies, and most of all, taxpayers. Under PCI's management, Pennsylvania's prisoner work program is costing rather than benefiting taxpayers."

"This program is not properly run and needs to be seriously overhauled," concluded Wagner. PLN agrees and adds that the entire concept of prisoner industrial and slave labor is flawed in that it cannot be shown to reduce recidivism, or save taxpayers money. Rather it operates as a government boondoggle while proven, low cost programs such as education and family visiting are eliminated. Thus, the entire concept should be overhauled or, even better, abandoned. ■

Sources: Pennsylvania Department of the Auditor General Performance Audit of Pennsylvania Correctional Industries dated 09/13/05 and press release dated 09/15/05 (both reports available at www.prisonlegalnews.org); www.philly.com; *Pittsburgh Post-Gazette*

\$100,000 Settlement For Black Oklahoma Prisoner Beaten By White Prisoners

Creek County, Oklahoma, has paid \$100,000 to a black man who was severely beaten by a group of white prisoners in the county jail.

Rameses Gibbs, a black man, was arrested on November 22, 2001, on a misdemeanor charge and taken to the Creek County Jail. After he was booked in, jailers placed Gibbs in Cell 15--a large tank-type cell reserved for white prisoners who were trouble makers or openly racist, according to Gibbs' complaint. At the time the cell was occupied by at least 12 white prisoners, and no blacks. Many of the white prisoners had racist tattoos, and the cell walls were covered with confederate flags, swastikas, Aryan Brotherhood symbols, and the like, which the prisoners made from paper and torn up sheets.

Not surprisingly, Gibbs was attacked by the white prisoners as he climbed onto a bunk in the back of the cell. He was allegedly beaten and kicked for approximately 10 minutes before jailers opened the cell door and the beating stopped. The beating resulted in multiple contusions, bruises, and a broken hand. Gibbs was treated at a local hospital, where his hand was bandaged and he received eight stitches over his right eye.

Gibbs sued in the U.S. District Court for Northern District of Oklahoma under 42 U.S.C. § 1983 and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, alleging

violations of his Fourteenth Amendment rights to reasonably safe confinement and to be free from pretrial punishment and racial discrimination. He named as defendants the County, Sheriff Steve Toliver, Undersheriff Rick Ishmael (the jail administrator), and deputies Carl Hessom and Floyd Simons.

Gibbs additionally claimed the jail was grossly understaffed--Hessom and Simons were the only jailers on duty for approximately 90 to 100 prisoners when Gibbs was attacked--which resulted in an increased risk of violence in the jail. He further alleged the County failed to adequately fund jail operations, did not have an adequate classification policy in place, and that Hessom and Simons were not adequately trained or supervised. Gibbs also contended the investigation into the beating was inadequate, and as a consequence no charges were filed against the assailants and no disciplinary action was taken against the jailers.

Following the August 22, 2005, filing of Gibbs lengthy and well-drafted response to the defendants' motion for summary judgment, the defendants agreed to settle for \$100,000. Gibbs was represented by Tulsa attorneys Steven A. Novick and D. Gregory Bledsoe. See: *Gibbs v. Board of County Commissioners of Creek County*, USDC ND OK, Case No. 03-CV-482-CVE-SAJ. ■

Georgia Prisoner Beaten By Guard Awarded \$22,000

On October 19, 2005, a federal jury awarded \$22,000 in damages to a Georgia prisoner who was beaten by a guard.

Plaintiff Larry Hudson, 45, claimed that on March 7, 2002, while confined in disciplinary segregation, he became involved in a verbal confrontation with guard J. Singleton. According to Hudson, guard S. Gibson then opened Hudson's cell door, allowing Singleton to enter, and locked it behind him. In the cell Singleton punched Hudson in the face and threw him against the wall.

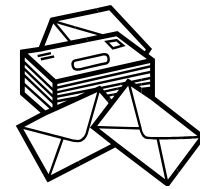
As a result of the beating Hudson suffered fractures to his arm and shoulders and cuts to his lips and nose. He also claimed that on numerous occasions after the assault Singleton threatened and

verbally assaulted him.

Hudson sued Singleton and Gibson, pro se, alleging violations of his Fifth, Eighth, and Fourteenth Amendment rights. Specifically, Hudson contended Singleton assaulted and battered him without justification and that Gibson violated policies by opening his cell door and failing to stop or intervene in the assault.

A federal jury in Statesboro found for Hudson and awarded him a total of \$22,000. The verdict included \$1,000 in actual damages and \$10,000 in punitive damages against each defendant. See: *Hudson v. Singleton*, USDC SD GA, Case No. 6:02-CV-00137-JEG. ■

Source: *The Georgia Trial Reporter*



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Texas State Representative Criticized For Helping Prisoners and Families

by Matthew T. Clarke

Texas Representative Terri Hodge has been taking heat for (gasp!) helping prisoners and their families, in other words--for doing her job.

Hodge is accused of the following: (1) helping arrange rare face-to-face meetings between parole-eligible prisoners and members of the parole board; (2) helping obtain the dismissal of disciplinary charges against prisoners which might otherwise prevent them from being paroled; (3) using a rarely-used legislative privilege to obtain the otherwise-highly-secret parole files of prisoners; and (4) helping prisoners transfer to prisons that are closer to their families. All of the criticism against Hodge actually points to flaws in the parole and prison administration in Texas.

Why should prisoners and their families have to get a state representative involved in the parole process to get the prisoner a face-to-face meeting with a single, voting parole official? In most states, the entire voting parole committee or board routinely meet face-to-face with the prisoners they are voting on. After all, shouldn't there be an effort on the voting parole officials' part to get to know the person whose future they are about to decide. Instead, in Texas, parole officials routinely spend mere seconds reviewing a prisoner's file before voting to grant or deny parole. This occurs in part because there are only 18 voting parole officials for over 150,000 Texas prisoners.

What did Hodge do to get the disciplinary charges dismissed? She wrote or called the prison officials and asked about them. She is not accused of having requested dismissal of the charges, but merely having inquired about them. This outside scrutiny apparently led the prison officials to dismiss the disciplinary charges

on their own accord. The reader is left to judge the validity of disciplinary charges that are dismissed due to mere outside scrutiny. However, it is well known within the Texas prison system that some guards will write prisoners bogus disciplinary cases out of spite to prevent their parole.

Hodge is not accused of passing on information from the confidential parole files to prisoners or their families. That would violate Texas state law. She is merely accused of having requested and received the files of prisoners she was interested in using the "legislative purpose" privilege. Hodge has recently been interviewed on KPFT's Prison Show and noted that she and other legislators are working on a complete reform of the parole statutes for the next legislative session, so she unquestionably has a legislative purpose in seeing parole files of prisoners becoming eligible for parole. However, the whole debate on whether this is an abuse of her "legislative purpose" privilege distracts from a more important question: "Why are Texas parole files secret?" After all, they are government files and should therefore be subject to open records provisions if for no other reason than to allow interested parties to verify the facts alleged in the files. However, so called "victims' advocacy" groups and politicians continue to advocate keeping parole files secret, claiming that allowing prisoners to read the letters of the people and/or agencies protesting the prisoner's parole would permit retaliation. This argument seems specious as it is no surprise to prisoners that the many victims and prosecutors don't want the prisoner paroled. However, this falls flat when used against the tens of thousands of Texas prisoners imprisoned on drug and public order offenses where there is no "victim." The only thing the secrecy does is allow people to plant false allegations in the parole file with no opportunity for fact-checking.

Finally, helping prisoners get transferred to a prison closer to home is not a minor issue in Texas, the largest state in the lower 48. Texas operates a gulag archipelago of over 100 prisons in all parts of the state. Thus, Texas prisoners and their families can be separated by 1,000 miles. Again, the real question should be: "Why is it necessary to have the involvement of

a state legislator to get a compassionate transfer." There should be a functioning mechanism to allow for such family-unification transfers available in the Texas prison system without the necessity of outside assistance.

Another complaint is that many of the families of prisoners Hodge assisted—including many from outside her legislative district in Dallas--have either contributed to her campaign fund or helped her in political fundraising. Hodge counters that she has never asked anyone for contributions quid pro quo. However, many of the family members of prisoners whom she has helped have either contributed to her campaign or helped with fund raising because, as one of the few representatives who is responsive to their needs, they want her to remain in office.

Parole board members deny having been influenced by Hodge.

"I voted my conscience, and at no time did I ever vote a case in a particular way, simply because I felt pressure or I felt that was what someone else wanted me to do," said former parole official Burt Reyna

Likewise, the families of the prisoners Hodge helped uniformly deny Hodge having asked for money.

Maggie Brooks, one such family member, who donated \$75 to Hodge's campaign fund explained why she made the donation.

"We are working on the same cause," said Brooks. "She's a politician. Do you know any politician who does not accept campaign funds if they give it to you? She has never, ever, never, mentioned--nothing, nothing--about money, ever. I've never known her to be anything but honest, with high integrity."

The real reason the media is bashing Hodge is because she won't toe the line and bash prisoners like most other Texas legislators do. The few Texas legislators who treat prisoners as human beings may be popular with their constituents (Hodge ran unopposed in the last election), but they will never be popular with the reactionary, corporate media in the Lone Star state. ■

Source: cbslltv.com.

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See page 45 for more information.

Texas Politicians Provided Perks Using Prisoner Slave Labor

by Matthew T. Clarke

Texas Correctional Industries (TCI), the industrial division of the Texas prison system, has been operating as a cut-rate, custom craft-goods supplier for dozens of Texas legislators. One politician furnished his new home with prisoner made goods. The goods include a dining table with hand-carved state seal adornment, ten chairs, bar stools, kneeling benches, a holy water font and altar chairs all of which cost Democratic state Senator Eddie Lucio \$6,319.

Legislators are not the only people who can order personal goods custom made at below-market costs by Texas state prisoners, prison employees and board members can do so too. They can also have furniture refurbished at below-market rates. Some employees refurbish furniture or order newly-made goods in such quantities that they appear to be running a business of reselling the items. Such a business would be very profitable as such work done by prisoners in Texas incurs no labor costs because the prisoners are not paid for their labor.

"Allowing lawmakers to take advantage of not having to pay what they would pay at a retail store, and using it strictly for personal use, does not look good," said Suzy Woodford, the Texas Director of Common Cause, a government watchdog group.

Lucio counters that he has broken no law and paid for the goods with his private funds.

"I like the idea of getting things hand-crafted and by prisoners," said Lucio. "That is unique. It is the subject of conversation when people come to visit me. I say, 'I ordered it from our own prisoners here.'"

Texas prisoners are no doubt duly impressed that the products of their forced-slave labor are acting as conversation pieces for Lucio.

Not all legislators' purchases are made using private funds. Republican state Representative Burt Solomons bought five custom-made wet bars adorned with the state seal for \$2,135 in campaign funds in 2004. He said the prison-made furniture was used to reward his campaign staff for their hard work.

Republican state Representative Tony Goolsby bought a replica of a historic desk for \$1,110 using his campaign funds. Other legislators used campaign funds to purchase prison-made Texas-shaped barbecue grills,

bedroom furniture and, other items.

"We're all born the same way, but we're not all equal," said Goolsby. "Everybody gets perks."

Goolsby did not explain what perks the unpaid prisoners had gotten.

John Benestante, TCI's director, said the policy of personal sales to lawmakers and state officials is long-standing and predated his assumption of the directorship. It accounts for about 1% of TCI's sales in 2005. Traditionally, legislators used the policy to purchase job-related items, such as furnishings for their offices and constituency gifts like gavels and flag boxes. The purchase of personal items is a newer trend.

The Texas Board of Criminal Justice, the policy-making entity for the Texas prison system, is considering banning private sales of TCI goods to employees and legislators. The sales amounted to \$64,000 for legislators and \$300,000 for employees in 2005. This doubtlessly understates the real market value of the heavily-discounted goods and services.

"Although such sales are small in

scale, it is appropriate to review the practice," said Christina Melton Crane, the board's chair. "The agency will examine this issue to determine if changes are warranted."

It is hardly surprising that Texas lawmakers are beginning to see the prisoners as their own slave labor force. For years, the legislature has refused to treat its prisoners as human beings--continuing such policies as a ban on prisoner-use phones in the prisons, refusing to pay prisoners for their labor (except in a few private-industry pilot programs and maintaining an arbitrary and capricious system of parole while keeping some of the most draconian sentencing laws in the country on the books. Texas clearly views its prisoners as commodities, not people, much as the Third Reich viewed its prisoners: they are objects of economic exploitation--not redeemable beings worthy of respect. 🗑️

Sources: *Houston Chronicle*, *Associated Press*, *eyewitness accounts*, *Dallas Morning News*.



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Bubble-Gum Computers in Washington State DOC

by Gary Hunter

“Bubble-gum-and-baling-wire operation....a risk to public safety over the long term.” That’s how Rep. Glenn Anderson, R-Fall City, Washington, described the state prison’s current computer system.

“It’s a disaster. It’s been a disaster for a long time,” agreed state Rep. Ross Hunter, D-Medina.

Anderson is a former high-tech management consultant and Hunter is a former general manager for Microsoft. Both sit on the Information Services Board which regulates state technology projects. Their critical comments refer to a computer integration attempt that began six years ago.

In 1999 IBM contracted with the Washington DOC to provide a system to more efficiently access information about prisoners and parolees. Offender Management Network Information project (OMNI) was sold to the state by IBM Global Services at a cost of \$58 million. It is currently two years behind schedule and \$6 million over budget.

Several independent sources have warned state officials that IBM’s projections are unrealistic. A report by Coplan and company noted that much of “the work [by IBM] was only partially completed, was not completed on time or budget, and was done in a way that DOC should be reluctant to continue.” Coplan also pointed out that IBM had already modified the original contract several times costing the state more than \$3 million. Yet in December, 2004, the DOC gave IBM another \$1 million and simultaneously scaled back the project. Coplan’s view is that “IBM is being rewarded for poor or non-performance.” Coplan advised the DOC to terminate its contract with IBM or at least re-evaluate whether “the project as a whole is still justifiable.”

As recently as March 2005 Sierra Systems, also an independent consultant, noted that “We have seldom seen the level of tension, lack of trust or absence of respect we see exhibited in this project.” They also advised prison officials to explore other options.

Jim Walters, Corrections Department project manager, said that IBM oversold the project and “Overly aggressive schedules were set.”

Hunter went even further saying that DOC officials “wanted to get more done

than they had time or money for and didn’t really manage to project very well. It should have gotten done.” he said. “It should have gotten to a point where we could deploy it. They slipped.”

Clay Helm, spokeswoman for IBM, defended the project by pointing out that phase one was successfully installed and completed two years ago. But earlier this year the system crashed for four days leaving the DOC unable to transport or otherwise generate any information on paroled prisoners.

This is disconcerting since the reason for the change was initiated by the state’s past inability to effectively track parolees with their old computer system. That inability has cost the state tens of millions of dollars in lawsuit payouts.

The project was to be implemented in three phases. Phase one is in place but is still problematic. Phase two was scheduled for implementation in June 2005. It is a

Web-based program designed to provide easy access to prisoner information using a variety of click messages and menus. It is still not in place. Now state legislators have approved \$11.25 million for phase three.

Tom Wallace, senior technology manager for the Information Services Department, said that Governor Christine Gregoire “was very specific that the project should be successful, carried forward and implemented.”

Corrections officials are predicting project completion by June 2007. Not everyone is so optimistic.

Rep. Anderson says that the new agency director, Harold Clarke, should be given an opportunity to correct the problems. But, “If at that point, they can’t do it, yes, we’ll probably shut the whole thing down and we’ll have to start from scratch.” ■

Source: *Seattle Post-Intelligencer*

\$475,000 Settlement In California Suicide Suit

On December 20, 2005, the county of San Mateo, California, agreed to pay \$475,000 to settle a wrongful death lawsuit involving a mentally ill woman who committed suicide in the county jail.

Angela Ramirez, 23, was imprisoned at the Women’s Correctional Center after being sentenced to 120 days on a minor drug charge. At the jail Ramirez showed obvious symptoms of severe withdrawal from prescription drugs, injured herself numerous times, repeatedly asked for psychiatric medication, and threatened suicide. Even so, she received no medical treatment, according to the lawsuit, which was filed in the U.S. District Court for the Northern District of California.

Untreated and suffering, Ramirez slipped unnoticed into a shower area on April 6, 2003, and hanged herself with a bed sheet. It took jailers 1 ½ to 2 hours to locate her.

Ramirez’s parents, Lisa Fidler and Rito Ramirez, had initially sought \$11 million in their lawsuit--which alleged claims under 42 U.S.C. § 1983 and state law--but decided to settle due to the difficulty of trying a case in federal court, said

one of their attorneys, Randall Scarlett of the San Francisco-based Scarlett Law Group. Under California law, damages for medical negligence would have been capped at \$250,000 for each parent, or \$500,000 total, said Scarlett.

“They felt that by getting the \$475,000 they had been vindicated, that Angela’s death had been vindicated,” Scarlett said. “This is in no way a loss.”

The aging jail was built in 1980 to house 89 women but held 130 at the time of Ramirez’s death. A poor layout made it hard to supervise, said Sheriff Don Horsley, who also acknowledged a personnel shortage at the jail.

“It’s a sad case,” said Horsley. “If we had taken it all the way to trial, we could have won it ... But the truth of the matter is she came in there alive.”

Kevin R. McLean of Belli & McLean Law Offices in San Francisco and Cal J. Potter of Potter Law Offices in Las Vegas also represented the parents. See: *Fidler v. San Mateo County*, USDC ND CA, Case No. C-04-1404-SC. ■

Additional Source: *insidebayarea.com*, *Associated Press*

California Prison Guards' Overtime Doubles to \$277 Million

The total California Department of Corrections and Rehabilitation (CDCR) guard overtime pay in 2005 of \$277 million was twice that of 2004. CDCR's 30,000 prison guards averaged \$72,000 for the year, gaining about \$15,000 each in overtime pay. But the number of guards annually earning over \$100,000 quintupled to 2,400, based upon dramatically increased overtime pay. 182 guards at San Quentin State Prison, or about 1 in 5, took home more than \$100,000. The highest paid CDCR guard, John Mattingly at High Desert State Prison, grossed \$187,000, including \$114,000 in overtime.

These revelations, dug out of the state controller's office by the San Diego *Union-Tribune*, "hit me hard in the belly," said State Senator Gloria Romero. "Reform has been slow in coming, and I would say largely it's nonexistent."

Elaine Jennings, CDCR spokeswoman, tied the growth in overtime to the growth in the prison population. However, the prison population has stagnated at about 165,000, being effectively capped there by the fixed number of beds.

Another blame factor was the brief closing of CDCR's training academy,

where a neophyte with a G.E.D.-equivalent becomes a guard in 16 weeks. The academy hopes to graduate 3,700 in the coming twelve months.

The guards' contract also fomented overtime cost growth. Overtime is first offered to the most senior guards, who earn the highest base pay, thus disproportionately skewing overtime pay rates. Another factor is sick leave. When one guard calls in sick and another is summoned, he, too, can declare that he is sick, and get a full day's pay. Thus, "sickness" often results in several guards being paid for the job of one.

Yet another driver for overtime costs is the practice of "bed-vacancy-driven recidivism" wherein parole agents (guards' union members) violate enough parolees to keep about 1 in every 4 CDCR beds filled. At San Quentin, "beds" were created for up to 500 parole violators by cramming bunks onto the floors of cell blocks, spaced 12" apart. This created extra "posts" for guards, but it didn't create any guards to fill the posts. The result was an overtime bill at San Quentin of \$1 million per month, which explains why 1 in 5 of its guards broke the \$100,000 pay level in 2005. (These beds were later eliminated by order of federal Judge Thelton E.

Henderson when he declared such housing conditions unconstitutional during a tour of San Quentin in February 2005.)

Early retirement also increases overtime. The reduced retirement age for guards in their latest contract permits a guard with 30 years in to retire at age 50 with 90% of his pay.

In addition, CDCR gives "fitness pay" (\$130/mo.) for taking an annual physical, cost of living adjustments for high-rent areas (e.g., San Quentin) and "rattlesnake pay" (bonuses to work at isolated desert prisons).

Recent court orders to improve health-care may increase medical guarding costs. And the absence of "rehabilitation" -- Governor Schwarzenegger's now apparently hollow call to cut the prison population 10% -- is also swelling the need for guards. The extant guard shortage notwithstanding (about 8% statewide), Governor Schwarzenegger recently proposed building two more prisons, which would require 2,000 additional guards. That should absorb the training academy's output and ensure continued overtime costs in the years to come. ■

Source: *San Diego Union-Tribune*.



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\$365,000 Settlement For Restrained, Untreated Michigan Boot Camp Prisoner

On December 22, 2005, the state of Michigan agreed to pay \$365,000 to a boot camp prisoner who was strapped in a restraint chair for six hours and later suffered kidney and liver failure.

Craig Allen Cook II was arrested on June 14, 1999, and imprisoned in the Manistee County Jail. He had violated his parole by returning home an hour late. At the jail Cook began experiencing nausea, diarrhea, profuse sweating, tingling in his arms and legs, and other symptoms. Despite repeated requests from him and his mother, Cook was never seen for the symptoms.

On July 19, 1999, Cook, 22, was transferred to the Cassidy Lake Alternative Facility, a boot camp operated by the Michigan Department of Corrections (MDOC). The next day--without having undergone a health screening, a violation of MDOC policy--Cook was forced to participate in a three mile "motivational run." He collapsed during the run.

When the guards, including Captain Steven Bigcraft, were unable to "motivate" Cook with threats and other verbal abuse, he was taken to a control room and strapped into a restraint chair, the lawsuit said. A "spit mask" was placed over his face. Some time during his six hour ordeal in the chair Cook lost consciousness. MDOC medical personnel--employed by Correctional Medical Services--performed several cursory examinations during that time but took no remedial action.

Cook was barely able to move when guards released him from the chair. He asked for help going to the bathroom but the guards refused, instead telling him to go to bed. In the morning Cook was found naked in his bunk, lying in his own feces.

After cleaning him up, MDOC personnel transported Cook to a local hospital where he was placed in intensive care. Doctors there diagnosed Cook with, among other things, liver and kidney failure and placed him on dialysis. Hospital personnel also noted that Cook had abrasions on his arms, legs, and face; a large bruise on his chest and one on his left knee; a laceration on his forehead; and other injuries. Cook remained hospitalized for two months.

Cook sued the MDOC, numerous guards, and CMS medical personnel

under 42 U.S.C. § 1983 and state law. His allegations included negligence, assault and battery, excessive force, and Eighth Amendment violations. The defendants initially moved for summary judgment but the U.S. District Court for the Eastern District of Michigan denied their motion. The Sixth Circuit affirmed the denial in an unpublished opinion, *Cook v. Martin*, 148 Fed.Appx. 327 (6th Cir. 2005).

Following the unsuccessful appeal, the State settled for \$365,000. Cook was represented by Hugh Davis and Cynthia Heenan of the Detroit-based Constitutional Litigation Associates, P.C. See: *Cook v. Martin*, USDC ED MI, Case No. 02-CV-70213-DT. ■

Additional Sources: *Associated Press*, *Traverse City Record-Eagle*

Transgender Wisconsin Prisoners Continue Hormone Treatment Despite Law

by Michael Rigby

On January 25, 2006, a federal court in Wisconsin issued an emergency injunction to prevent the state from discontinuing hormone therapy for three transgender prisoners, despite a new state law banning the therapy.

In January 2006 the Wisconsin legislature enacted the "Inmate Sex Change Prevention Act," Wis. Stat. § 302.286(5m). Sponsored by Republican state representative Mark Gundrum, the law prohibits the state from providing either surgery or hormone therapy to transgender prisoners. The statute, apparently the first of its kind in any state, was opposed by the Wisconsin Department of Corrections (WDOC), said lawyers for Lambda Legal and the American Civil Liberties Union (ACLU), which are representing two of the women.

Gundrum initiated the legislation in response to a lawsuit filed in 2003 by a third prisoner, Donna Dawn Konitzer, aka Scott Konitzer. In that lawsuit Konitzer sued the WDOC after being denied gender reassignment surgery, which she claims prison doctors promised to perform. Konitzer, who is serving 123 years for armed robbery, also sought to be housed in a female prison.

All three prisoners suffer from Gender Identity Disorder (GID), a recognized psychiatric illness that requires treatment. Konitzer has been receiving testosterone blockers and feminizing hormone therapy since 1999, according to her lawsuit, *Konitzer v. Bartow*, USDC ED WI, Case No. 03-C-717. Prisoner Kari Sundstrom began receiving hormone therapy in 1990. Prisoner Andrea Fields started the treatment in 1996. Lambda and the ACLU are

representing Sundstrom and Fields.

The legislature's knee jerk reaction could have severe medical consequences. According to experts cited in the lawsuits, abrupt withdrawal from hormone therapy can lead to diabetes, hypertension, wasting disease, and heart failure. Psychiatric problems including depression and increased thoughts of suicide are also possible.

At least one of the State's own witnesses agreed with the prisoners that terminating the therapy would be cruel and inappropriate, noted the ruling in Konitzer's case. Fields and Sundstrom, whose therapeutic doses had been halved in anticipation of the law's January 24, 2006, deadline, were already experiencing depression, mood swings, severe headaches and other symptoms. The ruling by Judge Charles Clevert Jr. reinstated the women's medication to its original strength.

The new law is apparently based on misdirected morality rather than established medical opinion. Nor is it fiscally justified. The treatment costs roughly \$675 to \$1,600 per year--arguably less than the price of treating complications associated with withdrawal. Moreover, fewer than a dozen Wisconsin prisoners have been receiving hormone therapy. Still, Representative Gundrum remains unswayed. "It's ridiculous to ask the taxpayers to pay for this," he said. See: *Sundstrom v. Frank*, USDC D WI, Case No. 06-C-112. The injunction can be viewed on PLN's website at prisonlegalnews.org. ■

Additional sources: *planetout.com*, *gay.com*, *signonsandiego.com*, *AP*

Armor Correctional Health Services: A New Company Blossoming with Political Payback

by David M. Reutter

A recently-formed Florida prison healthcare corporation is blossoming with new contracts from county sheriffs who decided to change bidding requirements and in one case eliminate cost as a consideration.

The company, Coconut Creek-based Armor Correctional Health Services, is owned by Miami physician Dr. Jose Armas. In 2004 Armor had no track record, no active contracts and no sales. It now has over \$210 million worth of contracts over a five-year period, including medical care for prisoners in Broward, Brevard and Hillsborough counties. Other contracts to treat prisoners in Martin and Lancaster counties are pending.

To obtain the contracts, some behind-the-scenes action occurred. In October 2004, Broward County Sheriff Ken Jenne awarded Armor its first contract, worth \$127 million, to provide services for the county's 5,000 prisoners. During the bidding process Jenne dropped a requirement that companies must have experience providing healthcare to prisoners. While no explanation was provided for that action, it was known that Armas, through his companies and associates, had been a major contributor to Jenne's reelection campaign.

Upon obtaining the Broward contract after only three months in business, in May 2005 Armor sought and was awarded a five-year, \$19.9 million contract to provide medical care to prisoners at the Brevard County jail. Once again, wording about corporate experience was altered in the bid specifications. Rather than rely on Armor's experience, the county decided to instead rely on the company's individual executives' experience.

And in what Hillsborough County's detention chief termed an "unusual" (but not illegal) decision, Armor obtained the jail's three-year, \$65 million prisoner medical contract despite submitting a bid that was millions of dollars more than bids submitted by three competitors. The county had inexplicably decided to drop price as a consideration in the bidding process.

The behind-the-scenes action also included sheriffs lobbying other county officials who were considering contracting

out prisoner healthcare. In March 2005, Jenne called St. Lucie County Sheriff Ken Marcara and recommended Armor. "He said he knew the guy running it and asked if I would entertain their bid," said Marcara. "We were talking, I brought it up," Jenne told the *Daily Business Review*. "I told him our people were very satisfied with them." The problem, however, was that Armor hadn't yet started work in Broward County at the time of Jenne's endorsement of the company.

Other sheriffs, including Ric Bradshaw of Palm Beach and J.R. Parker of Brevard County, also tried to peddle Armor's services to other jurisdictions. "If sheriffs are talking to each other, it's been completely on their own initiative," said Armor spokesperson Dana Clay. But Anthony Alfieri, director of the Center for Ethics and Public Service at the University of Miami, warned against such unofficial lobbying. "The use of surreptitious lobbying that is unknown to the public and unregulated by the public seems to be both unwise and arguably wrong," he said.

Further, Armor hired ex-Hillsborough County Sheriff Cal Henderson as a "consultant" after he left office in January 2005. His duties have included lobbying sheriffs in Marion, Collier, Sarasota, Manatee, Leon and Lee counties. Such tactics apparently work. In June 2006, the Lancaster County sheriff's department recommended to the county commission that the jail outsource its medical care to Armor Correctional Health Services. The annual cost for privatizing the medical services was an estimated \$3.1 million. The jail's in-house medical care budget for 2006 was \$2.1 million – \$1 million less the cost of hiring Armor, according to County Controller Dennis Stuckey. However, Lancaster County prison warden Vincent Guarini stated he couldn't retain qualified medical staff for the lesser amount, citing a turnover rate of almost 200% over the previous 18 months. Prisoner health care has rapid growth potential in Florida. Currently, the Florida Department of Corrections is entertaining bids to provide care for about 18,000 prisoners in 13 prisons in South Florida. That contract alone is estimated to be worth about \$385 million. Apparently

there is so much business that companies are teaming up to maximize their profits. On April 19, 2006, it was reported that Geo Care, Inc., a subsidiary of private prison operator Geo Group (formerly Wackenhut Corrections), had entered into an agreement with Armor to provide mental health services at the Palm Beach County jail complex over a five-year period. The contract is expected to result in around \$2.7 million in revenue during the first year.

The sad part is that rather than awarding contracts based upon merit and fiscal savings for taxpayers, much less providing competent medical care services to prisoners, the stark reality of favoritism and political payback pervades the bidding process. Of course, that is part and parcel of how the prison industrial complex operates. ■

Source: *Miami Herald, Daily Business Review*

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Ohio Awards \$662,000 to Man Wrongly Imprisoned for Rape

The State of Ohio has agreed to pay Nathaniel Lewis, 28, \$662,000 for the five years he spent in prison before his conviction was overturned by a federal appeals court in 2002.

While a freshman at the University of Akron (UA), Lewis was convicted of raping another UA freshman, Christine Heaslet (Beard), in 1996. After the jury found Lewis guilty, he was sentenced to eight years in prison.

Lewis claimed on appeal that the trial judge erred in failing to allow the jury to hear excerpts for Heaslet's diary. Those appeals were rejected by state and federal courts until the Sixth Circuit Court of Appeals agreed, and ordered a new trial. See: *Lewis v. Wilkinson*, 307 F.3d 413 (6th Cir. 2002).

The State of Ohio dismissed the indictment against Lewis just 15 days after the Sixth Circuit's decision, forgoing future prosecution on the charge. Lewis filed a civil suit seeking a declaration that he was wrongly imprisoned. A hearing was held by the Summit County Court of Appeals.

The Court found that the relationship and activities of Lewis and Heaslet prior to the alleged rape; the admitted conduct of Heaslet before the sex act (calling her roommate to see if she was coming home and taking a birth-control pill in Lewis' presence); and her demeanor immediately after the sex, leads to the conclusion that it was consensual sex.

The Court found Heaslet's diary damaging to her contention she was raped. "I think I pounced on Nate because he was the last straw...I'm sick of men taking advantage of me...and I'm sick of myself for getting into them," Heaslet wrote in her diary. "I'm not a nympho like all these guys think. I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends."

The Court found a Lewis was innocent of rape and was a wrongfully imprisoned individual. On September 22, 2005, the State of Ohio entered into a record settlement after such a finding.

Lewis received a \$212,000 payment. Another \$200,000 was placed into a structured annuity with Lewis receiving \$3,664.58 per month starting in September, 2006 for 5 years. Lewis' counsel, Kirk Migdel, received \$167,000 and Counsel

Scott Smith received \$83,000 for fees and costs in the case.

Migdel and his wife, Debra, had worked on Lewis' case pro bono since 1998. Lewis is currently working for a car rental company while residing in

Ypsilanti, Michigan. His incarceration apparently had an effect on Lewis: he now hopes to be hired as a guard with the Michigan prison system. See: *Lewis v. Ohio*, Ohio Court Of Claims, Case No: 2005-08042 WI. ■

Canadian Prison Sanctioned Skin-Art Saving Society Health Problems

by Gary Hunter

Six Canadian prisons are paying prisoner tattoo-artists to ply their trade. The experimental government training program was initiated as an attempt to reduce the spread of infectious diseases.

Legal tattooing ensures equipment will be sterile and sanitary. Connie Johansson, assistant warden at Manitoba's Rockwood Institution, north of Winnipeg, reasons that "We consider these harm-reduction approaches to reduce the cost that eventually comes to you in the community, because the majority of our offenders are eventually released to your community and mine, and those costs transferred over to us."

The pilot program was initiated at a cost of \$700,000. Prisoners trained as tattoo-artists are paid \$6.90 per day while customers pay \$5.00 per pattern. Prisoners are lining up to pay the fee. Names, gang logos and designs deemed "offensive to the public" are not allowed.

Prisoners also praised the idea. "Pretty smart thing," said Ray Trottier as he engraved a skull and crossbones on another prisoner. "They should have did this years ago."

"I think it's probably one of the best things they could actually do," said skin-artist Shawn Sorensen. "I've seen a lot of people do tattoos in jail, and I've seen a lot of stuff done where how they're doing the tattoos is totally unsafe."

Sorensen is referring to instances in which pens and paper clips are fashioned into make-shift needles and almost always reused on numerous prisoners. Infections from illegal tattoos incur both medical and financial costs for both taxpayers and prisoners.

"So if they're going to spend the money and use taxpayers' money for this kind of project, you're probably saving a lot more money from people getting diseases," said Sorenstam.

Naturally, there are some disgruntled observers. Guards fear that the tattoo equipment can be used as weapons, says union spokesman Kevin Grabowsky. For now the project is continuing as a pilot project. Canadian prisons also distribute condoms to prisoners upon request in an effort to stem the spread of HIV and HCV. ■

Source: CBS News

Korean Company Employing Prisoners Receives Coveted Quality Award

A South Korean company employing 70 prisoners at Jeonju Prison to build precision automobile airbag parts won the "Single Parts Per Million" certificate of quality from the Korean Chamber of Commerce and Industry, and the Small and Medium Business Association.

The February 10, 2006 award commended management at Jinpyeong, Inc., one of the 30 private companies in Korea that employ 1,400 prisoners nationwide at \$16/day.

The prisoners' initial product defect

rate for the 0.03 millimeter error-limit parts was 1 in 8. So, company management became involved in the prisoners' lives, even eating and exercising with them, to instill good work ethics. After adding expert technicians to train the prisoners, the company's production record since April 2005 improved to zero defects and a profit of \$50,000. One prisoner reported the job gave him great confidence to be able to adjust to post-prison life. ■

Source: *Joongangdailyjoins.com*.

California DOC Drug Program Funds Squandered

by Marvin Mentor

Five California Department of Corrections and Rehabilitation (CDCR) employees, testifying under subpoena at a February 27, 2006 State Senate Government Oversight Committee hearing, revealed the use-it-or-lose-it practice of spending hundreds of thousands of dollars allotted to prisoner drug treatment programs on such items as guitars, pianos, a portable stage, plasma TVs, lavish furniture and even cars. This suspect result, which the employees were ordered to suppress, resulted from the intersection of two policies: drug treatment contractors under spending their budgets to increase profits, and “zero-based budgeting,” a state policy that automatically reduces a department’s subsequent fiscal year funding allotment by the amount left over from the previous fiscal year.

The Senate hearings focused on why CDCR overspent its \$6 billion budget by over \$500 million in each of the past two years. CDCR has 34 contracts for helping prisoners beat addictions; fully 65% of California prisoners have a substance-abuse problem. State Senator Jackie Speier was incensed to learn that drug-rehab money, an investment by the Legislature to reduce recidivism and hence prison costs, was instead having the opposite effect, engendering “preposterous expenses of money.”

A *San Francisco Chronicle* investigation revealed much abuse. One program at Pleasant Valley State Prison (PVSP) spent \$95,127 on the above types of questionable items in 2002-2003, while then Governor Gray Davis was making emergency cuts to school funding to stem a budget deficit.

Contractor Amity Foundation spent \$500,000 on movie-making equipment in 2003-2004. That money included two \$26,750 camcorders, two \$22,000 accessory lenses and two \$6,423 50” plasma TVs. One camera was reportedly kept at the home of the program director because there was no room at PVSP to store it. Amity also took three California parolees and six counselors to Arizona in 2000 where they repaired an air conditioner and did painting and reroofing at Amity’s Tucson ranch.

Debra Olson, CDCR analyst, said she was told that if she wanted to advance in the Department, she should “keep her mouth shut.” She testified that one

drug program contractor billed \$5,000 for office supplies but refused to provide receipts. Olson was also told to discredit a University of California (Los Angeles) report suggesting that a drug program at Corcoran State Prison was ineffective, and had hired as “counselors” untrained former convenience store and fast food restaurant employees.

CDCR auditor Larry Cupler reported that a program designed to treat 40 prisoners was paid its full amount even though it only treated 12. Worse yet, CDCR administrators approved \$1.9 million in expenses although the contractor provided no receipts.

When suspect contractor Mental Health Systems’ manager David Conn was called to the stand, he claimed he was “having a heart attack,” and left. However, Senator Speier noted that he flew back from Sacramento to San Diego later that day. When inspecting Mental Health’s parolee residential rehab center in San Diego, CDCR contract analyst Carolyn Deitsch was stunned to see “beautiful leather couches, mahogany desks and expensive artwork.”

Parole Agent Jonathan King, previously overseeing a PVSP drug rehab program, reported that their end-of-year splurge bought guitars, a digital drum, a portable stage (that did not fit inside the program area) and a car. The car col-

lected dust on prison grounds for over six months, King reported. “They weren’t using it.” He also reported that vacant counselor spots went unfilled and that “untrained clerical staff” ran therapy sessions, which included showing Hollywood movies or declaring a “recreation day” where prisoners played cards and dominoes.

Department administrator Jim L’Etoile didn’t deny telling these drug program contractors to spend all of their money at the end of the year. Speier questioned why it wasn’t spent on more drug counselors instead. “You’re not representing the taxpayers’ interests,” she protested. L’Etoile remained silent.

Joe Ossman, the latest to oversee CDCR’s drug rehab programs, testified that some programs were effective and spent money wisely, pointing to San Francisco-based Walden House as an example. But Mental Health Systems was heavily criticized by Speier, who noted that its largesse in furniture, cars, and musical instruments were part of \$322,000 in questioned costs between 2001 and 2004.

Senator Speier also blasted Governor Schwarzenegger’s failed corrections policies. “He said he was going to tear up the credit card and control spending. He has failed.”

Source: *San Francisco Chronicle*.

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North Carolina Prisoner Taps Jails Bank Account for \$120,000

A former prisoner of North Carolina's Durham County Jail (DCJ) managed to bilk the jail's prisoner account for over \$120,000.

After serving 69 days at DCJ, Keith Edward Wright, 34, was issued a check for the balance of the money he had not spent in DCJ's canteen. Ordinarily those types of check amount to \$10 or less. But Wright had a better idea than cashing his check – or so he thought.

Shortly after his release, "[Wright] attended a cookout, and he made a general announcement that he could pay bills," said Detective Sgt. Jeremiah Davis. Wright then masterminded more than 250 electronic withdrawals from DCJ's bank account. Those withdrawals, which equaled more than \$120,000, went to pay dozens of his friends' and acquaintances' mortgage payments, utility bills and credit card charges.

Davis told people he could consolidate their debts and pay their bills, for a small fee. The payments included \$1,300 for one man's credit card bill, \$175 toward a woman's Sprint account and \$525 for another's power bill.

DCJ knew nothing about the misappropriated funds until SunTrust Bank officials called the sheriff's office to advise that the account was overdrawn by more than \$8,000, said Davis.

Wright's scam wasn't complicated, as he didn't hack into the bank's computer system or print counterfeit checks. He simply used the telephone. Davis suspects that, with DCJ's check in hand, Wright paid from the checking account over the phone using the jail's account number. Wright's friends with access to the account number shared it with others.

Wright was arrested on September 23, 2005, charged with seven felony counts of obtaining property by false pretenses and one count of larceny, and held at DCJ under a \$100,000 bond. Davis said he expects to file charges against several more people. Wright wasn't the first person to come up with the bank account scam. In 2004, William Umstead used a jail's prisoner account to order more than \$8,000 of computer equipment from Dell; he was caught after trying to pick up the shipment.

DCJ was reimbursed for the fraudulently obtained funds after the electronic charges were reversed by SunTrust. Security measures have been put in place

to prevent similar fraud, but the jail will still issue checks to released prisoners for canteen balances. "I see no need to change the way in which we're doing business," said Durham County Finance Director George K. Quick.

On Nov. 29, 2005, Wright pled guilty to charges resulting from the scam and was sentenced to serve a minimum of 70 months. ■

Source: *News Observer*

Survivors of Texas Jail Suicidee Win \$516,000 Against Phone Provider

by Matthew T. Clarke

The mother and son of a prisoner who committed suicide by hanging himself from a telephone in his jail cell won a lawsuit against the phone provider. On appeal, the award was upheld, but some of the costs awarded were not.

Rolando Domingo Montez was 19-years old when he was arrested for public intoxication on November 14, 1999. He was placed in a cell at the Port Isabel (Texas) City Jail. Also in the cell was a coinless (collect calls only) telephone which had been placed there by JCW Electronics under contract to the City of Port Isabel to provide telephone services to the jail. The next day, Montez used the phone to call his mother three times, asking her to post bail. While they were trying to raise bail money, the mother and Montez's girlfriend (who was the mother of his son) were told that he would be released on personal recognizance at 17:00 on November 16, 1999. However, when Montez's mother arrived at the jail to pick him up, he was discovered hanging by the phone cord in the jail cell.

The mother, girlfriend and son filed a personal injury suit in state court against the phone provider alleging negligence, breach of express and implied warranties, strict liability and misrepresentation. The jury gave the plaintiffs an unspecified award based on breach of implied warranty, but found Montez 60% responsible for his own death. The jury awarded Montez's mother \$140,000 in damages and \$376,000 in damages to his son. Because Texas law does not allow recovery from a tort in which the claimant is more than 50%, the plaintiffs moved for judgment notwithstanding the verdict. The trial court granted the motion, issuing a verdict in the plaintiff's favor on the basis of fraud and breach

of contract and awarded them the jury award, guardian ad litem fees, attorney fees and costs. JCW appealed. Plaintiff's cross-appealed.

The court of appeals held that, because no breach of contract claim was pleaded, plaintiffs could not recover based upon that theory. It also found that the assignment of 60% responsibility to Montez precluded recover based upon a claim of fraud, an intentional tort.

In their cross-appeal, plaintiffs claimed that they should have been granted judgment on the basis of the jury's finding that JCW breached the implied warranty of fitness for a particular purpose, even though the trial judge dismissed all other causes of action (except fraud and breach of contract) when it granted the motion notwithstanding the verdict. The court of appeals agreed.

According to the trial record, in 1998, when negotiating with the city to install phones in the jail, JCW suggested installing phones in each jail cell to be used without supervision. The police chief testified that JCW owner, Bradley Woods, had assured him that the phones were safe for unsupervised use by prisoners and could not be used by a prisoner to harm himself or anyone else. During trial, the city manager and city attorney testified that, during a meeting held after the suicide, Woods admitted to having known about similar suicides prior to placing the phones in the jail cells. The owner of the business that manufactured the phones testified that they were not suitable for unsupervised use and had been intended to be installed in a public area. He also testified that it was common knowledge in the industry that phones placed in cells were dangerous to prisoners.

Because the owner misrepresented the phones as being safe for use by unsu-

pervised prisoners when, in fact, he knew they were not, he breeched the implied warranty of fitness for a particular purpose. Thus, the jury's finding is supported by the record. Because the telephone was used to commit the suicide, the breach of implied warranty was the proximate cause of Montez's injuries. Because breach of implied warranty is a part of the Universal Commercial Code (UCC), it is not a tort and therefore not subject to the bar from recovery when the claimant's responsibility exceeds 50%. Therefore, the cross-appeal was sustained.

The court of appeals also held that attorney's fees could not be recovered on a UCC claim. Therefore, the award of attorney fees was reversed. Furthermore, the trial court had awarded \$25,000 in guardian ad litem fees and \$19,955.25 in costs. The court of appeals held that, whereas the guardian ad litem fees were proper, \$3,175.47 of the costs for expert witness travel and per diem and \$2,064.75 of the costs for photocopying were improperly awarded. Therefore, the unspecified award and \$25,000 in guardian ad litem fees were upheld and the costs were reduced to \$14,315.03. The judgment was affirmed as modified. See: *JCW Electronics v. Garza*,

176 S.W.3d 618 (Tex. App. Corpus Christi 2005).

Another Port Isabel jail prisoner, Gavino Barrera, committed suicide using a phone cord in his cell a few weeks after Montez killed himself. After the jury award in the Montez case the defendants all entered into confidential settlements with the Barrera family. The plaintiffs in both cases were represented by Brownsville, Texas attorney Benigno Martinez. See: *Barrera v. City of Port Isabel*, Judicial District Court of Cameron County, Case No. 2001-04-1831-C. ■

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Muslim Prisoner Attacked by Other Muslims May Sue Prison for Failure to Protect

by Marvin Mentor

The Ninth Circuit U.S. Court of Appeals held that a California Muslim prisoner who was attacked by fellow Muslims stated two Eighth Amendment claims against prison officials by alleging that (1) they failed to protect him and (2) that his conditions of confinement during nine months in administrative segregation exposed him to serious health hazards.

Clarence Hearn, Jr. is a Muslim prisoner at Calipatria State Prison. In May 1997, a note was sent to Deputy Warden Sylvia Garcia warning that the "ruling" Muslim prisoners were trying to force other Muslim prisoners to share their prayer oil. Another note told of intra-Muslim fights being staged in the Muslim chapel. Friction grew between the opposing groups in October 1997. In March 1998, another Muslim was targeted for disputing the ruling group's authority, again over the oil. Hearn was involved in the oil's delivery, and was later attacked in the chapel by Muslim prisoner Rushing, who was acting under orders from prisoners Tubbs, Hankins and Irby of the ruling group. Hearn was moved to another yard for his safety.

There, when Hearn began teaching Arabic to fellow Muslims, a rumor circulated that because Hearn did not follow the sunnah (one version of Islamic law), he must be killed under the teachings of Islam. Violence between Muslims escalated in June 1998, which Hearn reported to guard Powell. Chaplain Kahn offered to help settle the disputes. Prisoner Lino allegedly ordered Hearn to be stabbed because Hearn "held impious beliefs." Hearn was then beaten and stabbed in the chapel by several other Muslims, who turned out the lights and attacked him from behind. Hearn suffered head lacerations, body cuts and bruises. After medical treatment he was placed in administrative segregation for his own safety.

While in segregation, Hearn complained of lack of cold water [provided to general population prisoners because of 100 degree temperatures] and of unsanitary conditions, including non-functioning toilets, insect filled sinks and stagnant pools of water infested with dead insects. These conditions forced him to avoid the prison yard for health reasons. His administrative grievances were denied, whereupon he

filed a 42 U.S.C. § 1983 complaint alleging cruel and unusual punishment for failing to protect him and for inhumane living conditions. His suit was dismissed in July 2002 because he did not allege deliberate indifference on the part of prison officials and because the prison conditions were not sufficiently serious to meet the Eighth Amendment's subjective component. Hearn appealed, and the Ninth Circuit appointed Daniel L. Alexander of Los Angeles as pro bono counsel.

The district court had dismissed the failure-to-protect claim on grounds that Hearn had failed to show that prison authorities had had a sufficiently culpable state of mind of a pending attack. The Ninth Circuit disagreed, holding that Hearn gave detailed facts showing religiously-motivated violence, which was known to Chaplain Kahn, guard Powell and the unit Captain. It was also shown that prison authorities knew of the previous fights in the chapel and did nothing about them. In fact, Hearn's facts went on to show that prison officials literally created the risk and facilitated the attacks by passing messages back and

forth through Chaplain Kahn. Because the series of attacks was "longstanding, pervasive [and] well documented" (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)), the evidence could prove to a trier of fact that prison officials had knowledge of the attack. Accordingly, the appellate court found that Hearn had met his burden of alleging sufficient facts which, if found true by a jury, could permit him to prevail.

As to the inhumane conditions, the Ninth Circuit found the district court's determination that things weren't so bad unpersuasive, because that court failed to take into account the nine months Hearn was forced to endure those conditions (citing *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) [deprivations are lengthy or ongoing]) and that long-term deprivation of outside exercise is unconstitutional (citing *LeMaire v. Maass*, 12 F.3d 1444, 1458 (9th Cir. 1993)).

Accordingly, the Ninth Circuit reversed the district court's dismissal on both grounds and remanded the case for further proceedings. See: *Hearn v. Terhune*, 413 F.3d 1036 (9th Cir. 2005). ■

Alabama Sheriff Charged With Raiding Jail Food Fund

Mobile County, Alabama, Sheriff Jack Tilman has been charged with theft and violation of the public officials' ethical laws for allegedly taking for personal use funds allocated by the state to feed jail prisoners.

Alabama paid Tilman \$1.75 per day to feed the prisoners in the Mobile Metro Jail. Tilman spent an average of \$1.45 a day. He allowed the excess to accumulate. It eventually became several hundred thousand dollars Tilman then deposited some of the funds in a personal CD and a retirement account. Tilman maintains that state law authorized him to retain the excess funds. In addition to the criminal charges, the Mobile County district attorney's office filed a civil suit against Tilman seeking recovery of the surplus funds.

Meanwhile, the county has been unable to duplicate Tilman's food budget. In FY 2004, it spent an average \$2.64 per

day per prisoner for food. In FY 2005, it trimmed the amount to \$2.27. Thus, the county has been forced to pay the difference between the amount allocated by the state and the amount actually spent--\$1.1 million thus far. The county has also hired a consultant to analyze the jail's food preparation and purchasing. On December 12, 2005, the county commissioners voted to solicit bids for feeding the 1,400 prisoners in the jail and associated minimum-security barracks from private jail food preparation companies. No one seems to be asking whether the \$1.45-per-day food provided by Tilman was constitutionally or nutritionally adequate. Also unasked was whether Tilman skimmed on the prisoners' food because he intended to raid the "surplus" funds all along. ■

Source: *Mobile Register*.

EMSA Negligent In Florida Jail Prisoner's Death, County Pays \$65,000

by Michael Rigby

On April 1, 2005, a jury in the 19th Circuit Court of St. Lucie County, Florida, found EMSA Correctional Care negligent but not liable for damages in a prisoner's allegedly drug-related death. EMSA's co-defendant, St. Lucie County, settled prior to trial for \$65,000.

Jason King, 20, was arrested for peddling marijuana in 2000 and sentenced to 240 days in the St. Lucie County Jail. King died at the jail before he was released. According to his mother, Lillie King Gingras, his death was caused by an adverse reaction to the psychotropic medication Elavil, which he obtained from another prisoner.

Gingras sued EMSA and the County, individually and on behalf of her son's estate, claiming the defendants were negligent. The County was negligent, she contended, because jailers failed to properly supervise the prisoners. She claimed EMSA was negligent for dispensing medication in little cups, which allowed the prisoner who was taking the drug to hide it in his palm

or hand and later give it to her son.

At trial EMSA contended it did not kill King. As evidence the company pointed to indefinite toxicology reports. It was equally probable, EMSA argued, that King died from an unrelated spontaneous convulsion. In addition, no one testified they saw King take the drug, and a medical examiner testified the cause of death was uncertain. After deliberating 5.5 hours, the jury found that EMSA was indeed negligent, but that its negligence did not cause King's death. The jury therefore awarded no damages.

EMSA is a subsidiary of Prison Health Services, which has been implicated in the deaths of prisoners nationwide due to neglect, non-treatment, and questionable cost-cutting measures.

Gingras was represented by Laurence C. Huttman of the Stuart, Florida, firm Rubin and Rubin. See: *Gingras v. EMSA Correctional Care, Inc.*, 19th Circuit Court of St. Lucie County, Case No. 01-CA001646. ■

\$790,000 Settlement In Ulcer Death of Georgia Jail Prisoner

In November 2005, Dekalb County, Georgia, a private medical provider, and a local hospital agreed to pay a combined total of \$790,000 to settle with the widow of a prisoner who died from a perforated ulcer.

While imprisoned in the Dekalb County Jail, the decedent, 64, was taken to Grady Memorial Hospital after he complained of stomach pains. After undergoing a CT scan, he was released with instructions to return in one week. But jail officials failed to return him to the hospital. He died one day after his scheduled follow up.

The decedent's estranged wife, Gloria Daniels, sued the County, Grady Memorial, and the now defunct Correctional Healthcare Solutions (CHS), which provided medical care at the jail. The suit, brought in state court, alleged that her husband's ulcer bled through and perforated his stomach, resulting in his death.

Daniels further contended in her lawsuit that jailers and a CHS nurse failed to obtain appropriate medical help the

night her husband died even though he was vomiting blood. She also claimed that CHS personnel were negligent in failing to return her husband to the hospital for his follow up and that the County failed to provide adequate funding to maintain appropriate medical staffing levels.

Daniels additionally argued that hospital personnel neglected to perform an abdominal exam on her husband and that the radiologist overlooked evidence in the CT scan of free air in the stomach--an indication the stomach was perforated and required immediate medical attention.

The \$790,000 settlement was reached after extended mediation. CHS agreed to pay \$400,000, the hospital \$325,000, and Dekalb County \$65,000. Daniels insisted the settlement not be confidential. She was represented by Craig T. Jones, Roderick E. Edmond, and Hezekiah Sistrunk Jr., all of Atlanta. See: *Daniels v. Correctional Healthcare Solutions*, Fulton County Court, Case No. 03CSO46785F. ■

Source: *The Georgia Trial Reporter*

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Tolling Provision Appeals to NY Personal Injury Action

The New York Court Of Appeals held that “the year-and-90-day period contained in General Municipal Law § 50-; is a statute of limitations (to which the tolling provision of CPLR § 205[a] applies)” rather than a condition precedent to suit.

On December 17, 1997, New York City Department of Corrections prisoner Joseph Campbell was being transported in a van. Due to a broken leg, he was in a wheelchair which was not properly secured and fell over during transport, causing Campbell to fall and injure himself.

On March 19, 1998, Campbell filed a timely notice of claim on the City, pursuant to General Municipal Law § 50-e. On March 3, 1999, Campbell brought suit in federal court, but the action was dismissed on April 8, 2002, pursuant to 42 U.S.C. § 1997e(a), for failure to exhaust administrative remedies. The federal court declined to exercise pendent jurisdiction over Campbell's state law claims.

On July 10, 2002, Campbell brought a personal injury action in the state Supreme Court against the City and officers involved in a December 17, 1997 incident.

The City moved to dismiss, arguing “that the action was time-barred under General Municipal Law § 50-i, which provides that no personal injury action shall be maintained against the City unless the action is ‘commenced within one year and ninety days after the happening of the event upon which the claim is based.’ Specifically, the City maintained that section 50-I is a condition precedent to suit, not a statute of limitations subject to the tolling provision of CPLR § 205(a).” Relying on *Yonkers Contracting Co. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y. 2d 375 (1999), the Supreme Court granted the City's motion, and the Appellate Division affirmed.

The Court of Appeals reversed, explaining that it has consistently treated the year-and-90-day provision contained in section 50-I as a statute of limitations and that the City presented no valid reason “for departing from this consistent precedent.” The court also found that the City, and lower courts, mistakenly relied upon *Yonkers* because the express terms of § 50-I and its legislative background are “distinctly different” than the statute at issue in *Yonkers*. “Thus, there is no

evidence that the Legislature intended the year-and-90-day provision of section 50-I as a condition precedent to suit.”

See: *Campbell v. City of New York*, 4 N.Y.3d 200, 825 N.E.2d 121 (NY Ct. App. 2005). ■

No Qualified Immunity for Failure to Perform Timely Liver Biopsy

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals affirmed a ruling by the U.S. District Court (N.D. Cal.) that the failure of a prison health care manager to provide a Hepatitis-C positive (HCV+) prisoner with a timely liver biopsy amounted to deliberate indifference to his serious medical needs and was not protected by qualified immunity.

Markus Tatum, while incarcerated at California's supermax Pelican Bay State Prison (PBSP), was approved for a liver biopsy by PBSP Health Care Manager Dwight Winslow in January 2001, but treatment was delayed for over a year. Under the terms of the settlement in *Madrid v. Gomez*, 889 F.Supp. 1146, 1200-27 (N.D. Cal. 1995), qualified PBSP HCV+ prisoners were mandated to have their liver biopsies within six weeks of request. [See: *PLN*, May 2004, pp.3-4.] This requirement was not abated by Tatum's transfer from PBSP in August 2001.

After exhausting administrative remedies, Tatum sued under 42 U.S.C. § 1983. The district court's denial of Winslow's motion for summary judgment based upon qualified immunity was reviewed under the recent two-part test of *Saucier*

v. Katz, 533 U.S. 194 (2001) [*PLN*, June 2002, p.19].

The first test, whether the behavior complained of rose to a constitutional violation, was determined against Winslow under the facts of the case. “A prisoner can establish deliberate indifference by showing that delaying treatment was ‘medically unacceptable,’” the court held, citing *Broughton v. Cutter Labs*, 622 F.2d 458 (9th Cir. 1980) [six day delay in treating hepatitis can support a claim of deliberate indifference to a prisoner's medical needs]. Other factual questions in the record relating to whether Tatum qualified for a biopsy per *Madrid*, if resolved in Tatum's favor, also supported meeting the first prong of *Saucier*.

The second prong, whether Winslow was on notice that his conduct violated Tatum's constitutional rights, was easily resolved against Winslow by the plain language of the *Madrid*-spawned hepatitis treatment protocol.

Accordingly, the Ninth Circuit affirmed the denial of Winslow's qualified immunity defense, permitting Tatum's case to proceed below. See: *Tatum v. Winslow*, 122 Fed.Appx. 309 (9th Cir. 2005) (unpublished). ■

Florida District Court Awards Federal Prisoner \$829.65 for Lost Property

The U.S. District Court for the Northern District of Florida, Tallahassee Division, has awarded a federal prisoner \$829.65 for lost property.

Plaintiff Iris Pereira sued the United States seeking compensation for several items of personal property lost during her transfer from the Federal Prison Camp in Coleman, Florida to the Federal Correctional Institution in Tallahassee, Florida. Originally styled as a complaint under 42 U.S.C. § 1983 and filed in the federal district court for the District of Columbia, the D.C. court transferred the case to the Tallahassee Division and noted that the

claims were firmly grounded in the Federal Tort Claims Act, 28 U.S.C. § 1246(b).

Observing that under the FTCA Pereira was limited to the amount of damages claimed, and that the parties did not disagree on the amount, a magistrate on April 27, 2004 recommended the court enter summary judgment sua sponte in Pereira's favor and dismiss the case with prejudice.

The district court adopted the magistrate's recommendation and on June 10, 2004, awarded Pereira \$829.65 in damages. See: *Pereira v. United States*, USDC ND FL, Case No. 4:02CV60-SPM/AK. ■

Texas Court of Criminal Appeals Reinforces DNA Testing Law

by Matthew T. Clarke

The Texas Court of Criminal Appeals (CCA) handed down a decision that removed previous restrictions against prisoners seeking DNA testing to prove their innocence.

Billy James Smith, a Texas state prisoner, filed a motion for DNA testing. The court appointed an attorney to represent him. The attorney filed a formal motion for DNA testing and attached an affidavit in which Smith declared his actual innocence of the crime. The trial court denied the motion, reasoning that it had failed to include facts in the affidavit that would establish by a preponderance of the evidence that favorable DNA testing results would establish Smith's innocence. The trial judge granted Smith's motion to take judicial notice of the trial record.

Smith's attorney then appealed. The Court of Appeals affirmed the trial court. Smith filed a pro se petition for discretionary review to the CCA. The CCA granted review and issued an opinion stating that the harsh standard it had set forth in *Kunstler v. State*, 75 S.W.3d 427 (Tex.Crim. App. 2002) no longer applied to Texas DNA testing motions.

The reason for revisiting the *Kunstler* standard, which required that a prisoner moving for DNA testing "show a reasonable probability exists that exculpatory DNA test results would prove their innocence," was that the legislature had amended the DNA testing law because of the *Kunstler* decision.

In 2003, the Texas State Legislature passed H.B. 1011, which amended Article 66.03 of the Texas Code of Criminal Procedure, changing the previous language in the article which required prisoners seeking DNA testing to show a "reasonable probability" that they would not have been "prosecuted or convicted" had favorable DNA testing results been available. The new language replaced "reasonable probability" with "preponderance of the evidence" and deleted "prosecuted or" from the statute, removing the first prong of a two-prong test that basically required the prosecutor to admit that he would not have prosecuted the case. The new standard requires that the prisoner seeking DNA testing show there is at least a 51% chance that, had he had favorable DNA testing results available, the jury would not

have convicted him.

The CCA held that the assertion of a claim of actual innocence in the affidavit supporting the DNA testing motion was essentially the same as claiming that he would not have been convicted had a jury been shown favorable DNA test results. This, combined with matters in the trial record which the CCA was able to consider because the trial judge had judicially noticed the record, indicated that favorable DNA test results would have made it probable that a jury would not have convicted Smith. The case was returned to the trial court so that DNA testing could be ordered.

In 2001, the Texas Legislature passed

one of the most progressive DNA testing laws in the country. The courts eviscerated it. [see *PLN Apr. 2003*, p. 11]. The 2003 legislature then passed an amendment to make it clear that it wanted DNA testing to be available to prisoners. This time it appears the CCA listened. It seems odd when the legislature of a state is more concerned in seeing the wrongly convicted released from prison than the states' criminal courts. It is also worth noting that, in this case, the court-appointed attorney screwed up and lost both the motion and appeal whereas the pro se prisoner was able to prevail on discretionary review. See: *Smith v. State*, 165 S.W.3d 361 (Tex. Crim.App. 2005). ■

\$769,000 Awarded For Death of Asthmatic Virginia Jail Prisoner

On May 11, 2005, a jury in Portsmouth City, Virginia, awarded \$769,000 to the family of an asthmatic prisoner who died in the city jail due to inadequate medical care.

While serving a five day sentence in the Portsmouth jail for driving with a suspended license, Mark Anthony Benthall, 23, suffered a fatal asthma attack. Benthall had suffered from severe asthma since childhood and often required hospitalization.

Benthall's mother, Linda Whitfield, sued the jail's on-call physician, Thaddeus Sutton, M.D., and Correctional Physician Services, the jail's medical provider. Whitfield alleged her son had made numerous requests for medical attention prior to losing consciousness and that he died due to the defendant's failure to provide timely treatment.

Dr. Sutton claimed his authority over the prisoner was limited and that he

ordered medications which Benthall never received. He further contended that he left specific instructions for Benthall to be taken to the hospital if his condition worsened. The jail's principle nurse, who testified for Whitfield, claimed she had to call Sutton several times as Benthall's condition worsened before receiving permission to transfer him to the emergency room. By the time Benthall arrived at the hospital, however, he was already brain dead.

After deliberating 2.5 hours, the jury awarded Benthall's 3-year-old daughter \$750,000 in compensatory damages and \$19,000 for medical and funeral expenses.

Whitfield was represented by attorneys Stephen Bricker and Michael Herring, both of Richmond, Virginia. Whitfield had also retained expert witness Lawrence B. Schwartz, M.D., a Richmond allergist. See: *Whitfield v. Sutton*, Portsmouth County Circuit Court, Case No. CL405-00. ■

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No Qualified Immunity for Retaliatory Transfer; Jury Awards \$219,000 in Damages

The Sixth Circuit Court of Appeals has held that a guard is not entitled to qualified immunity for initiating a retaliatory prison transfer against a prisoner who had complained to the guard's supervisor that the guard failed to authorize money disbursements to pay the prisoner's lawyer.

Michigan prisoner Darrell Siggers-El filed suit against David Barlow, a guard at Michigan's Mound Correctional Facility in Detroit, alleging a First Amendment violation for retaliating against him for trying to access the courts. The district court denied Barlow's motion for summary judgment on qualified immunity grounds, and Barlow appealed.

Siggers-El approached Barlow in the fall of 2000 requesting he authorize disbursement of \$300 to a lawyer who had agreed to review Siggers-El's appellate brief and file concerning his criminal conviction. When Barlow noticed the attorney's surname of "El," he asked if she was black and part of Siggers-El's religious organization. Sigger-El's positive response resulted in Barlow stating, "I don't mean for this to sound racist, but you would probably have a better chance with a white lawyer." When Siggers-El asked why Barlow believed this, Barlow replied, "Since most crimes are committed by blacks, judges tend to associate black lawyers with crime. I know this. My brother-in-law is a lawyer." Barlow then refused to authorize the disbursement.

A few hours later, Siggers-El told Assistant Deputy Warden Thomas Reger of Barlow's refusal. Reger ordered Barlow to process the disbursement. Barlow summoned Siggers-El to his office and angrily stated, "If you ever go over my head again, your ass is out of here."

In early January 2001, Siggers-El requested another \$300 disbursement to pay his lawyer to interview him. After a week, Siggers-El asked Barlow to check on its status. Barlow later advised the money was sent. The next day, Siggers-El received the disbursement request marked "rejected." Barlow threw Siggers-El out of his office when asked about the disbursement. The Warden's administrative assistant agreed to expedite the disbursement on Siggers-El's request.

The next day Barlow said to Siggers-

El, "didn't I tell you what would happen if you ever (went) over my head again?" Two days later Barlow filled out a Security Classification Screen designating Siggers-El "for transfer." 26 days later, Siggers-El was transferred to Adrian Regional Facility, which caused him to lose his high-paying prison job that he needed to pay his lawyer. The transfer also made it more difficult for the attorney to visit and represent him by moving him to a remote prison.

Barlow argued there was no constitutional violation because the acts of "going over the heads" of prison officials is not protected because it is "inconsistent with [plaintiff's] status as a prisoner or with the legitimate penological objectives of the corrections system," for it is disruptive to the orderly function of the prison. The Sixth Circuit found Siggers-El's ac-

tions were part of his attempt to access the courts. The appellate court held that Barlow's act of filling out the security screen would inexorably lead to a transfer, and such a transfer would "deter a person of ordinary firmness from the exercise of the right at stake." This, combined with the foreseeable consequences, made the transfer retaliatory.

The appeals court further held that it was clearly established in law that such a retaliatory transfer was unconstitutional. As such, the Court affirmed the district court's denial of Barlow's summary judgment motion. See: *Siggers-El v. Barlow*, 412 F.3d 693 (6th Cir. 2005). Note: In November 2005, a federal jury ruled in Siggers-El's favor and awarded him \$19,000 in compensatory damages and \$200,000 in punitive damages. ■

California Third-Level Administrative Appeals May Be Filed with Prison Appeals Coordinator

by John E. Dannenberg

The Solano County Superior Court ordered that when a California Department of Corrections (CDC) prisoner files a third (Director) level administrative appeal, he need not mail it via U.S. Mail to the Director of Corrections as noted on the bottom of the Form 602 appeal form, but may submit it to the prison Appeals Coordinator via institutional mail — who then has the duty to forward it to the Director's appeals representative.

Michael Brodheim alleged in a habeas corpus petition that the California Medical Facility State Prison (CMF) violated prison regulations by forcing him to use U.S. Mail to deliver a third level appeal to the Inmate Appeals Branch in Sacramento, and thus personally incur the costs of postage. CDC replied that Brodheim had not demonstrated any violation of due process or right of access to the courts. The superior court answered that prisoners have a right to seek enforcement of statutes and regulations and may initiate a habeas proceeding to "compel a state or local official to comply with duties imposed on him by regulation, statute or constitutional provision."

At issue was the interpretation of prison regulation § 3084.2, which states "At the formal levels, the appeal shall be forwarded to the appeals coordinator within the time limits prescribed in section 3084.6." Although respondent pointed to another section (3084.5(e)(2)), which states that third level appeals will be reviewed by a designated person at the Director's level, it does not specify any delivery process and was therefore irrelevant. Since third level appeals often contain weighty exhibits, the prisoner's cost burden becomes a significant financial disincentive to seeking third-level redress. CDC, on the other hand, has its own inter-prison mail system and would incur no added cost.

The superior court ordered CMF to comply with "the unambiguous language of section 3084.2(c), requiring the appeals coordinator to accept and process all formal level appeals, including the third level." Since CDC must treat all prisoners equally, the practical effect of the order is to apply statewide. See: *In re Michael Brodheim*, Solano Superior Court No. FCR219566, Aug. 8, 2005. ■

Ohio Pre-S.B. No. 2 Indeterminately Sentenced Prisoners Who Took a Plea are Entitled to Meaningful New Parole Hearings

by John E. Dannenberg

The Ohio State Court of Appeals, Tenth Appellate District, ruled that the class of Ohio state prisoners who, prior to the enactment of S.B. No. 2 in 1996, had pled guilty or no contest to lesser or fewer charges than they were indicted for and who have now reached parole eligibility on their resulting indeterminate sentences, are constitutionally entitled to new "meaningful parole hearings." In so ruling, the appellate court resolved some of the inconsistencies that arose when S.B. No. 2 abolished indeterminate sentences for most crimes and set determinate terms that could result in lesser punishment for similar crimes committed after the 1996 enactment.

Douglas Ankrom and numerous other parole-eligible indeterminately sentenced Ohio prisoners who had taken a plea for their convictions had successfully sued Harry Hageman and other officials of the Ohio Adult Parole Authority (OAPA) in the Franklin County Court of Common Pleas. That court agreed with plaintiffs that the OAPA's post-S.B. No. 2 changes to its methods for determining the risk of release of pre-S.B. No. 2 indeterminately sentenced prisoners violated the prisoners' rights to due process and equal protection of the laws, as well as their contractual rights under their plea agreements. The challenged method, dubbed "the matrix," attempted to quantify each prisoner's risk according to two axis's of numerical values assigned to the "felony level of their most serious offense" and to their history-based risk of recidivism. The matrix yielded five possible gradations of parole risk, indicating both if and when the prisoner should be paroled.

However, on March 1, 1998, OAPA revised (without regulatory change or approval) the matrix. They retained the recidivism risk rating factor but replaced the former "felony level of the offense" with a new creation, the "offense category." While at first this might appear to mirror the earlier scheme, a serious discrepancy appeared because a prisoner's "offense category" may include scoring related to offenses he was originally only charged with but not convicted of due to plea bargains. Thus, post-1998, all pre-S.B. No. 2 sentenced prisoners who had taken pleas found themselves in the disadvantaged position of being parole

ineligible until they had done the time for the greater convictions they had avoided through their pleas.

Following a pro se lawsuit filed in February 2001, the public defender entered an appearance and gained class certification. In August 2004 the trial court granted summary judgment in favor of the prisoner plaintiffs, and the OAPA appealed. The appellate court held that the OAPA "impermissibly attempted to exercise the same function of the judiciary in executing its own authority" by setting standards that in effect disregarded the

trial court's sentence." Curiously, the court found that the OAPA was not bound to make regulatory changes under the APA to implement its policies because they are only discretionary policies, not administrative rules.

Accordingly, the appeals court sustained the gravamen of the Court of Common Pleas' ruling, leaving open for future interpretation the meaning of the subjective expression "meaningful parole hearing." See: *Ankrom v. Hageman*, Ohio Court of Appeals, Tenth District, 2005 WL 737833 (unpublished). ■

Ninth Circuit Holds Prisons Not Immune In ADA and RA Suit

The Ninth Circuit Court of Appeals held that state prisons are not entitled to Eleventh Amendment immunity from suits brought by prisoners under the Americans with Disabilities Act (ADA).

Billy Ray Phiffer, an Oregon state prisoner, filed suit in federal court under the ADA. The state filed a motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity. The district court denied the motion. Oregon filed an interlocutory appeal and the Ninth Circuit affirmed. Oregon then filed a petition for a writ of certiorari in the Supreme Court, which was granted. The Supreme Court vacated the Ninth Circuit's opinion and returned the case to the appellate court for reconsideration in light of the Supreme Court's recent deci-

sion in *Tennessee v. Lane*, 126 S.Ct. 1778 (2004), in which it ruled that the ADA validly abrogated Eleventh Amendment immunity.

On remand, the Ninth Circuit held that Oregon was not entitled to Eleventh Amendment immunity under Title II of the ADA. It also held that Oregon had clearly waived its Eleventh Amendment immunity under section 506 of the Rehabilitation Act by accepting federal funds. Therefore, the district court's denial of the motion for judgment on the pleadings was affirmed and the case returned to the district court for further proceedings. Phiffer was represented on appeal by attorney Dawna F. Scott of Lake Oswego, Oregon. See: *Phiffer v. Columbia River Correctional Institute*, 384 F.3d 791 (9th Cir. 2004), cert. denied, 126 S.Ct. 1140 (2006). ■

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Alabama Clarifies Prisoners' Right to Call Witnesses At Disciplinary Hearing

by Matthew T. Clarke

The Court of Criminal Appeals of Alabama held that prison officials may not use excuses such as "off duty" or "unable to reach by phone" to deny prisoners' witnesses at disciplinary hearings.

Lebron Luster, an Alabama state prisoner, filed a petition for writ of habeas corpus in state district court when he was convicted of a disciplinary violation after prison officials refused to allow two witnesses to testify for him at the disciplinary hearing. Following the filing of the state's response, the district court summarily dismissed the petition. Luster appealed.

Luster was found guilty of violating Rule # E9, Regulation # 403 (absconding -- absent without permission). His punishment included loss of privileges for 45 days and a referral for custody review. Luster alleged that he was removed from work release because of the disciplinary violation. The Alabama Supreme Court had previously held that prisoners have a liberty interest in remaining on work release. *Ex parte Berry*, 794 So.2d 307 (Ala. 2000).

One of Luster's requested witnesses was his work supervisor. During the disciplinary hearing, prison officials allegedly made a hurried, last-minute telephone call but were unable to reach the supervisor. They wrote "not available" on the disciplinary report explaining the denial of the witnesses.

"An inmate facing a disciplinary proceeding should be allowed to call witnesses in his defense, when doing so will not be unduly hazardous to institutional safety or correctional goals." *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 61 L.Ed.2d 935 (1976). "Denying the presence of a witness because of the mere fact that the requested witness is 'off duty' or 'cannot be reached by phone' does not comport with those due process rights

afforded in both *Williams v. Davis*, 386 So.2d 615 (Ala. 1980) and *Wolff*, supra." *Lewis v. State*, 485 So.2d 81 (Ala.Cr.App. 1986), quoting *Ex parte Bland*, 441 So.2d 122 (Ala. 1983).

Merely writing that a witness is "not available" on the disciplinary form does not satisfy the requirement that specific findings of fact be made regarding the reason a witness is not available. Thus, if his allegations were true, the appellate court found that Luster was entitled to a new disciplinary hearing. The lower court's dismissal was reversed and the

case returned to the district court with instructions to set aside its order of dismissal, conduct a hearing to determine why the witnesses weren't available, make specific findings of fact thereon, and order a new disciplinary hearing for Luster if the reasons did not comport with *Wolff*. The district clerk was instructed to forward a transcript of the hearing and the district court's findings to the Court of Criminal Appeals within 42 days of the release of the opinion. See: *Luster v. State*, 926 So. 2d 1080 (Al. 2005) and 2004 Ala.Crim.App. Lexis 159. ■

RLUIPA Bars Total Ban on Melanic Literature

A Michigan federal district court has entered an injunction that bars the Michigan Department of Corrections (MDOC) from continuing a total ban on Melanic literature, requiring MDOC officials to screen such literature to ensure prohibited materials are prevented entry into MDOC prisons.

The court's order comes in a civil rights action filed by MDOC prisoner Fingal E. Johnson, which was certified as a class action and has seen over five years of litigation. Before the court was what it construed as opposing motions for summary judgment.

This action started after MDOC classified the Melanic Islamic Palace of the Rising Sun and its imprisoned members as a Security Threat Group (STG). That classification came after several Melanics were involved in a riot at MDOC's Chippewa Valley prison. Johnson describes the Melanic faith as a religion that is significantly influenced by Islam and other spiritual philosophies. Because of the STG classification MDOC ordered all Melanic materials to be disposed of by prisoners, and placed a blanket ban on all incoming Melanic literature.

The prisoners argued the total ban violated the First Amendment, Due Process Clause, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Before addressing these ques-

tions, the court addressed the defendants' qualified immunity motion. The court held there was no clearly established law that a total ban of material from a group with the STG classification or the Melanics specifically was constitutionally forbidden, making the defendants immune on the First Amendment claim.

The court also found that because the prisoners were given seven business days notice that MDOC was going to confiscate all Melanic materials and they were able to grieve that confiscation, the prisoners' due process claim failed, entitling defendants to qualified immunity. Finally, the court held the defendants were qualifiedly immune from damages under RLUIPA because the RLUIPA was not in effect at the time of the January 12, 2000 MDOC order on Melanic literature.

Moving to the request for declaratory and injunctive relief, the court found that the MDOC's total ban on Melanic Literature was reasonably related to MDOC's penological needs. Therefore, the court held that under *Turner v. Safely*, 482 U.S. 78 (1987), the prisoners' First Amendment claim failed.

The court, however, found that RLUIPA imposes a heightened burden on MDOC, requiring that any substantial burden on an imprisoned person's religious exercise must further "a compelling governmental interest" and be done "by the least restrictive means possible." The court held that rather

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than a total ban on Melanic Literature, the MDOC can screen the literature to assure it does not contain threats to prison security.

Accordingly, the court granted the prison officials summary judgment on

the First Amendment and Due Process claims, but "reluctantly" entered injunctive relief on the RLUIPA claim, barring a total ban on Melanic materials. See: *Johnson v. Martin*, 2005 WL 3312566 (USDC, W.D.Mich. 2005).

In a subsequent ruling on the MDOC's motion for reconsideration, the district court upheld its previous ruling granting injunctive relief. See: *Johnson v. Martin*, 2006 WL 223108 (USDC, W.D.Mich. 2006). ■

California Supreme Court Resolves Conflict From Concurrent Sentences With Different Credit Earning Rates

by John E. Dannenberg

The California Supreme Court held that when a prisoner is sentenced to two concurrent prison terms, the shorter of which is for a violent felony eligible only for 15% good-time credits and the longer of which is for a non-violent felony eligible for 1/2 time credits, the prisoner is limited by the 15% rate only for the duration of the shorter sentence, and thereafter may earn 1/2 time credits for the remaining term of the non-violent offense.

James Reeves was sentenced to ten years in state prison for a non-violent drug offense and to five years for a violent assault offense. The ten year term qualified for 1/2 time conduct credit earning while the five year term was restricted to only 15% credit earning under California Penal Code (PC) § 2933.1, since the latter crime was violent. Because the trial judge did not announce that the sentences were to run consecutively, they were presumed to run concurrently (PC § 669(2)).

The California Department of Corrections (CDC) deemed Reeves' concurrent sentences to be a single term with a unitary credit earning status devolving solely from the violent crime. Reeves argued the opposite, that the longer term (non-violent, and not subject to § 2933.1) subsumed the shorter one, and that he should get 1/2 time credits for the total concurrent term.

The California Supreme Court split the difference. It ruled that for the first five years, Reeves was serving time for both violent and non-violent offenses, and that the former must control. To not do so would frustrate the purpose of § 2933.1, which was to impose harsher punishment for violent offenses. But once he had completed that term, he should not be punished similarly for his non-overlapping time for the non-violent drug crime.

However, the court agreed with the state that such lenity does not attach to consecutive sentences. The statutory scheme for that case is clear; the harsher credit restriction of § 2933.1 controls. Thus, had Reeves instead been sentenced to consecutive terms, he would have had

to do 85% of 15 years. California readers should keep this in mind when negotiating

plea bargains. See: *In re Reeves*, 35 Cal.4th 765, 28 Cal.Rptr.3d 4 (Cal. 2005). ■

Washington Court's Authority to Order Community Custody Limited

A Washington Appeals Court has held that an amended statute limits a trial court's ability to sentence criminal defendants to community custody in only specified offenses. The matter was on appeal after a Spokane County Superior Court denied a petition filed by the Washington Department of Corrections (WDOC), taking a review of the sentences of Tamra A. Jones, Ty J. Jordan, and Donald Konshuk (the defendants).

The Superior Court sentenced each of the defendants to a period of confinement of less than one year followed by a term community custody that had as a condition being evaluated and treated for substance abuse. The Court then imposed the terms of community custody under RCW 9.94A.545, based on its findings that the chemical dependency of the defendants contributed to their committing the crimes of conviction.

The Appellate Court stated that prior to amendment in 2003, RCW 9.94A.545 authorized a superior court to impose community custody in all sentences for felonies that imposed confinement time of one year or less. The amendment, however, limited that authorization to "sentences of confinement for one year or less, in

which the offender is convicted of a sex offense, a violent offense, a crime against a person... or felony violation of Chapter 69.50 or 69.52 RCW."

The Appellate Court held that RCW 9.94A.545 was clear on its face and unambiguously limits the court's authority to impose community custody. Moreover, the amending legislation indicates a legislative intent to limit the expenditure of WDOC's community supervision resources to more serious offenders.

Accordingly, the Superior Court's order was reversed because it was without authority to impose community custody in the case at issue, for did not include convictions for the specified offenses enumerated in RCW 9.94A.545. See: *In re sentence of Jones*, 129 Wn.App. 626, 120 P.3d 84 (Wa.App. III 2005). ■

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News in Brief:

Arizona: On February 23, 2006, Jamie Wanek, a guard at the Maricopa county jail in Phoenix was charged with 57 felony and misdemeanor counts of having sex with a jail prisoner Joshua Lopez, 30, and bringing him alcohol, drugs and other contraband. Lopez has also been charged with promoting contraband and unlawful sexual conduct.

Arizona: On May 10, 2006, an unidentified guard at the Perryville prison shot himself in his leg while undergoing weapons qualification training at the prison's firing range.

California: On February 2, 2006, FBI agents arrested Juan Cortes, 34, Anthony Robuffo, 39, Ricardo Campos, 26 and Juan Nieto, 30, all guards at the federal Metropolitan Detention Center in Los Angeles on charges that they took bribes from prisoners in exchange for smuggling cigarettes and cell phones into the jail for them. According to prosecutors, the guards accepted bribes ranging from \$1,000 to \$6,000 to bring the contraband into the jail. For example, Cortes is accused of accepting a \$6,000 bribe in exchange for providing a prisoner with a cell phone and two cartons of cigarettes. Nieto of accepting \$1,000 in exchange for two cartons of cigarettes.

China: In December, 2005, the Chinese government announced it would allow the United Nations special rapporteur on torture to tour the nation's prisons and meet with prisoners. The Chinese government has previously resisted such efforts and the decision to allow the inspections is seen as an effort to improve the nation's compliance with human rights accords. By contrast, the United States refuses to allow United Nations inspectors to tour US prisons or meet with American prisoners.

England: During a December, 2005, inspection by members of the Prison Reform Trust of an 800 bed men's jail in Manchester, run by the private, for profit, UK Detention Services, three guards were doused with a bucket of human excrement by disgruntled prisoners. PRT reported serious safety issues at the jail which averaged over 25 assaults a month, 2,500 disciplinary charges in a six month period and 40% of all prisoner drug tests being returned positive for drug use.

Florida: In an effort to encourage informants, the Polk County sheriff's office has printed decks of cards which it distributes for free to jail prisoners that

depict assorted unsolved crimes, mostly homicides, soliciting tips and information. The deck of cards has led to at least two indictments when an unidentified jail prisoner saw the card depicting the murder of methamphetamine dealer Thomas Grammar. Based on the tip police have charged Jason Seawright, 29, and Reggie Williams, with Grammar's murder.

Georgia: On December 22, 2005, Cleotis Heard, a jail guard at the Fulton county jail, was arrested and charged with stealing and using a jail prisoner's debit card. Heard was assigned to the booking area of the jail. It was not disclosed how much money he stole from the prisoner.

Georgia: On February 23, 2006, Jesse Paul, 38, was sentenced to ten years in prison without parole and ten years probation for fighting with another prisoner in the Harris county jail while awaiting trial on auto theft charges. Assistant district attorney Dan Trimble said the sentence was warranted by the fact that since 1986 Paul had racked up seven felony convictions and spent 11 ½ years in prison, all for stealing cars. This sentence will be served concurrently with a five year sentence for auto theft. A jury rejected an aggravated assault charge in the same case which had involved Paul gouging another prisoner's eye after the two exchanged words about Paul's girlfriend. The other prisoner was not injured.

Indiana: On March 28, 2006, Jason Kendall, 24, a guard at the Putnamville Correctional Facility was arrested on charges of trafficking with a prisoner.

Louisiana: On February 23, 2006, Sylvia Amato, 72, was arrested and charged with attempting to bring a loaded .22 caliber revolver into the Louisiana State Prison in Angola while visiting Peter Mule, an alleged member of the "Dixie Mafia" serving time for a 1971 murder. Upon entering the prison Amato declared and surrendered a .38 caliber revolver but said she forgot about the smaller gun.

Maryland: On January 18, 2006, Deidre "Dee" Farmer, the transsexual plaintiff in the Supreme Court prisoner rape case of *Farmer v. Brennan*, was indicted by a federal grand jury on mail fraud, conspiracy and identity theft charges stemming from alleged credit card fraud. Farmer had been released from prison less than a year earlier on February 15, 2005, when a judge had declared Farmer, then purportedly blind, bed ridden and dying of AIDS, to no longer be "a threat

to society." Farmer had been imprisoned for over a decade on credit card fraud charges as well.

Michigan: On December 6, 2006, Timothy Luoma, the warden of the Baraga Maximum Correctional Facility and deputy warden Darlene Edlund, were removed from their positions after prisoner Garfield Lawson III escaped on August 6, 2005, with the aid of prison kitchen worker Kathy Sleep. They were recaptured in Wisconsin. Apparently this is the first disciplinary action against a prison warden in the Michigan DOC in the last 20 years.

Missouri: On January 22, 2006, the Cape Girardeau county jail was partially evacuated due to a carbon monoxide leak in a natural gas vent. The leak was discovered after prisoners and guards in one unit began complaining of headaches and nausea. 32 prisoners and seven employees were affected by the leak.

New Jersey: On May 6, 2006, the Department of Corrections announced that it would sell 16 houses located near prisons where seven prison wardens, who each earn \$91,000 a year, are now living rent free at tax payer expense. The move came as legislators expressed shock that high paid prison officials were living rent free in prison owned house, a practice that has been going on for decades.

New York: On May 12, 2006, Christine Sullivan, 50, a former administrator at the Federal Correctional Institution in Raybrook pleaded guilty to altering Bureau of Prison records to allow for the transfer of a medium security prisoner from that facility to a low security in a different state. Prosecutors did not disclose the name of the prisoner involved nor Sullivan's motivation in falsifying the records.

New Zealand: The government announced on May 12, 2006, that it would no longer store semen for prisoners convicted of murder and other serious crimes while they undergo medical procedures. The ban was announced after media revealed the government had paid to store the semen of a sex offender prisoner undergoing treatment for cancer.

Nigeria: On January 3, 2006, the federal government ordered the immediate release of almost 25,000 prisoners, mostly pre trial detainees, from the country's 277 prisons, to relieve overcrowding. The government also announced the creation of a Chief Inspector

of Prisons and Board of Visitors to monitor conditions in the nation's prisons, which also house pretrial detainees who have not been convicted of anything.

Ohio: On January 16, 2006, Ronald Pruitt, a guard with the Department of Rehabilitation and Correction, was arrested and charged with felonious assault stemming from his shooting of his fellow guard Daniel Thomas, 40, in the arm and leg at an Ohio State University parking lot. Both men guarded prisoners brought to the OSU hospital for medical exams. Pruitt used his own pistol in the shooting, not the state's. Pruitt was released on bond awaiting trial.

Oklahoma: On January 17, 2006, Oklahoma county deputy prosecutor Monty Mayfield, 34, was fired from his job after being arrested on public drunkenness charges at a Bon Jovi concert.

Rhode Island: On May 5, 2006, Captain Gualter Botas, 37; Lt. Kenneth Vivieros, 53, and guard Ernesto Spaziano, 37, were arrested and charged with beating state prisoner Michael Walsh, 30. Walsh claims the defendants also forced him to eat his own feces. The defendants were released on their own recognizance.

Texas: In February, 2006, vice president Richard Cheney accidentally shot Harry Whittington, 78, with a shotgun while the two men were quail hunting on a Texas ranch. Whittington was shot in the face and chest and recovered from the wounds. Whittington is an Austin attorney who has served on the Texas Board of Criminal Justice where he advocated reform and improvement of the Texas prison system.

Texas: On December 30, 2005, Damien Wheeler, 23, a prisoner at the Civigenics run Bi-State Jail in Texarkana died shortly after being involved in a fist fight with prisoner Nathaniel Cleveland, 19.

Utah: In February, 2006, Bert Jackson, 99, was released from prison after serving 3 years of a 15 year sentence for child molestation. Jackson had the distinction of being Utah's oldest prisoner.

Utah: On February 24, 2006, the Utah Supreme Court ordered that Hilldale judge Walter Steed be removed from the bench because he is a polygamist with three wives. This violates Utah's law against bigamy. Steed had served as a judge for 25 years and been married to the three women, who are sisters, since 1965, 1975 and 1985. He has a total of 32 children with his three wives. Prosecutors have declined to prosecute Steed and other polygamists criminally unless the

bigamy also involves another crime such as domestic violence or child rape due to its prevalence in Utah.

Uzbekistan: On December 22, 2005, the Uzbek Military Court sentenced 24 former prison guards and officials from the Andijan prison to one to three years in prison after convicting them of abusing their power and neglecting their duties.

Wisconsin: In 2001 Christopher Ochoa, 39, was freed from prison after being exonerated in the murder of an

Austin, Texas Pizza Hut worker. In May, 2006, he graduated from the University of Wisconsin law school with a law degree. Ochoa said he hopes to become a prosecutor so he can control investigations. As previously reported in *PLN*, Ochoa and his also wrongfully convicted co-defendant Richard Danziger both received a multi million dollar settlement from Austin police stemming from their wrongful conviction and the 12 years they both spent in prison as a result. ■

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Actual Innocence Required in Washington "Criminal Malpractice" Actions

In a 5-4 decision, the Washington Supreme Court held that plaintiffs suing criminal defense attorneys for legal malpractice must prove that they are innocent of the underlying criminal charge.

Dr. Jessie Ang and his wife were prosecuted on 18 criminal counts, including conspiracy to defraud the United States, bank and tax fraud, and filing false statements related to two sets of signed tax forms reporting conflicting income.

The Angs retained attorneys Richard Hansen and Michael G. Martin to defend them. Prior to trial, counsel attempted to get the Angs to plead guilty but they rejected the government's plea offers.

Trial commenced in December 1997. "On the fifth day of trial, just prior to the conclusion of the government's case, counsel again attempted to induce the Angs into accepting a plea." They rejected the offer as being the least attractive, yet. They later agreed to plead guilty, however, when Dr. Ang was told his wife could face sexual assault in prison.

Before the pleas were entered, the Angs retained attorney Monte Hester "to review the plea discussions and provide a second opinion. Hester concluded the government had not met its burden of proof and that the plea agreement provided the Angs with no material benefit." The Angs then replaced Hansen and Martin with Hester and another attorney,

Keith MacFie.

They withdrew their pleas and in September 1999 proceeded to trial again. The government again offered a plea, which the Angs rejected, and they were acquitted of all counts at trial.

The Angs and their corporation sued Hansen and Martin for legal malpractice. The case proceeded to trial and the court instructed the jury that the Angs must prove that they were innocent of the underlying criminal charges. The jury found that they failed to do so. The Court of Appeals affirmed the judgment and the Supreme Court granted review.

Citing *Falkner v. Foshaug*, 108 Wash. App. 113 (2001), the Court explained that in a "criminal malpractice" action — one involving "legal malpractice in the course of defending a client accused of a crime" -- a plaintiff must prove that they successfully challenged their convictions and are actually innocent of the crimes charged.

The Court rejected the Angs' argument that their acquittal satisfied both *Falkner* requirements. The Court concluded that legal innocence and actual innocence are not the same. Therefore, "the Angs were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges."

Judge Sanders and three other judges dissented, concluding that "the malpractice standard for criminal cases should be the same as [for] civil." Moreover, *Falkner* "is not binding authority, nor is case law from other jurisdictions upon which *Falkner* is based." He was not "persuaded by [*Falkner's*] logic." Finally, Judge Sanders suggested "the majority's rule simply invites malpractice since the defense attorney knows he is held to a lower standard. Proving innocence is impossible since a negative cannot be proved." See: *Ang v. Martin*, 154 Wash.2d 477, 114 P.3d 637 (Wash. 2005). ■

Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 915 15th St. N.W., 7th Floor, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. FAMM-gram, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rul

ings, administrative developments and news about the Florida DOC. \$10 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 1511, Christmas, Florida 32709.

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.

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Writing to Win: The Legal Writer, Steven D. Stark. Broadway Books, 283 pages. \$15.95. Explains the writing of effective complaints, responses, briefs, motions and other legal papers. 1035

The Celling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 Pages. \$19.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

Everyday Letters For Busy People, by Debra Hart May, 287 pages. \$15.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters 1048

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$11.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

Spanish-English/English-Spanish Dictionary, 60,000+ entries, Random House, \$5.99 Two sections, Spanish-English and English-Spanish. All entries listed from A to Z. Hundreds of new words. Includes Western Hemisphere usage. 1034

Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. & Canada, by Jon Marc Taylor, 341 pages. \$24.95. Includes contact info & outlines courses offered by over 250 education providers. Info on high school, vocational, paralegal, law, college and graduate courses. One of a kind prisoner resource. 1047

The Citebook, 21st ed., by Tony Darwin, Starlite, 306 pages, \$41.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

Deposition Handbook, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$29.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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Actual Innocence: When Justice Goes Wrong and How To Make It Right, updated pb., by Barry Scheck, Peter Neufeld and Jim Dwyer, 432 pages. \$9.99. Two of O.J.'s attorney's explain how defendants are wrongly convicted on a regular basis. Detailed explanation of DNA testing and how it works to free the innocent. Devastating critique of police and prosecutorial misconduct and the system that ensures those abuses continue. 1030

Roget's Thesaurus, 717 pages. \$5.99. Over 11,000 words listed alphabetically linked to over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and identifies informal and slang words. 1045

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Capital Crimes, by George Winslow, 360 pages. \$19.00. Explains how economic policies create and foster crime and how corporate and government crime is rarely pursued or punished. 1024

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$17.00. Documented and has first hand reporting on law enforcement's war on the poor. Covers paramilitary policing and SWAT teams, the INS and prisons. 1002

The Perpetual Prisoner Machine: How America Profits from Crime, by Joel Dyer, 318 pages. \$19.00. Exposes how private prisons, banks, investors and small companies profit from the prison industrial complex, and prison growth adds to revenue & profits. 1025

Crime and Punishment In America, by Elliott Currie, 230 pages. \$12.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

Worse Than Slavery: Parchman Farm & the Ordeal of Jim Crow Justice, by David Oshinsky, 306 pgs \$14.00. Analysis of prison labors roots in slavery. Focuses on prison plantations and self sustaining prisons. Must reading to understand prison slave labor today. 1007

States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World, by Danny Cox & John Hoover, 256 pages, \$14.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

BOP Occupational Training Programs Directory, 124 pgs. \$10.00. Directory listing vocational and education programs available to prisoners in every federal prison. Includes contact info for BOP national, regional and CCM offices, and BOP facilities. Invaluable if considering a training or education transfer. 1053

Criminal Injustice: Confronting the Prison Crisis, by Elihu Rosenblatt; South End Press, 374 pages. \$18.00. A radical critique of the prison industrial complex. 1009

Marijuana Law: A Comprehensive Legal Manual, by Richard Boire, Ronin, 271pages. \$17.95. Examines how to reduce the probability of arrest and successful prosecution for people accused of the use, sale or possession of marijuana. Invaluable information on legal defenses, search and seizures, surveillance, asset forfeiture and drug testing. 1008

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All Things Censored: Mumia Abu-Jamal, ed. by Noelle Hanrahan, 303 pgs. **\$14.95**. Includes 75 articles by Abu-Jamal. Attacks capital punishment & critiques the dehumanizing prison system. 1040 ☐

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$13.95**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson; Lawrence Hill Books, 368 pages. **\$16.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016 ☐

The Politics of Heroin: CIA Complicity in the Global Drug Trade, April 2003 Rev Ed, by Alfred McCoy; Lawrence Hill Books, 734 pages. **\$32.95**. Latest Edition of the scholarly classic documenting U.S. government involvement in drug trafficking. 1014 ☐

No Equal Justice: Race and Class in the American Criminal Justice System, David Cole; The New Press, 218 pages. **\$15.95**. Shows how the criminal justice system perpetuates race and class inequality, creating a two tiered system of justice. 1028 ☐

Ten Men Dead: the story of the 1981 Irish hunger strike, by David Beresford, 334 pages. **\$13.50**. Relies on secret IRA documents and letters smuggled out from the IRA political prisoners during their 1981 hunger strike at Belfast's infamous Long Kesh prison. 1006 ☐

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For-Profit Transportation Companies: Taking Prisoners, and the Public, for a Ride

by Alex Friedmann

According to the latest report from the U.S. Department of Justice, Bureau of Justice Statistics, as of June 2005 approximately 2.2 million people were incarcerated in prisons and jails nationwide – not including immigration detention centers and juvenile facilities. This enormous imprisoned population is not static; prisoners are moved both intrastate and interstate on a regular basis for a variety of reasons, including court appearances, medical visits, detainer extraditions, Interstate Compact transfers and bail bond remands. A mobile, constantly-shifting “prison on wheels” is an apt analogy.

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While there are no firm statistics for the total number of prisoners transferred and extradited annually, the U.S. Marshals Service, which is responsible for the transportation of prisoners and immigration detainees in federal custody, receives around 1,000 transport requests per day and moves nearly 300,000 prisoners each year through its Justice Prisoner and Alien Transportation System (JPATS).

On the state and local level, individual jurisdictions are responsible for their own prisoner transportation needs. Although almost all sheriff's offices and state Departments of Correction maintain their own prisoner transport services, they also rely heavily on privately-operated companies, especially for interstate trips. The reasons for using such for-profit transport services boil down to cost and convenience, both related to staffing concerns. At least one and often two or more guards must be used to transport prisoners; for intrastate trips this can be an all-day undertaking while interstate extraditions often take multiple days. Consequently, staff shortages occur when county or state guards are used to transport prisoners, expenses such as gas and meals are incurred, and overtime pay may result. It is often logistically simpler and less expensive to pay a private company to provide such services.

Private Prisoner Transportation as Big Business

Private prisoner transport services operate pursuant to the Extradition Clause of the U.S. Constitution and the Extradition Act, which gives them the

same authority as public agencies that move prisoners. Private transportation guards – called “agents” in the industry – can take custody of, move and house prisoners while en route to their destination; they are allowed to carry weapons and use deadly force, but are not considered sworn law enforcement officers.

While there are numerous prisoner transport services, most are relatively small operations. At the top of the industry are multi-million dollar corporations such as TransCor, the undisputed market leader. Most private transportation companies share similar characteristics – they own their own fleet of vehicles, move prisoners by both ground and air (the latter being booked on commercial flights), and provide transport services on a fee-per-mile basis similar to the commercial trucking industry. Many use GPS tracking technology. Currently, the major prisoner transportation companies include:

- TransCor America, LLC is a wholly-owned subsidiary of Corrections Corporation of America (CCA). The Nashville, Tennessee-based company was founded in 1990 and acquired by CCA in 1994; it has approximately 300 employees and 80 vehicles, and moved more than 25,000 prisoners in 2005. The company says it maintains \$50 million in insurance coverage and boasts that it can save public agencies between 30-40% on interstate prisoner transportation costs. TransCor also claims it's the only company with the ability to perform mass transfers, stating that in 2002 it transported 795 prisoners between three states within 26 hours. Such mass prisoner moves are usually to pri-

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vately-operated prisons, such as the ones operated by its parent company CCA.

TransCor's finances are consolidated with those of CCA, its parent company, so precise financial data is difficult to obtain. But according to CCA's Form 10-K 2005 Annual Report, TransCor took in gross revenue of \$14.6 million in 2005, \$19.1 million in 2004 and \$18.9 million in 2003. The company has apparently been losing money for years, however – TransCor's 2005 expenses were \$21 million, for a net loss of \$6.5 million. CCA chief financial officer Irving Lingo, commenting on the company's poor performance, stated in a November 3, 2004 conference call that they "clearly desire to make a profit from TransCor at some point." TransCor controls an estimated 85% of the private transport market.

- PTS of America, LLC (formerly Prisoner Transportation Services, Inc.) is also located in Nashville. The company was founded in 2001 by Thor Catalogne, who previously worked for TransCor.

- Con-Link Transportation Corp., which began business in 2001, is based in Memphis, Tennessee and run by Randy L. Cagle. The company uses unarmed guards and favors diesel vehicles – which Cagle says are safer in case of fires resulting from accidents (diesels also tend to get better gas mileage, which reduces operating costs).

- U.S. Extraditions, Inc., located in Palm Bay, Florida, started in mid-2004 and primarily offers intrastate transportation services. The company has twelve full-time employees and operates five vehicles. According to company vice-president Robert Downs, who formerly worked for Mid Florida Extraditions, Inc., another private transport service, the prisoner transportation industry is "a big market."

- Security Transport Services is headquartered in Topeka, Kansas and was formed in 1995. The company maintains a staff of 40 drivers and transports no more than five prisoners at a time.

- Court Services, Inc., founded in January 2002 and based in Riverside, California, focuses on bail enforcement extradition services. Court Services is run by Eric Kindley and proudly states it has had no losses due to accidents "to date."

There are also a number of smaller companies, such as Affordable Extradition

Service, Inc., located in Woodbury, Tennessee; First Transit, Inc.'s Secure Transportation Services in New York; and Prisoner Transportation Services, LLC, based in Mesa, Arizona. Due to economies of scale it's hard for smaller prisoner transport companies to compete with the larger corporations; some go out of business while others are bought out. In December 2002, for example, TransCor acquired Tri-County Extradition, Inc., a privately-held prisoner transportation service in California with annual revenue of \$2 million. Other companies, including Federal Extradition Agency (formerly of Memphis), Extraditions International (Colorado) and State Extraditions (Florida) are no longer in operation.

Wackenhut Corp., the private security juggernaut, entered the prisoner transportation market in 2003 with its Prisoner Transport and Extradition Services, which was managed under the company's Special Police Division. Wackenhut's transport division proved to be problematic; one company employee, who did not want to be named, referred to the fee-per-mile rates commonly used in the industry as "hit and miss" and "a crapshoot." He stated that Wackenhut's prisoner transportation service, which shut down in May 2006, had approximately \$4 million in annual contracts on paper but was earning only half that amount in actual revenue. The company also had problems meeting some of its contractual obligations. On February 26, 2006, the Board of Commissioners in Bernalillo County, New Mexico voted to cancel its contract with Wackenhut because the company was "late extraditing 26 out of 50 transport prisoners from holding facilities and has continued to have difficulties meeting scheduled court ordered pick-ups." Wackenhut continues to offer prisoner transport services but now does so on an hourly-rate basis.

Typically, public agencies that need to arrange prisoner transportation can call a company's toll-free number and coordinate pick-ups, drop-offs and payments over the phone or on the Internet. Larger departments such as state prison systems usually enter into longer-term statewide contracts. For overnight and multi-day trips, private transport services house their imprisoned passengers at local jails or correctional facilities along the way, sometimes for a fee and sometimes gratis as a courtesy.

Prisoner transportation fees range from approximately \$.80 to \$1.50 per

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mile, with \$1.00 per mile being the industry average. Additional costs may apply for transporting juveniles and prisoners with medical needs, and some companies impose a fuel surcharge. These fees add up. TransCor studied Montana's prisoner transportation system in 1993, concluded the state spent approximately \$1 million each year, and said it could provide the same services for around \$650,000. From 2000 to 2006, State Extraditions billed Orange County, Florida about \$1 million for transport services (mostly through no-bid contracts; the company's co-founder, Dennis Warren, happens to be employed with the county's Corrections Department). And according to separate fixed-cost contracts between the state of Nevada, TransCor and PTS, over a two-year period from March 2005 through February 2007 the companies will receive payments of up to \$2 million. Each.

Additionally, the prisoner transportation industry has attracted ancillary businesses that cater to its specialized services, including companies that manufacture or modify secure transport vehicles, produce various types of restraint systems (including the "black boxes" that prevent handcuffs from being unlocked), and make brightly-colored clothing for prisoners to wear while they're in transit.

Some of the larger companies that sell security vehicles include Motor Coach Industries and Blue Bird, which produce heavy-duty prisoner transport buses, and Mavron, Inc. and American Custom Coach, which make specialty prisoner transport vans (Mavron also makes animal transport vehicles). Several private transportation companies, such as PTS, do their own vehicle security modifications.

The History of (and Troubles With) Privatized Transport Services

Prisoner transportation companies expanded both in number and scope during the 1990's as the U.S. prison and jail population nearly doubled over a ten-year period, largely due to tough-on-crime laws that resulted in a surge of convictions and longer sentences. The greater number of prisoners meant a greater need for prisoner transfers and extraditions, and a full-fledged industry was born.

Initially, most such services were "mom and pop" operations, sometimes

literally two-person businesses. At first there also was little regulation of privatized prisoner transportation companies – no regulatory oversight, no standards, no minimum security requirements or enforcement mechanisms to ensure that transport services were safe or provided humane treatment for the prisoners in their custody. While there were federal regulations for moving livestock and safety requirements for commercial truck drivers, few guidelines were in place for transporting prisoners. Companies were self-policed and set their own policies. As U.S. Rep. Bill McCollum put it, "Anyone with a vehicle and a driver's license can engage in this business and with very little accountability when things go wrong."

Further, private companies, by their nature, are primarily concerned with making a profit. PTS, for example, states it strives to be "number one" in the industry – not necessarily the largest, but the best in terms of "... safety, quality and *profitability*." To this extent problems within the prisoner transportation industry mirror those that exist in other areas where correctional services have been privatized: The inherent profit motivation of private transport companies, with a corresponding need to lower costs and increase revenue, has resulted in escapes, deaths, injuries and mistreatment of prisoners.

The greatest expenses for private transportation companies are those related to its employees – wages, benefits, staffing levels and training. In the 1990's private transport services had fairly low training requirements; e.g., prior to 1999, TransCor required only 40 hours of in-house training for its employees. Further, transportation companies weren't always picky about the people they hired, sometimes failing to conduct adequate background checks, and their drivers were often held to demanding travel schedules to ensure the company maximized its profit on each trip.

As a result, prisoners who were extradited by private transportation services raised repeated complaints, such as transport guards speeding, driving recklessly and staying behind the wheel for lengthy periods of time – even to the point of falling asleep while on the road. Prisoners were sometimes held in full restraints with no stops for food, water or restroom breaks for over 12 hours at a time. Prisoners with serious medical needs were neglected; others were held in hand and leg restraints so tight that they

caused injuries. Some prisoners claimed they received just one or two meals a day, typically from fast food restaurants, with guards pocketing the remaining allotment for food costs. "There is virtually no government regulation of the conditions prisoners live in while they are shackled all day long without sanitary facilities in these cramped transport vans," said Mark Silverstein, legal director of the Colorado ACLU, in 1999. There is even an Internet forum page devoted to criticisms of TransCor, the largest of the private transportation services, titled "TransCor Terror."

Private transport services have also been condemned for taking their imprisoned passengers on unnecessarily meandering routes across the country, collecting and delivering as many prisoners as possible in order to increase their revenue. Such "diesel therapy," in which prisoners may be on the road for a week or more, can be physically and mentally debilitating as well as dangerous. The longer period of time prisoners are in transit, the greater the possibility of an accident; also, the more times that a transport vehicle stops for food or fuel, the greater the risk of an escape.

According to TransCor, the average time that prisoners spend in transit is between four and five days. Apparently, however, this is not always the case. William Minnix was extradited from Ohio to Colorado on a parole violation in July 1997. He was transported by TransCor on a 20-day trip that took him to New York, Michigan, Maryland, Kentucky, Wisconsin, South Dakota and several more passes through Ohio as other prisoners were picked up and dropped off along the way. TransCor executive vice president Chuck Kupferer, quoted in a December 18, 1997 article in *Westword* magazine, was more candid. "If a guy wrote to you and said he was on the road for fifteen days, I have no doubt in my mind that he was," he said. "It's not rare, but it's not usual." Nor have things changed much since then. On February 14, 2004, Rick Hollon, a veteran charged with failure to pay child support, was extradited by TransCor to Nevada from Kansas. He passed through Missouri, Oklahoma, Texas and New Mexico over a 17-day period, which was confirmed by a company spokesperson. Hollon reportedly lost 30 pounds while taking the scenic route in TransCor's custody.

The cost cutting measures employed by private transport companies, which let

them offer substantial savings to public agencies, also appear to contribute to the numerous problems experienced by the industry. Former TransCor president John G. Zierdt, Jr., who resigned in 2000, insisted the company did not cut corners in dangerous ways. "When we have an escape, it hurts our stock price," he explained, apparently referring to the stock price of CCA, which owns TransCor. However, there is no evidence that the stock market acts – or indeed should act – as a regulatory force for privatized prisoner transportation services, especially when public safety is at risk.

Private transportation companies that are more concerned with their profit margins than the public good also tend to avoid costly security precautions used by public prisoner transport services. Jim Cashell, president of the Montana Sheriff's and Peace Officer's Association, said it was not unusual for deputies to use a back-up "chase car" for prisoner transports. Chase cars, which provide an added level of security, aren't favored by private transportation services due to the additional vehicle and employee expenses.

Another example of cost cutting is the use of 15-passenger vans. Several transportation companies, including Con-Link, U.S. Extraditions, Court Services and PTS, use 15-passenger vans – which hold more prisoners and thus make extradition trips more profitable. However, these higher-capacity vehicles also have a higher chance of rollover and lower safety ratings. The National Highway Traffic Safety Administration (NHTSA) has repeatedly issued warnings about 15-passenger vans, including three consumer advisories since 2001. NHTSA found that 74% of 15-passenger vans had improperly inflated tires, which greatly increases the chance of an accident. NHTSA also determined that when such vehicles are loaded with 10 or more passengers, the rollover rate is almost three times higher than when they have fewer than five occupants.

In fact, federal law prohibits the sale or lease of new 15-passenger vans to schools for transporting primary through high-school age children unless such vehicles meet federal school bus safety standards. Apparently, though, 15-passenger vans are considered safe enough to transport prisoners. Further, according to NHTSA data for 2006 model year vehicles, the Ford E350 XLT passenger van received a two-out-of-five-

star safety rating and was found to have a 30% chance of rollover. The E350 is the "primary transport vehicle" for PTS according to the company's website, and E350 vans are also used by TransCor, U.S. Extraditions and Con-Link for prisoner transportation.

As a result of the initial lack of regulation of private transport companies, and the negative impact on safety and security caused by their for-profit motives, prisoner transportation services experienced a plethora of accidents and escapes, and their employees extradited prisoners under dangerous, inhumane and abusive conditions with frightening frequency. The details of these incidents read like a comedy of errors – except there is nothing funny about negligence, preventable accidents, sexual abuse and escapes that endanger the public.

Problems in the Past: Reflections in the Rear-View Mirror

A prime example of the hazards faced by smaller prisoner transport services in the earlier days of the industry occurred on August 28, 1996, when Rick Carter and Sue Smith, a husband-and-wife team who ran R & S Prisoner Transport, were overpowered by six convicts when they stopped at a Texas rest area. The unarmed couple was held hostage during an escape attempt that ended in a high-speed police chase. When Carter and Smith had arrived at an Iowa prison to pick up the prisoners, five of whom had murder convictions, the warden reportedly said, "You've got to be kidding me." However, when told R & S had an extradition contract he released them into the company's custody.

Larger prisoner transport services, including the top names in the business, didn't fare much better. According to the *Palm Beach Post*, a convicted felon being transported through West Palm Beach, Florida by Federal Extradition Agency in June 1997 was left alone behind a gas station to urinate, and promptly escaped. A month later, on July 30, 1997, Dennis Glick, a convicted rapist, took a gun from a Federal Extradition Agency guard who had fallen asleep in the transport van when they stopped in Colorado. Glick took seven prisoners, a guard and a local rancher hostage, stole two more vehicles, and was caught the next day while attempting to escape on a stolen horse. Federal Extradition Agency was billed more than \$17,000 for the cost of the search, but an official with the Pueblo County Sheriff's Office

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said at the time that his agency “hasn’t heard a word” from the company. On October 23, 1997, four prisoners escaped from a Federal Extradition Agency van near Swanton, Ohio, taking a shotgun and four rounds of ammunition; the private transport guards had left the vehicle unattended with the engine running. And two Federal Extradition Agency guards were arrested in Dalton, Georgia on December 27, 1997 after drinking and fighting with each other while transporting nine prisoners. They were charged with DUI and reckless conduct.

TransCor had a bad year in 1997, too. Three of eleven prisoners being extradited by the company escaped on December 4, 1997 after they removed their restraints, threw a rookie guard out of the van and drove away while another guard was buying meals at a Burger King in Owatonna, Minnesota. One of the escapees, Homer Land, kidnapped a married couple and held them captive for 15 hours. Ironically, the same TransCor van used in the Owatonna escape had been involved in another escape attempt just four days earlier. On November 30, 1997, Whatley Roylene removed his handcuffs and took a shotgun from a sleeping TransCor guard when their van stopped at a gas station in Sterling, Colorado; the other guard was outside the vehicle at the time. Police officers surrounded the van, and the resulting standoff reportedly ended when other prisoners convinced Roylene to give himself up.

A succession of accidents and escapes occurred over the following years. Evelio Escalante, an alleged gang leader, escaped from TransCor guards in Waterbury, Connecticut on October 27, 2000; they had failed to shackle him or handcuff him behind his back. And when an Extraditions International van stopped for a restroom break in Canyon Country, California on January 23, 2000, the guards carelessly left the keys in the ignition. Two of the nine prisoners they were transporting, Geoffrey Johnson and Nevada state prisoner Billy Freeman, jumped into the front seat and drove off, reaching speeds of 90mph before crashing. A company spokesman said the escape resulted from “an error in judgment.”

After two more Nevada prisoners fled from an Extraditions International vehicle at a California rest stop on March 25,

2000, state officials decided to discontinue the company’s services. James Prestridge and John Doran had overpowered one of the guards, taken his gun, and then relieved another sleeping guard of his weapon. “As soon as I heard about it, I stopped using them,” said then Nevada prison director Bob Bayer. “When we have two problems in that short space in time, we can’t afford not to.”

On May 24, 2000, a van operated by Extraditions International was involved in a fatal accident in Great Barrington, Massachusetts. One guard, Scott Lee Bellon, was killed and a second guard and a prisoner were injured when the vehicle failed to navigate a curve and crashed into a stone wall. In another accident, Patrick R. Dalka and Jason Szydle, among other prisoners and two guards, sustained injuries when a TransCor van rear-ended another vehicle in Tennessee on July 13, 2000. The next day Szydle signed a release form in which he agreed not to hold the company liable in exchange for \$1,000. TransCor issued him a check, which he didn’t cash. Instead, in a subsequent lawsuit filed in federal court, Szydle said he felt “threatened, intimidated and coerced” into signing the release, and stated in an affidavit that he had been deprived of food and sleep for almost 24 hours following the accident and was threatened by TransCor employees. The case was closed on March 30, 2004 following a confidential settlement. See: *Dalka v. Sublett*, USDC WD TN, Case No. 01-2485-V. See also 2002 WL 1482532 and 2002 WL 1483877.

On November 20, 2000, thirty-nine Wisconsin prisoners filed suit in U.S. District Court against TransCor and other defendants. They claimed that during a 30-hour bus ride from a state prison to a CCA-operated facility in Sayre, Oklahoma on January 25, 2000, the TransCor vehicle had no heat, no working toilet and an inoperable muffler that let exhaust fumes inside the vehicle. According to court documents the prisoners were splashed with waste from the overflowing toilet and vomited on each other due to the terrible stench. They were denied meals and medication. Wearing only jumpsuits in sub-zero weather, some reportedly arrived in Sayre with frostbite and hypothermia. In a December 27, 2000 order, a federal judge found the prisoners had “alleged facts sufficient to support an Eighth Amendment claim as well as state law claims of assault and

battery, intentional infliction of emotional distress and negligence.” The case was settled confidentially in November, 2002. See: *Wine v. Dept. of Corrections*, USDC, WD WI, Case No. 00-C-704-C (2000 WL 34229819).

But the above incidents, while illustrative of the shortcomings of private transportation services, pale in comparison to the most devastating incident to befall the industry to date. On April 3, 1997, six prisoners were burned alive when the van extraditing them caught fire on the side of an interstate near Dickson, Tennessee. One of the two guards burned his hands while attempting to release the shackled prisoners, who were locked in a wire cage in the back of the vehicle. They were being transported for parole and probation violations by the Federal Extradition Agency, which, despite its official-sounding name, was a private company operated by former bounty hunter Clyde J. Gunter. The prisoners who died in the blaze were Richard King, Monty Crain, John Cannon, Steven Hicks, James Catalano and David Speakman.

A female prisoner who was dropped off just before the accident said the van had been making “knocking noises,” and according to news reports the vehicle was vibrating badly during a trip that went from Memphis to Iowa, Wisconsin, Michigan, Ohio, Pennsylvania and then back to Memphis before leaving again for Mississippi and Arkansas. Prior to the fatal accident the van had been driven almost non-stop for 24 hours. Court records indicate that when the transport guards stopped in Memphis they informed the company’s main office about the problem, but were told to continue. The van’s drive shaft apparently came loose, bounced off the road and punctured the gas tank; the 1995 Ford E150 had logged more than 240,000 miles in two years and the universal joint failed due to excessive wear.

In initial court filings Federal Extradition Agency stated the fire was “an unavoidable accident.” Less than two months later, on May 22, 1997, another transport vehicle operated by the company crashed near Collyer, Kansas, injuring four prisoners and killing a guard.

On February 28, 2001, a federal jury in Nashville awarded \$10.5 million to the 10-year-old daughter of James Catalano, one of the prisoners killed in the van fire, on civil rights and negligence claims. The jury apportioned 100% of the fault to

Federal Extradition Agency; a separate confidential settlement was reached with Ford Motor Company. The reported jury award was \$10.5 million, but according to court documents the award was reduced to \$7 million. See: *Catalano v. Federal Extradition*, USDC MD TN, Case No. 3:97-cv-00790. A second federal jury awarded \$20 million in compensatory and punitive damages to the estate of John Cannon, another prisoner who died in the accident, on December 20, 2001. The jury in that case found Federal Extradition Agency had violated Cannon's civil rights and had ignored known mechanical problems. The reported jury award was \$20 million, but according to court documents the award was \$17.5 million. See: *Cannon v. Federal Extradition Agency*, USDC, MD TN, Case No. 3:97-1183. Additional lawsuits filed against the company following the van fire were resolved through confidential settlements.

James R. Omer, Sr., an attorney with the law firm that litigated both the Cannon and Catalano lawsuits, said Federal Extradition Agency's insurance carrier paid the damage awards to the limit of the company's policy. The remaining amount could not be collected because Federal Extradition Agency had no assets and had gone out of business.

Escapes and accidents, even serious ones, while often preventable, are at least understandable in an industry that moves thousands of prisoners across the country on a continual basis. More troubling are the rapes and sexual abuse of female prisoners by male guards employed by private transport companies.

TransCor guard Jack ter Linden was accused of fondling and sexually assaulting two female prisoners, Beverly Hirsch and Joann Gwynn, in separate incidents during extraditions to Colorado in 1993. The women claimed that ter Linden also skimmed money from the prisoners' food allowances, falsified trip logs and placed them in the driver's cab in violation of

company policy. Gwynn related that during a six-day trip through seven states she was repeatedly raped by ter Linden, and another guard failed to report the sexual abuse. A TransCor official stated at the time that male guards transporting female prisoners "had no impact on prisoner safety." Gwynn and Hirsch sued TransCor and reached undisclosed settlements with the company in March 1999. See: *Hirsch v. Zavaras*, USDC CO, Case No. 1:93-cv-01917 (see 920 F.Supp. 148 (D.Co. 1996)); *Gwynn v. TransCor*, USDC CO, Case No. 1:95-cv-02886.

On October 8, 1994, Arnold H. Faulhaber and Joseph Jackson, co-founders of Fugitive One Transport Company, were arrested on charges of raping a female prisoner they were transporting.

Cheryl Nichols and other prisoners were being extradited by two TransCor guards on October 25, 1997. Nichols accused one of the guards, Angel Rivera, of raping her in a gas station bathroom in Louisiana; Rivera admitted they had had sexual contact but claimed it was consensual. TransCor fired him, and on Aug. 6, 1998, Nichols filed a state court lawsuit in Tennessee, claiming the company was negligent in hiring, training and supervising Rivera. TransCor settled the case for a confidential amount. See: *Nichols v. TransCor*, Circuit Court for Davidson Co., Tenn. (see appellate ruling, 2002 WL 1364059).

In October, 1999, Cheryl Schoenfeld was sexually assaulted by two TransCor employees while being transported through Texas. TransCor guards Michael Jerome Edwards and David Jackson forced her to expose her breasts and perform oral sex, and penetrated her vaginally with a flashlight and a gun barrel. Three prisoners testified that at one point Edwards pulled over and threatened to shoot them, saying he would claim they were trying to escape. Edwards previously had been accused of sexually assaulting a female prisoner he transported in New Mexico

a month earlier.

Both Edwards and Jackson were charged with sexual assault. Jackson plead guilty while Edwards was convicted, based partly on DNA evidence, and sentenced to ten years plus a \$5,000 fine. Schoenfeld and Annette Jones, another prisoner who said she had been mistreated by Edwards, filed suit against TransCor on February 24, 2000. The company agreed to settle the case in April 2002 for \$5 million, \$4 million of which was paid by its insurance carrier. See: *Schoenfeld v. TransCor*, USDC WD TX, Case No. 5:00-cv-00248. Tim Maloney, Schoenfeld's attorney, criticized TransCor for its "absolute and total disregard for ... prisoners' rights, welfare and safety," blaming the company's apparent belief that "the most important thing is the bottom line."

In another sexual assault case involving TransCor, 43-year-old Catherine Jamison, a married mother of four children, was repeatedly raped over a five-day period in March 1998 while in the custody of TransCor guards who extradited her from Texas to Colorado. She was threatened with retaliation if she reported the abuse. On March 1, 1999 the Colorado chapter of the ACLU filed a federal lawsuit against the company on her behalf. "It is time for TransCor to take full responsibility for the safety and treatment of prisoners that the government entrusts to its care," said ACLU Legal Director Mark Silverstein. The ACLU announced on April 24, 2002 that it had obtained a "substantial settlement" for Jamison, although the amount was not disclosed. See: *Jamison v. TransCor*, USDC CO, Case No. 1:99-cv-00390.

But it was not the repeated rapes of female prisoners, nor the six convicts who were roasted alive while locked inside a van in rural Tennessee, both due in part to

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the lack of governmental oversight of the private transport industry, that resulted in much-needed regulatory reform. Rather, it was yet another escape.

On October 13, 1999, Kyle Bell was one of a dozen prisoners aboard a Greyhound-type TransCor bus that stopped to refuel near Santa Rosa, New Mexico. Bell, a notorious criminal from North Dakota, was serving a life sentence for molesting and killing 11-year-old Jeanna North. While two TransCor guards were asleep on the bus and two others were occupied outside the vehicle, Bell used a handcuff key, which had not been detected during a strip search, to remove his wrist and leg restraints. He then crawled through a ceiling ventilation hatch and slipped to the ground unnoticed as the bus pulled away. He was wearing civilian clothes that didn't identify him as a prisoner. Despite stopping at two jails after Bell had escaped, the TransCor guards didn't notice he was missing until nine hours later when they were rolling through Arizona. They then delayed notifying law enforcement authorities for another two hours.

Bell's escape resulted in a nationwide manhunt and widespread outrage. TransCor went into full public relations mode, admitting that "several procedural violations ... occurred involving security policies." Then-TransCor president John Zierdt, Jr. offered a corporate mea culpa, stating "We are embarrassed by this incident and are reviewing all standing policies and procedures." The four guards who had transported Bell were fired; one had been the company's employee of the year in 1997. Regardless, TransCor was sharply criticized by public officials and lambasted by the media.

North Dakota suspended using TransCor for prisoner transportation services. According to a November, 2000 report by the state's legislative Criminal Justice Committee, an internal review indicated that TransCor had failed to follow its own policies related to the number of guards that should have been present, the awakening of guards during stops, prisoner headcounts, the use of chains linking prisoners together, and the positioning of guards on the bus during stops. It was revealed that the TransCor employees had received only one week of training; in comparison, officers with the

U.S. Marshals Service receive a comprehensive 16-week training course.

TransCor attempted to lay some of the blame on North Dakota officials, stating the paperwork they had received only indicated Bell was serving a life sentence, not that he was an escape risk. Apparently it didn't occur to the company that all prisoners, particularly those serving life sentences, might be escape risks. North Dakota Governor Ed Schafer, commenting on TransCor's gross security lapses, noted sarcastically that "These people present themselves as experts in transporting prisoners."

Bell evaded authorities for almost three months and appeared on *America's Most Wanted* twice before being captured in Texas on January 9, 2000. He had changed his appearance, was working part-time jobs and was living with a woman who had five young children. Governor Schafer stated he would seek to have the cost of the manhunt for Bell reimbursed by TransCor. During subsequent negotiations, however, the state settled with the company for \$50,000 despite having incurring expenses of over \$102,000. Incredibly, as part of the settlement North Dakota agreed to rehire TransCor for future prisoner extradition services.

But Bell's escape resulted in far more than bad press, scrutiny by lawmakers and sharp criticism of TransCor – it accomplished what more than a decade of deaths, accidents, sexual assaults and numerous other escapes had not: Comprehensive federal regulation of the prisoner transportation industry.

Finally, Federal Intervention

In 1999, U.S. Senator Byron Dorgan of North Dakota introduced a bill containing a broad range of regulatory measures for private prisoner transport services. Entitled the Interstate Transportation of Dangerous Criminals Act, it was more commonly referred to as "Jeanna's Law" after Jeanna North, the child whom Kyle Bell had murdered. The legislation was co-sponsored by Senator Patrick Leahy and then-Senator John Ashcroft.

In announcing his proposed legislation, Sen. Dorgan stated, "No family that pulls into a gas station should have to worry that the van next to them might contain violent criminals and untrained guards more attentive to their next nap or cheeseburger than to the safety of the rest of us." Sen. Leahy, then ranking member on the Senate Judiciary Com-

mittee, further noted that there had been "an alarming number of traffic accidents in which prisoners were seriously injured or killed because drivers were tired, inattentive or poorly trained. Privatization of prisons and prisoner transportation services may seem cost efficient, but public safety must come first."

Jeanna's Law received support from a broad range of corrections-related and victims' rights organizations, including the National Sheriff's Association, National Association of Police Organizations, Fraternal Order of Police, California Correctional Peace Officers Association, New York Correctional Officers and Police Benevolent Association and National Organization of Parents of Murdered Children, among others. Sen. Dorgan argued that regulatory legislation was necessary, noting that "A company hauling hazardous waste, cattle, or even circus animals has to meet certain minimum standards. Yet there are no requirements for hauling violent criminals around the country." His proposed bill included the following provisions:

- Minimum standards for background checks and pre-employment drug tests for prospective employees of private transportation companies.
- Minimum standards for the length and type of training that employees must receive before they are allowed to transport prisoners, not to exceed 100 hours of pre-service training. Such training must include the use of restraints, searches, use of force, use of firearms, CPR, map reading and defensive driving.
- Limitations on the number of hours that employees can be on duty during a specific time period, with such limitations not being greater than those set forth under the Federal Motor Vehicle Safety Act.
- Minimum standards for the number of employees necessary to supervise violent prisoners.
- Minimum standards for employee uniforms and identification that clearly identify employees as transportation officers.
- Standards requiring certain violent prisoners to wear brightly colored clothes while being transported that identify them as prisoners.
- Minimum requirements for the use of restraints when transporting violent prisoners.
- A requirement that when transporting violent prisoners, private transport

companies must notify local law enforcement officials 24 hours before any scheduled stops in their jurisdiction.

• A requirement that in the event of an escape by a violent prisoner, private transportation services must immediately notify law enforcement officials in the jurisdiction where the escape took place, as well as the agency that contracted with the company for transporting the prisoner.

Jeanna's Law further included penalties for prisoner transport companies that fail to comply with the regulatory standards, including fines of up to \$10,000 per violation, the cost of prosecution for such violations, and restitution to public agencies that incur expenses for recapturing prisoners who escape from private transport services.

Still, some prisoners' rights advocates argued the proposed regulations didn't go far enough. Stephen Rahe, Co-Coordinator of the Colorado Criminal Justice Reform Coalition, said in a January 28, 2002 letter that more stringent standards were needed, including: 1) requiring private transport guards to obtain a commercial drivers license; 2) stricter guard-to-prisoner ratios, as one guard for every six prisoners is insufficient in some cases; 3) ensuring that prisoners be allowed to sleep at a secure facility, such as a jail, for at least eight hours for every two days spent in transit; 4) requiring companies to phase-in GPS tracking technology for their vehicles (a provision the U.S. Dept. of Justice declined to adopt, apparently because it would place a financial burden on private transport services); 5) requiring vehicle maintenance schedules comparable to schedules used by the U.S. Marshals Service and other public prisoner transportation agencies; and 6) requiring private transport companies to report use-of-force and medical incidents.

Sen. Dorgan's bill was passed by Congress and signed into law by President Clinton on December 21, 2000; however, the Dept. of Justice (DOJ) failed to formulate regulations to enforce the law's provisions until more than a year after the 180-day deadline for doing so. The regulations, codified at 28 C.F.R. § 97, were not approved until December 2002. "Tragically, incidents Jeanna's Law was designed to prevent have occurred since the regulations were supposed to be in place," stated Sen. Dorgan.

Those incidents included the escape of David R. Puckett, 17, who fled from a

TransCor guard at a Wisconsin airport on June 19, 2001. The transport guard, who was arranging a rental car at the time, had failed to handcuff the teenager. Puckett stole several vehicles and stabbed a police officer before being caught in Texas six days later. TransCor vice-president Chuck Goggin said, "We do the very best we can to keep screw-ups to a minimum," but the company acknowledged that their employee, who was subsequently fired, had not followed proper procedures.

Another escape occurred on September 28, 2001, when Christopher Paul Savage hijacked a TransCor van at a gas station in Clarksburg, West Virginia. Savage pretended he was sick and convinced the guards to stop; after his handcuffs were removed he overpowered both guards and left in the van with eight other prisoners. A clerk at the gas station said a TransCor guard ran into the store shouting, "Call the cops – they just escaped!" The van contained a pump shotgun and five shells, which Savage took with him after abandoning the vehicle nearby. The other prisoners were quickly caught but, despite a manhunt involving seven police agencies, Savage remained at large for almost six weeks before being captured in Georgia.

Six prisoners and a TransCor guard were treated for minor injuries after their van was involved in an interstate accident in Schuylkill County, Pennsylvania on April 8, 2002. Further, Extraditions International lost a van transporting a dozen prisoners on September 11, 2001 when the vehicle stopped at a McDonald's in Mentor, Ohio.

One of the prisoners, Lawrence Tutt, overpowered a female guard and drove away while a second guard was ordering food. "We've had problems like every transport company has," stated Capt. K.V. Schilling, an Extraditions International employee. "We all have escapes or problems."

Also while the DOJ regulations for Jeanna's Law were pending – which included require-

ments for employee sexual harassment training, female guards being available to escort certain female prisoners, and policies against sexual misconduct – another egregious incident involving sexual abuse occurred.

During a four-day van trip beginning May 13, 2001, two male guards employed by Extraditions International transported Robin Darbyshire, 41, a pretrial detainee, and a number of male prisoners from Nevada to Colorado. A lengthy article published in 2002 in *Westword* magazine detailed Darbyshire's sordid tale of harassment, sexual assault, ignored complaints and death threats by the company's employees.

One of the transport guards, Richard Almendarez, made crude sexual comments to Darbyshire, fondled himself, and asked her to sit on his lap. Almendarez, who was armed, also threatened to take Darbyshire out into the desert, shoot her, and claim she had tried to escape. When they reached a rest area Almendarez escorted her into a bathroom. He removed her restraints, ordered her to lie down, and made her expose her breasts and raise her skirt. Almendarez, who weighed over 300 pounds, then stood on her hand to keep her pinned to the floor, masturbated and ejaculated on her.

After the van stopped at Extraditions International's headquarters in Commerce City, Colorado, Darbyshire's complaints were ignored and she was placed back in the same van to continue the trip. Another prisoner who was extradited by Almendarez recalled that he had said, "I

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For-profit Companies (cont.)

should have taken the bitch out in the field and raped her and blew her fucking brains out.”

Darbyshire’s testimony resulted in investigations by law enforcement agencies in Colorado and New Mexico, and prompted a lawsuit filed by the ACLU’s National Prison Project in the U.S. District Court for Colorado on April 11, 2002. The suit claimed that Extraditions International had failed to properly train and supervise its employees and had been deliberately indifferent to Darbyshire’s complaints. According to court documents, besides the sexual abuse claims, Darbyshire and the other prisoners were continuously shackled during the four-day van ride, were only allowed to use restrooms every 10-12 hours, were not provided with sufficient food and water, and were transported in a reckless manner. It was also learned that Extraditions International knew Almendarez previously had been fired from the Texas prison system for abusing a prisoner.

The owner of Extraditions International, Jim Cure, a former Colorado state trooper, said Darbyshire was lying – despite statements from other prisoners who rode in the same van and corroborated her claims. Cure admitted that he didn’t “know what these officers do half the time.” He also acknowledged that sometimes problems occur with private transportation employees. “You can give them all types of training, but you can’t build in the human factor,” he said. “You may get the occasional pervert who slips in.” However, Cure defended Almendarez, saying, “He could go back to work for us today if he wanted to.”

On March 14, 2003, the ACLU announced that Extraditions International had agreed to settle Darbyshire’s lawsuit for an undisclosed sum. While the lawsuit was pending, Extraditions International had unsuccessfully tried to avoid liability by transferring its assets and claiming it had been bought out by a different company called American Extraditions, Inc. “This case provides an excellent example of why contracting with private for-profit companies to conduct correctional functions can be dangerous to prisoners and the public,” said the ACLU’s National Prison Project staff attorney David C. Fathi. See: *Darbyshire v. Extraditions International, Inc.* USDC CO, Case Number:

02-N-718

The DOJ regulations that were eventually implemented for Jeanna’s Law contained specific standards intended to remedy the accidents, escapes, abuse and related problems among private transportation services. A minimum of 100 hours of training was required before private guards could transport violent (but not non-violent) prisoners. The maximum driving time for transport guards was made the same as for commercial motor vehicle operators under Dept. of Transportation (DOT) rules. In general, drivers cannot exceed 11 cumulative hours or 14 non-cumulative hours of driving following 10 consecutive hours off duty, with certain other limitations. Although the one-to-six guard-to-prisoner ratio was preserved, public agencies that contract with private transport companies can require lower ratios. In case of escapes, law enforcement officials must be notified within 15 minutes absent extenuating circumstances.

Standards to ensure the safety of prisoners, though less precise, were also set forth, such as a vague provision that transport vehicles be “safe and well-maintained” (vehicle maintenance is a matter of particular concern; U.S. Extraditions vice-president Robert Downs stated his company put an average of 15,000 miles on their vans *every month*). Also included was a requirement that companies establish policies “to prohibit the mistreatment of prisoners, including prohibitions against covering a prisoner’s mouth with tape, the use of excessive force, and sexual misconduct.” Further, juvenile prisoners are required to be separated from adults and female prisoners separated from males, “where practicable.” Female guards are to be present when female violent prisoners are transported, also “where practicable” (a double loophole, since this provision doesn’t apply to non-violent female prisoners). Another regulation states that private transport companies “are responsible for taking reasonable measures to insure the well being of the prisoners in their custody including, but not limited to, necessary stops for restroom use and meals, proper heating and ventilation of the transport vehicle ... and prohibitions on the use of tobacco....” No minimum schedule for rest stops or meals was specified, however. The regulations also included civil penalties of up to \$10,000 for each regulatory violation, liability for the cost of prosecution, and payments to public agencies for expenses incurred

due to escapes from private transport companies.

Notably absent from the DOJ regulations were requirements related to seatbelts or other safety restraints for imprisoned passengers. TransCor, for example, doesn’t provide seatbelts for prisoners – despite a July 15, 2003 Pennsylvania court verdict against the company in a case in which a female prisoner was thrown into a metal screen separating the passenger area from the driver’s compartment when the TransCor van she was riding in came to a sudden stop. She suffered back and knee injuries, and received a \$166,323 judgment against the company. TransCor had claimed that seatbelts could be used as weapons and posed a danger to its employees, an argument that was rejected by the court. Not mentioned was the probability that retrofitting prisoner transport vans with seatbelts might be too costly for the profit-minded company. See: *Maggiolini v. TransCor*, Penn. State Court, Case No. 01-11-307.

According to data from the NHTSA, nationwide from 1990 to 2003 nearly 80 percent of the people who died in rollover accidents in 15-passenger vans – which, as noted previously, are used by at least four private transport services – were not wearing seatbelts. And seatbelts can make a huge difference. When a Con-Link van slammed into an 18-wheeler that had been traveling the wrong way on an interstate in Tennessee on May 9, 2006, although two guards and three prisoners were injured there were no fatalities. Everyone in the van was wearing a seatbelt.

Also missing from Jeanna’s Law were heightened liability insurance requirements for prisoner transport companies. Most private transportation services are subject to minimum amounts of insurance mandated by the Federal Motor Carrier Safety Administration (FMCSA), which requires at least \$1.5 million in public liability coverage for commercial vehicles in interstate transit – generally, for-hire vehicles that carry 15 or fewer passengers, including the driver. Such minimal coverage may be insufficient for prisoner transport services; consider that lawsuits following the Federal Extradition Agency van fire resulted in jury awards in excess of \$24 million.

Despite these omissions, Senator Dorgan said his legislation was “[A] common sense law that will do much to protect the safety of the American people if and when state and local governments use private

companies to transport violent criminals.” Senator Leahy, remarking on the civil penalties for violations of Jeanna’s Law, stated “This should create a healthy incentive for companies to abide by the regulations and operate responsibly.” Unfortunately, it appears their hopeful sentiments were overly optimistic.

Effective Regulation – Are We There Yet? Are We There Yet?

Notwithstanding the regulatory provisions of Jeanna’s Law and its civil penalties, accidents, escapes and abuses continue to occur among private transport companies – often resulting from the same security lapses and problems that predated the new regulations. This may be because although the rules have changed, the profit motivation of these companies has not. So long as prisoner transportation services are primarily concerned with making money, not ensuring public safety or the safety of their employees and the prisoners in their custody, such incidents will persist. And although the disincentives set forth in Jeanna’s Law – up to \$10,000 per violation – may seem substantial, consider that the larger prisoner transportation companies, including TransCor, take in millions of dollars in revenue each year.

Also, while the larger private transport corporations say they are in full compliance with Jeanna’s Law, including TransCor, Con-Link and Court Services, Inc., several of the smaller transportation companies are not. When asked how such non-compliant services remain in business, Randy Cagle, owner of Con-Link, says that some public agencies only “look at the dollar amount” and don’t do background checks. Thus, it’s little surprise that escapes and accidents, as well as allegations of sexual assault, continue to plague the prisoner transportation industry.

TransCor, for example, continued to experience a fairly high number of escapes and other incidents. Floyd W. Stolin, Jr. escaped from a TransCor van in Brighton, Colorado on August 4, 2004, fleeing from the vehicle when it made a traffic stop. Several months later, on October 24, 2004, a TransCor guard was fired after David Randal Moser, who was being extradited to face sex charges involving a minor, escaped from a transport van in Oxford, Mississippi after the vehicle stopped at a Wendy’s. TransCor officials declined to comment on the exact policy violations committed by their employee, but stated there was “some sort of breakdown, or a

series of breakdowns.” Stephanie Castle, a relative of the victim whom Moser was charged with sexually assaulting, also commented on the company’s security lapse, saying, “I can’t believe these extradition people have a web site saying they are high security.” TransCor paid the local police department for overtime costs incurred in searching for Moser, who was captured several days later.

In yet another high-profile sexual assault case involving TransCor, Denna

Ann Jensen, 34, was being extradited from California to Nevada on September 2, 2003, when TransCor guard Jason Duane Parker pulled behind a remote, abandoned truck stop. Parker, who had been making suggestive comments during the trip, removed Jensen’s restraints, donned a pair of latex gloves, forced her to perform oral sex, and digitally penetrated her. He then raped her while wearing a condom. After being dropped off at the Esmeralda County jail in Goldfield, Nevada, Jensen

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told one of the jail staff about the sexual assault. Deputies returned to the truck stop, where they found the condom and gloves.

Parker was arrested and charged with three felony counts of sexual assault and three counts of having sex with a prisoner. At trial he claimed the encounter had been consensual, though his testimony was contradicted by medical reports detailing Jensen's injuries, which were consistent with rape. Jensen also showed the jury her Aryan tattoo and stated she would never have willingly had sex with Parker, who was black. Parker was convicted of four of the charges. On September 29, 2003 Jensen sued TransCor in federal court. Asked why Jensen had been transported alone by a male guard in violation of company policy, an attorney representing TransCor said, "that's the big question, isn't it?" One possible answer is because it would have been more expensive to pay a female guard to accompany them. Denna Jensen's lawsuit was settled in January 2004 under undisclosed terms. See: *Jensen v. TransCor*, USDC NV, Case No. 2:03-cv-01359.

On September 2, 2004, four maximum security Montana prisoners removed their wrist, leg and waist restraints, pried a screen from the back window of a TransCor van, and escaped while the vehicle was stopped at a Burger King in Helena. A trainee guard had stayed with the van while a more experienced guard went inside to get food – which, according to a TransCor official, did not violate the company's safety policies. Although the prisoners were quickly apprehended, one had tried to hijack a truck.

Montana officials quickly suspended the state's \$308,000 annual contract with TransCor and demanded changes in the company's policies – including providing sack lunches or only making stops at secure facilities, providing chase cars when transporting dangerous prisoners, maintaining data sheets and photos for prisoners being transported, and notifying local authorities of any stops. Further, the state demanded that the company's guards wear their guns and be provided with radios that are carried at all times. TransCor complied and the contract was reinstated; the company also agreed to pay the costs of recapturing the escapees, which totaled \$23,516.

Other private transportation companies have also experienced recent escapes and security-related problems. On November 18, 2003, a Tennessee prisoner being transported by Con-Link ran away while still in handcuffs during a stop at a Subway store in Lewisburg, West Virginia. Robert L. South remained at large for five days before being captured.

The *Orlando Sentinel* reported on January 27, 2004 that a female murder suspect being transported by State Extraditions claimed she had been raped by a male guard while they were en route to Florida in late December 2003. According to a report from the Orange Co. Sheriff's Dept., Dixie Kennedy said the guard, Cecil Ormond, stopped at a motel in Alabama and told her they would be sharing a room. Once inside he allegedly ordered her to bathe and then sexually assaulted her. Company officials declined to comment on the incident. Although Alabama investigators confirmed that Ormond had stayed with Kennedy at a Days Inn instead of housing her overnight at a jail, no charges were filed after Kennedy said she didn't want to pursue the matter.

Florida prisoner Dominic Reddick, charged with trying to murder an Orlando police officer, escaped from State Extraditions after the company's transport van broke down in Florida on December 5, 2005. Reddick reportedly complained that his leg shackles were hurting him, and one of the guards obliged by taking them off. He ran away while the transport guards were occupied with other prisoners, still wearing handcuffs and prison clothes. "All they could tell us was 'He went that way,'" Sumter County Sheriff's Captain Gary Brannen said of State Extraditions' employees. Reddick was captured five days later following a massive search involving 200 officers from ten agencies, dogs, a helicopter and thermal imaging cameras. The Sheriff's office said it would bill the company for the cost of the search. "It's a big operation, and a whole lot of taxpayer money is being spent," said Chief Deputy Jack Jordan. According to Jordon, as of June 2006, State Extraditions had not reimbursed the sheriff's department and the matter had been referred to the county's legal department.

An appropriately-named prisoner being extradited from Mississippi to Texas used a refueling stop to escape from a

Guardrite Security vehicle on May 8, 2006. The unarmed private transport guards reportedly left James Bond unattended when they went inside the gas station. After Bond had escaped they failed to promptly contact law enforcement authorities and instead tried to search for him themselves. Bond stole a car, led authorities on a high speed chase and eluded capture for more than 20 hours. "We are looking at if we can bill Guardrite Security for the cost of this because this was totally uncalled for," said Sheriff James Haywood. "It's not impossible for prisoners to escape, but when one escapes like this, someone has to bear liability."

Most recently, in La Crosse, Wisconsin, three prisoners escaped from a PTS transport van on June 6, 2006. One of the company's guards initially claimed that prisoner Phillip Dunn had used his eyeglasses to pick the locks on his handcuffs and shackles and to open the van door. However, an investigation by PTS revealed that Dunn had stolen the guard's key ring, which contained keys to the van and all of the prisoners' restraints. Two of the escapees were soon caught but Dunn remained at large. Two PTS employees were fired.

Public Transport Services Imperfect

Publicly-operated prisoner transportation services are not immune to escapes, accidents and other problems, of course, both in the past and more recently. For example, in Connecticut in August 1999, four male prisoners being transported in a Sheriff's Department van by two deputies broke down a metal gate separating them from a female prisoner and sexually assaulted her.

And in a bizarre incident in November 2005, a Florida state prison van crashed through a parking garage wall at a medical center in North Miami Beach and plummeted four stories. The driver and a prisoner inside the vehicle survived the fall. That same month a Texas state prisoner escaped from a prison transport van by slipping out of his wrist and ankle restraints, leaving them locked on the floor behind him, and squeezing through a small rear window unseen by the two guards in the front seat. Carlos Kidd, the prisoner who accomplished the Houdini-like escape, was captured later that same day.

In Montana on January 11, 2006, murder suspect Dueston Haggard unlocked his restraints using a hidden key and escaped from a sheriff's transport van through an improperly welded hatch on the vehicle's

roof. He had not been strip searched before boarding the van and his absence wasn't noticed by the deputies until they arrived at their destination.

And on April 11, 2006 in downtown Hilo, Hawaii, a jail guard shot and killed a prisoner who was attempting to escape. Thane K. Leialoha had removed his handcuffs, fled from a jail transport van and scuffled with the guard before running across a busy street. He was shot in the back of the head. The shooting was cleared by the Dept. of Public Safety, which found that the guard, who was not named, had followed state law and prison policies related to use of force.

However, compared with their privatized counterparts, government-run prisoner transport services don't appear to suffer from a similar number of escapes, accidents and abuses. This may be because public law enforcement agencies aren't intent on making a profit, and thus are willing to invest in more costly security and safety measures such as chase cars and additional guards. They also tend to employ more experienced, professional and better-trained staff who take their public-service jobs more seriously.

In fairness, it should be noted that while comprehensive information can be obtained from government agencies, similar data is not readily available from private transport companies, which makes accurate comparisons difficult. But this illustrates another problematic aspect of the prisoner transportation industry – a lack of transparency and public accountability. While documents can be requested from federal, state and local agencies through public records laws or Freedom of Information Act (FOIA) requests, including transportation log books, vehicle maintenance reports, employee training records, etc., such is not the case with private companies which are, in general, under no duty to disclose such documentation. As stated by Thor Catalogne, founder of PTS, upon cutting short an interview, his company doesn't usually "give anyone any information." Two other companies, Prisoner Transportation Services, LLC and Security Transport Services, when contacted, refused to comment for this article.

Consider that Court Services Inc. has been transporting prisoners using unmodified 12- and 15-passenger vans and SUV's that the company rents from Budget Rentals and Capps Van and Car Rental. From September 6, 2005 to March

16, 2006, Court Services rented such vehicles at least 11 times in Kansas City, Missouri alone. Unmodified vehicles that lack security features, particularly a barrier between the guards and the prisoners being transported, pose greater safety risks than using secure transport vehicles. They are, however, less expensive for the company. Such unsafe practices are hard to detect due to the secretive nature of private prisoner transportation companies.

But some hard data, particularly concerning escapes, which are usually reported, is available. According to an exposé on private transport services published in *Mother Jones* magazine, from 1994 to 2000 TransCor experienced 25 escapes while other transportation companies had 12 escapes. Over the same period of time the U.S. Marshals Service, which moves an estimated twice as many prisoners each year as the entire private prisoner transport industry combined, had zero escapes. None.

A Roadmap for the Future: Where to Go From Here

Although federal regulation is beneficial, it apparently isn't sufficient in its present form to cure the on-going problems among prisoner transport companies that result from the industry's inherent profit motivation. What, then, is an effective solution?

While Jeanna's Law provides numerous rules and standards, as noted above it doesn't go far enough. Through its power to regulate interstate commerce, which includes the interstate transport of prisoners, Congress should impose further restraints on the private transportation industry that address: 1) higher minimum insurance requirements; 2) the types of vehicles permissible for transporting prisoners, with 15-passenger vans being excluded; 3) specific rules governing maintenance and inspection of prisoner transport vehicles; 4) mandatory seatbelt or other safety restraint requirements for prisoners being transported; and 5) increased civil penalties for regulatory violations that take into consideration a company's size or annual revenue. Further, federal law should require that all escapes, accidents and other incidents that endanger public safety during interstate prisoner extraditions be reported to a central government agency, such as the FMCSA, and made available to the public.

Even absent further regulation on the federal level, state and local authorities

can impose their own rules and regulations on prisoner transportation services. The provisions of Jeanna's Law specifically "do not pre-empt any applicable federal, state, or local law that may impose additional obligations on private prisoner transport companies or otherwise regulate the transportation of violent prisoners.... The regulations in this part in no way pre-empt, displace, or affect the authority of states, local governments, or other federal agencies to address these issues."

Connecticut Attorney General Richard Blumenthal, in a May 24, 2001 opinion regarding the impact of Jeanna's Law on state regulations related to prisoner transport services, determined that state officials were "free to enact laws that supplement, but do not conflict with, the federal acts and implementing regulations." Supplemental state and local regulations can address such issues as licensing requirements for prisoner transportation companies, in-state employee training requirements (including firearms training and certification), and standards for licensing and inspection of transport vehicles.

On a more basic level, law enforcement agencies that utilize private transportation



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For-profit Companies (cont.)

services should insist on contractual provisions that enhance public safety. Contracts can specify that chase vehicles be used during particular prisoner transports, that private transportation companies maintain a specific guard-to-prisoner ratio according to the number and type of prisoners being moved, that their transport vehicles not stop at non-secure locations for meal or refueling breaks, etc. Contracts also need to specify financial penalties to be imposed for violations, escapes, negligence, etc.

Public law enforcement agencies should further conduct comprehensive background checks before using private transportation companies, including proof of insurance and verification of FMCSA interstate operating authority when applicable, even for one-time transport services. During the ACLU's litigation against Extraditions International in the Darbyshire case, it was discovered that the company had operated illegally without proper licenses and insurance. And when Evelio Escalante escaped from TransCor guards in Connecticut in October 2000, it was revealed that the company wasn't licensed to do business in the state and, according to state officials, had failed to obtain a license for the previous two years despite being told to do so.

Private transport services that do not, or cannot, meet more stringent governmental regulations or contractual requirements should not be used by public agencies. Terminating or suspending business with prisoner transportation companies has proven necessary in the past. In November 2000, then Connecticut Gov. John G. Rowland ordered state officials to stop using TransCor after Escalante's escape. North Dakota suspended use of TransCor's services when Kyle Bell fled from one of company's transport buses in Oct. 1999. The Nevada Dept. of Correction stopped using Extraditions International in 2000 following two escapes, instead contracting with other services. And Montana prison officials planned to resume control over prisoner transportation services after the state's contract with TransCor expires on June 30, 2006, partly due to the escape of four maximum security prisoners from one of the company's vans in September 2004.

When a business begins to lose customers – and thus market share – it will

make necessary changes to ensure its continued profitability, even at greater cost to its bottom line. Only those prisoner transport companies that provide safe and effective services in compliance with government rules, regulations and expectations will survive. One that didn't, State Extraditions, apparently went out of business earlier this year following a high-profile escape and concerns over security violations, including loaded weapons being left in unsecured vehicles when transporting prisoners to and from Florida jails. State Extraditions co-founder Dennis Warren refused to comment on the company's closure.

One promising upstart in the industry is Show-Me Correctional Services, Inc., based in Slater, Missouri and founded in March 2006 by Heather Sheridan, a former Court Services, Inc. employee. Show-Me is the only woman-owned prisoner transportation service in the U.S. According to Sheridan, who also is a Licensed Practical Nurse with experience in corrections, her company does not use 15-passenger vans, requires seat belts for prisoners being transported, and has a no-exception policy for female guards to accompany female prisoners. The company's website explicitly acknowledges the many problems experienced by other private transportation services, and uses the motto, "A New Way In Thinking About Prisoner Extradition." Although Show-Me's rates are slightly above the industry average, Sheridan claims her company's profit margin is actually lower – and says she is willing to sacrifice higher returns for enhanced safety and quality of service.

Ultimately, for-profit companies will only respond to measures that affect their bottom lines. And given the fairly paltry financial disincentives provided for under Jeanna's Law, especially in relation to multi-million dollar companies like TransCor, existing penalties are inadequate. Instead, litigation has been the impetus behind forcing private transport services to change their operating policies, or forcing them out of business.

Federal Extradition Agency shut down in 1998 following the van fire in which six prisoners died; jury awards from the resulting lawsuits totaled over \$24 million. Extraditions International folded in January 2002 following an undisclosed settlement in a suit filed by the ACLU on behalf of Robin Darbyshire, who was sexually assaulted by one of

the company's employees. And lawsuits against TransCor by female prisoners who were raped by the company's guards have resulted in a number of settlements – one for \$5 million – which serve as an incentive for the company to adopt safer policies and practices related to employee hiring, training and supervision.

Thus, litigation also plays an important role in regulating the private transportation industry, so long as prisoners who have legitimate claims are able to obtain effective legal representation. TransCor has been named in almost 200 federal lawsuits since the early 1990's, ranging from claims of injuries resulting from accidents to allegations that prisoners were denied insulin and HIV medication by the company's guards. However, the vast majority of these suits are filed by pro se prisoners who are unable to match the legal resources and abilities of corporate defense lawyers; consequently, their cases are routinely dismissed. Further, when attorneys do represent prisoners in lawsuits against private transportation companies, in order to serve as an effective deterrent to the rest of the industry it's important not to agree that settlements remain confidential.

It will only be through additional state and local regulations, stricter contractual requirements and continued litigation, in conjunction with vigorous enforcement and expansion of Jeanna's Law, that the private transportation industry will be held accountable for the mistakes and misdeeds that have historically resulted from its need to generate profit. Government agencies must also be willing to pay higher fees for safer and more secure prisoner transport services; alternately, public officials may prefer to invest such funds in their own prisoner transportation agencies and avoid contracting with private companies altogether.

"We've got to make sure that we are not exposing the public to any risk," said then Nevada Prisons Director Bob Bayer in April 2000, after two prisoners, one a convicted murderer, escaped from a TranCor van. "The question is can they do the job as well as we can do the job." The question is not whether privatized prisoner transport services can simply turn a profit at the expense of public safety. That question has already been answered. ■

A footnoted version of this article is available on PLN's website.

PLN Wins FOIA Suit to Gain Copies of BOP Verdicts and Settlements without Charge

by John E. Dannenberg

The United States District Court (D.D.C.) granted PLN's motion for summary judgment and ordered the U.S. Bureau of Prisons (BOP) to provide investigative material requested by PLN under the Freedom of Information Act (FOIA) without payment of search or duplication fees. PLN, exercising its statutory right as a legitimate news media representative to seek BOP internal data that would be of public interest, was rebuffed by the BOP when it refused to comply with PLN's request for data concerning all litigation related payments against the BOP without PLN first ponying up \$6,944 in search costs, plus copying fees. The BOP refused to waive the fees, claiming there was no interest in this information by the public at large.

Amazingly, the BOP claimed it did not have this information, the money and details on all money it has paid out in litigation over a multi year period, available in any one location and that finding the information would require a hand search of records at all 114 BOP prisons and jails. If true, this shows a shocking lack of risk management. If not, it indicates a cavalier disregard for truthfully responding to media FOIA requests.

PLN appealed the GOP's decision to the U.S. Department of Justice Office of Information and Privacy (OIP) pursuant to 28 C.F.R. § 701.16(a) (2000). There, PLN, a non-profit organization, properly reasserted its claim that the public has a great interest in the amount and manner in which its tax money is spent, and in particular, in data on suits and settlements between the BOP, its employees, prisoners, contractors and the public. The OIP denied PLN's appeal, citing two factors. First, the OIP claimed that PLN had not "demonstrated that it has both the intent and ability to disseminate the requested records to the public," belittling PLN's print magazine and its website as inadequate because there is no guarantee that the public will visit it. [Note: PLN's website has received over 130,000 visitors in the past year or so.] Second, the OIP alleged that some of the documents, namely complaints and verdicts, were already publicly available

in courts, and that supplying PLN with them would not "enhance the public's understanding" of the government.

Dissatisfied, PLN sued BOP Director Harvey Lappin in federal court under the FOIA (5 U.S.C. § 552 (2000)). PLN demanded copies of prisoner complaints, settlements and claims showing the dollar amounts paid, responsive pleadings, plaintiffs' identifying information and amounts of attorney fees paid -- all without payment of search fees and copying costs. PLN averred that it had 3,400 [today, over 4,700] subscribers to its printed editions in 50 states, with readership estimated at 18,000 [28,000], and that its investigative reporting would provide the public with a better understanding of how the nation's prison system is run vis-a-vis respect for prisoners' constitutional rights. PLN promised that it would make the information available both in its print edition and on its website. The BOP opposed PLN's fee waiver request averring that PLN "did not explain how [the requested documents] would be of public interest." The matter was submitted to the court on opposing motions for summary judgment.

As a threshold matter, the court rejected the BOP's complaint that only the DOJ (an "agency"), and not Lappin, could be a legal defendant in an FOIA action. The court held that while Lappin was not personally liable, PLN had sufficiently alleged that the BOP was the defendant.

Reaching the fee waiver question, the court first ruled that "public interest" is the proper determinant, with the burden of proof falling to the requestor. PLN met the two tests of not being a commercial operation and of contributing to public understanding of the government. The court rejected the BOP's argument that because some of the documents might already be available in remote court files, the BOP's centralized files need not be tapped. Importantly, the court rejected the BOP's characterization of PLN as not having status as a member of the news media. The court rejected the BOP's attempt to declare PLN's requests as "too vague," agreeing that the category of damage verdicts and settlements was more than

sufficiently specific ("promoting public understanding of how prisons are managed") to meet the FOIA test.

Finally, and perhaps most satisfying, the court rejected the BOP's attempt to summarily dismiss PLN as a nonentity unable to do what it says -- disseminate its word to the public. The court held, "Regardless of the viability of the PLN website as a mechanism for distributing the requested information, with 3,400 reported subscribers and an estimated readership population of 18,000, PLN has demonstrated its ability to distribute the printed journal to the public."

Accordingly, the court granted PLN's motion for summary judgment and denied the BOP's motion for summary judgment. As this issue of PLN goes to press, the BOP has not indicated if it will appeal the decision, nor has it provided the records requested. PLN was ably represented by Ed Elder of the Washington DC law firm Klimaski and Associates. See: *Prison Legal News v. Lappin*, 2006 U.S. Dist. LEXIS 42738. The BOP has elected not to appeal this ruling. This is a final decision on the merits.

Under the Bush administration denial of fee waivers and seeking huge amounts of search fees to produce documents requested by public interest and non profit groups has become the norm. Very few groups have the resources or ability to mount litigation challenging these surious and illegal denials. PLN is one of the first nonprofit groups in the country to both challenge this Bush administration policy and win a resounding victory. ■

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From the Editor

by Paul Wright

This issue reports positive developments we have achieved in two lawsuits, one against the Washington Department of Corrections and the other against the federal Bureau of Prisons. Both cases have taken a lot of time and energy on the part of both PLN staff and our attorneys to win.

Unfortunately, we wind up spending an inordinate amount of time on censorship litigation just to ensure our readers can receive *PLN* and the books we distribute. When prisoners have issues or books from PLN censored please let us know as soon as possible as all too often prison and jail officials do not notify us of the censorship. We ask that prisoners use their grievance system and send PLN a copy of the documentation. Two things that greatly contribute to PLN's success in court: a well developed factual record and skilled attorneys who can use it.

This September marks the 35th anniversary of the rebellion at Attica in September, 1971 and subsequent massacre of 41 prisoners and prison employees by the New York state police and Department of Corrections. The Attica rebellion marks the beginning of the modern era of prison reform in the United States. One of the slogans of the era: Every prison is Attica, Attica is every prison, rings true today as it did then.

In some respects enormous progress has been made in the US prison system, the bulk of it as a result of judicial intervention. In many other respects things are as bad or worse today than they were then: overcrowding, inadequate medical care, brutality and a lack of accountability by staff remain unfixed. The biggest feature though is that today over 2.3 million people are imprisoned in US prisons and jails. In 1971 around 200,000 people were imprisoned in the United States. So while prison and jail conditions may have been deplorable and horrendous far fewer people were subjected to them.

One thing that has changed for the worse is the depoliticization of both US prisoners and the larger populace. In 1971 Attica was widely seen as the domestic face of carpet bombing, napalm, massacres and atrocities being carried out in South East Asia. Today the US openly runs concentration camps in Iraq and Guantanamo where political prisoners are being subjected

to torture and treatment their American counterparts have been undergoing for several decades, yet this is done with little protest and no resistance.

As I have mentioned in previous editorials, PLN's website offers a free daily list serv of prison and jail news and court related information. A lot of prisoners have written to PLN's office asking to receive the free daily news. I will spell it out: to get it you need to have internet access or if you do not, have a friend or relative who can sign up for it, receive it and print it out and send it to you. PLN lacks the resources to do this for you.

PLN's Subscription Madness campaign continues until September 30! Help increase our circulation by purchasing a gift subscription for a friend, relative, legislator, opinion maker, or other person who would benefit from our news and analysis!

Some readers have asked why we publish "old news" on cases or stories that occurred more than a few months ago. The reality is that publishing a monthly maga-

zine means that we have relatively long lead times, we are not a daily newspaper. The other thing is the reality of covering news emanating from prisons and jails: the walls serve to keep the news as well as the prisoners in. Alex Friedmann, *PLN's* associate editor, and I work long, hard hours ferreting out the news prison and jail officials would just as soon keep under wraps. In some cases they succeed in doing so, for a while. As a general rule I consider stories timely if they occurred within the last two years and would be of interest to a significant portion of *PLN's* national readership. Many other stories and articles that are of interest but untimely simply get posted onto PLN's online database where they can be accessed. Readers can help us bring people more timely news by continuing to send us news clippings and keeping us informed and posted on new developments, happenings, events, lawsuit wins and settlements, etc.

Enjoy this issue of *PLN* and encourage others to subscribe. 📖

Florida Guards a Day Late and a Dollar Short with Failure to Exhaust Defense; \$180,000 Verdict Upheld

Carlos Green, a Florida state prisoner, sued five guards and former Florida DOC director James Crosby on a number of legal theories in federal district court, including excessive use of force, deliberate indifference, cruel and unusual punishment, denial of medical care, equal protection, freedom of speech, access to the courts, and the torts of assault, battery and negligence. The claims were largely related to a cell extraction in which Green was beaten and sprayed with CS gas, then denied adequate medical treatment for the injuries he sustained.

The case went to trial on August 23, 2004, and a jury awarded Green \$65,000 in compensatory damages and \$25,000 in punitive damages against each of two defendants, J.K. Schwartz and Patrick J. Doremus, for a total award of \$180,000. The claim against Crosby was dismissed, and the jury found in favor of the three other guard defendants.

The guards' motion to dismiss because

Green hadn't exhausted his administrative remedies was filed after the dispositive motions were decided, so the district court denied the motion as untimely. The district court also specifically found that the punitive damages were no larger than reasonably necessary to deter the violation of Green's rights by Schwartz and Doremus, who remained employed with the FDOC. Following the jury verdict the guards appealed, complaining in part that Green had sued before exhausting his administrative remedies.

On appeal, the U.S. Court of Appeals for the 11th Circuit found that there was sufficient evidence for the jury to have found for Green on the merits of the case. The appellate court also refused to consider the guards' complaint that Green had sued before exhausting his administrative remedies, finding their untimely raising of that issue in the district court waived that defense. The appellate decision is unpublished. See: *Green v. Schwartz*, 138 Fed. Appx. 184 (11th Cir. 2005). 📖

Brownsville Texas Border Corruption Continues

by Gary Hunter

Coronado Cantu took over the Cameron County Sheriff's office in January 2001. He took up residence inside the Texas jail in June 2005. Cantu was charged with heading a crime ring that included drug trafficking, extortion and prostitution of female prisoners.

"Animo" was Cantu's watchword. Defined as spirit or enthusiasm, his mantra graced his speeches and embossed his business cards. The naive crowds loved him. In November 2000 they elected him sheriff over the incumbent Omar Lucio.

"There were a lot of people mesmerized by this guy," said county commissioner and Cantu critic David Garza. "He's a very charismatic individual."

"He portrayed himself as a nice guy," said county Judge Gilberto Hinojosa who originally supported Cantu. "No one expected him to get into bed with drug dealers."

But it's not as though there weren't early warning signs that Cantu was headed for trouble. Soon after being elected he asked for a consultant to help him manage his new office. County officials scoffed at the request.

"I guess he wants a cookbook -- 'How to Run a Sheriff's Office,'" chided County Auditor Mark Yates.

It appears now that Yates and other officials who denied Cantu's request should have looked deeper at the problems of the ex-plumber turned top-cop. Cantu's early tenure included escapes assisted by guards, stolen prisoner property, drug sales by guards and guards having sex with female prisoners. His chief administrator was arrested and accused of organizing a jailhouse "harem."

Anthony Knapp, history professor at the University of Texas at Brownsville points out that violent drug gangs frequently corrupt police in and around the border city. Professor Knapp, coauthor of several books on border problems, bases his comments on history of more than a decade of corruption of the South Texas border. Cantu is the fourth sheriff since 1994 to be convicted on federal corruption charges.

Commissioner Carlos Cascos expressed his embarrassment saying, "As far as what it cost the county, it's something money cannot replace. It's more than a black eye; our faces got bashed in. We'll

be looked at for a long time as a county of ineptitude and a haven for corruption."

That Cantu was a prime candidate for corruption is a matter of record. Former District Attorney Yolanda de Leon investigated charges that Cantu was fixing hot checks for friends when he was still a constable. In 2003 Cantu's administration suffered a scathing report issued by a county grand jury investigating \$16,000 stolen from prisoners' jail accounts. The report charged Cantu with allowing "an environment of permissiveness to develop without oversight on his part." The grand jury also noted that untrained guards with disciplinary problems were being promoted, by Cantu's office, to supervisory positions.

"It's not a pretty picture at all, and this just didn't happen at the end," said de Leon. "The conduct that is in the federal indictment went back at least two to three years, and the special treatment because of personal friendships went back almost to the beginning."

De Leon's original investigation was submitted to the El Paso District Attorney's Office but charges were never filed.

Cantu lost the ensuing election to the man he previously unseated. Lucio immediately fired 75 of the jail guards, many of whom had criminal records. Other guards were fired because they didn't take or couldn't pass the state qualifying exam for jail guards. Cantu himself was a high school dropout.

The U.S. Marshals Service relocated hundreds of federal prisoners because of Cameron County's and Cantu's corruption. Cost to the county was \$1.5 million in Federal funds. Lawsuits filed by workers fired for reporting sexual misconduct in while Cantu ran the jail has cost the county \$200,000 in settlements and \$200,000 in legal fees.

In July 2005 Cantu pleaded guilty to one count of racketeering and heading a criminal enterprise. Prosecutors requested a life sentence with animo.

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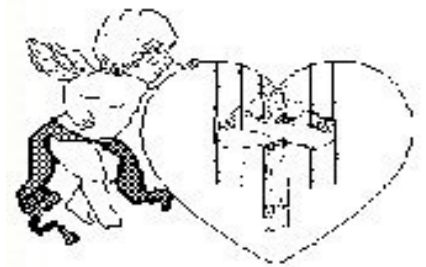
See Page 45 for more information.

On December 13, 2005, Cantu, 49, was sentenced to 290 months in federal prison for his many offenses. He was also fined \$5,000 and sentenced to five years supervised release. Geronimo Garcia, 33, the former operator of the Cameron county Jail Commissary was sentenced to 114 months in prison after being convicted on racketeering charges. ■

Source: *Houston Chronicle*

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A Captive Audience For Salvation

by Jane Lampman

A for-profit prison company stirs hope - and church-state issues - pursuing partnerships with Evangelical Christian ministries.

NASHVILLE, TENN. - America has the highest incarceration level in the world, and its prisons serve too consistently as revolving doors. Are faith-based programs in prisons the answer to these disturbing trends?

The largest private company running prisons and jails in the United States, Corrections Corporation of America, thinks so. CCA has embarked on a major initiative to expand such programs in all 63 facilities it operates under contract with local, state, and federal governments.

"These programs give inmates hope and prepare them to be different people," says John Lanz, CCA's director of industry and special programs.

While the ambitious approach wins kudos from some prisoners, other people question its constitutionality.

Though not directly supported by President Bush's faith-based initiative, CCA's program poses the same questions about how to encourage positive change in people's lives without privileging one form of religion with taxpayer dollars. Some also see potential political ramifications.

CCA provides for a variety of religious services in each facility, as required by law. But in addition, it has formed partnerships with eight national Evangelical Christian ministries under which CCA provides annual financial contributions and sets up franchise-style operations within facilities.

"We had chaplains and religious services, but I saw we didn't take full advantage of resources these national ministries provided, and they were having [legal] difficulties in state and federal facilities," says Mr. Lanz. "As a private company, we could knock down the barriers."

Critics say those barriers shouldn't come down. Religious programming per se - which can benefit both prisoners and the prison environment - is not at issue, but showing preference for a particular religion is. The partnerships do that, they suggest, especially when they include residential "pods" where one faith message structures the living situation, and benefits are available that others don't get.

In a case unrelated to CCA, Americans United for the Separation of Church and State has challenged in court the Inner Change program run in an Iowa prison by Charles Colson's Prison Fellowship. In June, 2006, the court held the program violated the constitutional separation between church and state, enjoined the program and ordered Prison Fellowship to refund \$1.5 million to the state of Iowa.

CCA says funding groups using company profits makes it legal, but others argue that since CCA acts for the government in running facilities, it cannot support a particular religious message.

"In the corrections context, CCA would be treated as if it is a 'state actor,'" says Robert Tuttle, a law professor at George Washington University and an expert on faith-based program issues.

The Freedom From Religion Foundation of Madison, Wisconsin, and its New Mexico members recently filed a federal lawsuit against the state and CCA over programming at the women's prison in Grants, New Mexico. FFRF says the Life Principles program in the "faith pod" there is fundamentalist Christian and teaches the women submission to male authority.

"This is a flagrant endorsement of religion," says Annie Gaylor, FFRF co-president. "We consider this a nationally significant lawsuit because they are the major private provider of prison services ... and have openly said they want to franchise this."

The company contends it's on safe ground because programs are voluntary and prisoners don't have to convert; it developed a checklist for detention facilities to follow, which it says will ensure they are meeting First Amendment requirements.

Ms. Gaylor disagrees: "They are being told that the only way they can be rehabilitated is through Jesus Christ, so it's a mind game even if they say you don't have to convert."

Volunteering in prison is a complicated question, Professor Tuttle says. Do some make choices they think officials or parole boards favor?

Studies Don't Support Program Effectiveness

Along with issues of taxpayer funding of a religious message, there are questions of religious programs' efficacy in prison. Todd Clear, a professor at John Jay Col-

lege of Criminal Justice in New York, has conducted several evaluations. He says that empirical data have not shown a positive impact that can be traced to the programs themselves.

The studies show "fairly substantial differences in post-release success of those involved and those not," he says, "but the differences disappear when you statistically control for the characteristics and background of the people."

Yet encouraged by Bush's faith-based initiative and by staff and prisoner interest, CCA says that along with the vocational, educational, and anti-addiction programs offered, faith-based programs are crucial.

"While all programs are important, our company - and, hopefully, our nation - has recognized that changing the hearts of people leads to larger change of attitudes and behavior," says Dennis Bradby, CCA's vice president for inmate programs.

At the Metro-Davidson detention facility in Nashville, Tennessee, prisoners can apply to live in separate residential communities some have dubbed "God pods," where life is highly structured.

Chaplain Dennis Smith coordinates one faith pod in which 41 prisoners study two programs: Life Principles - a character-building curriculum based on fundamentalist biblical teachings developed by the Institute for Life Principles, in Oak Brook, Illinois, (a group controversial even among evangelicals); and the Bible study course of School for Christ International, of Beaumont, Texas. Local volunteer teachers receive training by national ministries, which provide the materials.

At a pod session during a recent visit, prisoners listen to a televangelist-style message on DVD by the ministry leader, focused on religious doctrine, and then volunteer Ray Vick leads a discussion.

"The fact that I'm saved means I'm special to the Lord. Do you consider yourself a miracle?" Mr. Vick asks. "If it wasn't for Jesus, we couldn't be saved and become a new creation."

One prisoner raises the importance of forgiveness, and Vick talks about his experience of forgiving an absent father. In his second term at the jail, David Elmore signed up for the pod and considers it one of his best decisions.

"The programs teach me that God is

the head of my life whether I want Him to be or not, and if I yield to that, my life will be better - and I'm seeing that," he says in an interview. "We do anger resolution, the commands of Christ, and 170 lessons with DVDs and a text on what's expected of you as a Christian."

Mr. Elmore, who worked for a concrete company, says he played hard and did what he wanted, including alcohol and drugs. A divorced father who left home when his daughter was 4, he has also signed up with another of the ministries - Child Evangelism Fellowship - which encourages prisoners to communicate with their children around Bible lessons.

"My daughter always wanted to know why I wasn't there," Elmore says. "She's 18, and this helps us build a relationship based on who we are now rather than on past mistakes."

Harold Harris, also a repeat offender, says, "Once you get into the program it will grab you. Doing time is hard.... This is the best place to be in the facility because there's more peace."

The other faith pod of 100 prisoners is staffed directly by Men of Valor, a Nashville ministry founded by a former prisoner. It is committed to "winning men in prison to Jesus Christ and disciplining them" so they can "reenter society as men of integrity." The staff of five shepherds the men through a 12-month curriculum, including goal setting and one-on-one mentoring by volunteers. The mentoring will continue for a year after the prisoners' release, and includes support from a local church.

During the morning, the men spend time in group sessions on topics like mar-

riage and family, financial management, and Christian qualities of manhood; an afternoon community meeting is for discussing issues and worship. Today, it's a rousing, high-energy event, with a cappella praise songs, clapping, and rap music with Christian lyrics written last night by "the Prayer Squad": "This is the new life/ set back wait I got something to tell/ remember my old life/ high speeding on my way to hell...."

Eugene Gregory used to write a different kind of rap music, but says "since I got in the program, it don't feel right" anymore. This is his fifth time in jail. He's only 25 and has five kids. Raised in a strict, churchgoing family, he got caught up in adventure, drugs, and the "Wild Boys" gang.

"I've learned something new every day - it's exciting," he says. Even if allowed out after a coming court date, he'd prefer "to leave a new man. I want to inspire somebody to wonder what happened to me."

Does It Institutionalize Evangelical View?

Several in the pod say what's affected them most is the Bible study. "I used to read the Bible like any book, but they taught us to read one verse maybe a hundred times until you get the meaning," says Rodney Collier. "Now I know how to go to God."

Residential faith-based pods in prisons are a growing phenomenon in states, though controversial. Dr. Clear says Colson's Prison Fellowship (PF) has reorganized its programs to focus on reentry into the community.

In addition to the eight Evangeli-

cal ministries already under agreement, CCA has just signed with PF for a reentry program in Indiana. It's also developing a partnership with megachurch pastor Rick Warren's prison ministry.

Overall, "we're about 40-50 percent there in implementing these programs," Lanz says.

The all-out emphasis on Evangelical groups, including some fundamentalist ones, appears to involve deals with preferred religious groups for any structured programs beyond simple church services, raising questions about the choice prisoners have. Some county jails are taking similar steps.

"This is now a systematic attempt by folks on the prison and Evangelical side to move this vision of evangelical transformation as a core part of what it means to prepare prisoners for reentry," Tuttle says.

Dr. Clear is also skeptical. "The potential downsides of a partisan, Evangelical alliance with a profit-making prison industry are alarming," he says.

Yet he is strongly in favor of religious programming that offers real choice and is widely available. Prisoners are positive about programs because they ameliorate the strains of being locked up, he says.

The challenge for those in the corrections business is to find the right constitutional mix of programs that allow prisoners free religious expression and a choice of opportunities for rehabilitation. ■

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Pro Se Tips and Tactics: Fourteenth Amendment - Due Process: U. S. Supreme Court Clarifies Some Rights

by Daniel Manville

Introduction¹

For a number of years it seemed that rights of prisoners were being slowly narrowed, if not eliminated by not only the lower federal courts but also the United States Supreme Court. This eroding away of rights of prisoners was slowed significantly during the 2004-2005 Supreme Court term. In that term, the Court made clear the standard for finding the existence of a liberty interest. Contrary to most lower federal courts, the Court found the existence of a liberty interest when confined in supermax prisons. The Court also clarified when a prisoner needs to file a writ of habeas corpus instead of a civil action when the state has changed its parole release requirements after a prisoner was sentenced.

Muhammad v. Close

Since the late 1990s, confusion existed as to when a prisoner had to obtain a reversal of a guilty prison misconduct finding prior to bringing a section 1983 action for violation of due process.² Most lower courts would not authorize a lawsuit concerning facts related to a guilty misconduct finding until that finding was set aside.³ In *Muhammad v. Close*, the Supreme Court eliminated that confusion.

Muhammad filed a lawsuit alleging that prison staff had written a threatening behavior misconduct report in retaliation for writing grievances and filing prior lawsuits against staff.⁴ At the misconduct hearing, Muhammad was found not guilty of the threatening behavior but guilty of the lesser included offense of insolence.⁵ In the district court, Muhammad alleged that if he had been charged with the insolence offense he had actually committed, and not the fabricated one of threatening behavior, he would not have been placed in segregation pending the disciplinary hearing.⁶ He sought damages for the time spent in segregation.⁷

The district court dismissed the lawsuit for failure to provide sufficient evidence of retaliation. Muhammad appealed to the Sixth Circuit Court of Appeals. Instead of affirming upon the grounds found by the district court, the

Sixth Circuit applied its earlier holding in *Huey v. Stine*,⁸ which held that if a favorable ruling on the prisoner's claims would imply that the disciplinary guilty finding was wrongfully decided, the prisoner had to have the guilty finding set aside before the civil rights lawsuit could proceed.⁹

The *Muhammad* Court reversed for two reasons. First, it found that the Sixth Circuit had committed a factual error by assuming that Muhammad had sought expungement of the insolence guilty finding and the punishment. The Supreme Court stated that nowhere in his complaint did the prisoner challenge his conviction for insolence or the punishment imposed.¹⁰

The second reason for reversing was that the Sixth Circuit erred in applying the "favorable termination rule" of *Heck* "to all suits challenging prison disciplinary proceedings."¹¹ The Supreme Court found that Muhammad's lawsuit did not "seek a judgment at odds with his conviction or with the State's calculation of time to be served in accordance with the underlying sentence."¹² *Muhammad* stated that since no claims were raised in the complaint that would require the filing of a habeas action, such as seeking return of lost good time or shortening of a criminal sentence, the favorable termination rule of *Heck* did not apply.¹³

Based upon the decision in *Muhammad v. Close*, the "favorable termination rule" should be applied in the following situations:

1. If the prisoner did not lose good time as part of the misconduct guilty proceeding, the "favorable termination rule" does not apply, and the prisoner does not have to get the misconduct conviction overturned in a state forum or by federal habeas corpus prior to bringing a federal lawsuit. The prisoner can bring a section 1983 lawsuit as soon as prison administrative remedies are exhausted.

2. If the prisoner did lose good time as a result of the misconduct guilty finding, the "favorable termination rule" does apply, so the prisoner cannot bring a section 1983 suit to challenge the guilty finding until after the misconduct conviction is overturned, either in a state administrative

proceeding, in state court, or by federal habeas corpus after state remedies are exhausted.

3. If the only misconduct punishment imposed is placement in segregation, the "favorable termination rule" does not apply. The prisoner can bring a section 1983 lawsuit once the administrative remedies are exhausted. However, the prisoner will be required to show that the misconduct conviction deprived him of a liberty interest or imposed an "atypical and significant" hardship.¹⁴

4. *Muhammad* does not change the requirements that in all section 1983 lawsuits, the prisoner has to exhaust available administrative remedies before bringing a section 1983 lawsuit,¹⁵ and is required to show that the misconduct guilty finding deprived the prisoner of a liberty interest either by imposing an "atypical and significant" hardship on the prisoner, or by causing the prisoner to serve more time in prison.¹⁶

The *Muhammad* decision now allows cases to go forward, such as *Riley v. Kurtz*.¹⁷ In 1999, Riley obtained a jury verdict of \$25,003 based largely on the jury finding that prison staff had written two false misconduct charges to retaliate against Riley. On appeal, the Sixth Circuit reversed the jury verdict as to the grant of \$5,000 in compensatory damages that related to the misconduct conviction affirmed by the agency, and reduced the damage award to \$1,003. Riley argued that the restrictions imposed in *Heck* and *Edwards* were not applicable to him since he had already served his misconduct punishment and he was serving a life sentence and did not lose any good time. The Sixth Circuit refused to adopt this argument by Riley in 1999.¹⁸ It took another six years, too late for him, but Riley's argument has finally been adopted by the *Muhammad* Court.

Two positive things may have developed from *Muhammad* to assist prisoners in their litigation. First, appellate courts should not be reluctant, like the *Riley* panel, to be a step or two ahead of where the Supreme Court is going. Second, in many cases prisoners can now bring lawsuits for damages when staff have written false misconducts without first

getting the guilty misconduct findings set aside.

Wilkinson v. Austin

Over the years, prison officials have increased the use of long-term confinement in segregation for prisoners that they felt were disruptive to the good order of the prison system. These prisons were given the designation of “supermax” to reflect the high level of security under which these disruptive prisoners were confined. In Ohio, prisoners alleged that their initial placement in the “supermax” prison denied them due process. Even though on the eve of trial prison officials changed their “supermax” placement policy, the district court found that the changes were inadequate and ordered additional injunctive relief.¹⁹ Prison officials appealed to the Sixth Circuit, which affirmed the finding of a liberty interest. An appeal was then filed with the United States Supreme Court.

The Supreme Court agreed with the lower courts that there is a liberty interest in staying out of supermax.²⁰ The Supreme Court stated that although it has held that a liberty interest in avoiding particular conditions of confinement may arise from state policy or regulation, but in *Sandin*²¹ it abrogated the “methodology of parsing the language of particular regulations.”²²

“After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but

the nature of those conditions themselves “in relation to the ordinary incidents of prison life.”²³

This language appears to overrule the decisions of lower courts, including the Sixth Circuit,²⁴ which held that *Sandin* added a new hurdle (the “atypical and significant” hardship requirement) on top of the requirement that prisoners show a liberty interest under the pre-*Sandin* analysis.²⁵ After *Austin*, it seems that it is only the conditions of confinement, based upon the regulation, and not any mandatory language in the regulation, which will determine whether prison conditions impose an “atypical and significant” hardship.

The Supreme Court then noted that since *Sandin* the circuits “have not reached consistent conclusions for identifying the baseline from which to measure what is ‘atypical and significant’ in any particular prison system.”²⁶ The Court went on to state that it does not matter in this case since the supermax “imposes an atypical and significant hardship under any plausible baseline.”²⁷

“For an inmate placed in OSP [Ohio State Penitentiary], almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Un-

like the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context.”²⁸

The Court found that regardless of the “danger that [these] high-risk inmates pose both to prison officials and other prisoners,” this danger “does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance.”²⁹

In determining what process is due under these circumstances, the *Austin* Court looked to the factors in *Mathews v. Eldridge*.³⁰ As to the first factor, the interest involved, the Court stated that since the prisoners were already lawfully confined, their due process rights were more limited than where freedom from any confinement was at issue.³¹

As to *Mathews*’ second factor, risk of erroneous placement under Ohio’s existing procedures and the likely value of additional or different safeguards, the Court found that the revised policy of providing notice of the factual basis for placement, a fair opportunity to offer rebuttal and an appeal process were sufficient to meet the due process requirements.³²

The third factor, the government interest, was a “dominant consideration” due to prison staffs’ obligation to ensure the safety of others and the threat of

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Due Process (cont.)

gangs. The Court found that the existence of gangs which are “[c]landestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls,” justified the needs of the prison for limited procedures.³³ The Court also justified its decision by referencing the scarce resources of the prison system that are spent to confine prisoners in supermax and that additional resources would be needed if other procedures were required.³⁴

Austin has now given prisoners a liberty interest in not being placed in long-term segregation if such placement is of indefinite duration and their eligibility for parole is routinely denied due to this placement in segregation.³⁵ It is very likely that long term placement in segregation in Michigan would be found to create a liberty interest since such confinement is of indefinite duration and parole is routinely denied while a prisoner is confined in segregation.³⁶

Wilkinson v. Dotson

In *Wilkinson v. Dotson*, the Supreme Court was presented with a challenge to Ohio’s parole laws passed years after Dotson was sentenced, which imposed new procedural requirements as to his eligibility and suitability for parole. It was claimed that these changes in the parole

law violated the ex post facto clause.³⁷ The district court dismissed the section 1983 actions, holding that the lawsuit had to be brought as a habeas corpus action.³⁸ On appeal, the Sixth Circuit reversed, holding that since the claims of the prisoners were related to denial of eligibility and suitability for parole, and not for release from confinement, section 1983 was the proper action to be filed rather than an application for habeas corpus.³⁹ The Supreme Court granted review to determine whether such challenges had to be brought as habeas or civil rights actions.

The Supreme Court stated that its analysis did not depend upon the plaintiffs belief they would likely be released on parole if the old procedures were applied to their parole review.⁴⁰ The Court stated that the lawsuit had to be reviewed to determine whether the remedy sought by the prisoners would “invalidate the duration of their confinement—either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of the State’s custody.”⁴¹ If the remedy sought would implicate the length of the sentence, such as by re-crediting of good time or placement on parole, the prisoners would be required to bring habeas actions. If the remedy sought would only provide a new review or hearing in which release could still be denied, the proper remedy would be a civil rights action.

Since the early 1990s many states, including Michigan, have changed the

parole review procedures in relation to prisoners serving long sentences. In almost every state that implemented these new parole review procedures, the changes have had negative impacts on those sentenced prior to the enactment of the new law being enacted.⁴² For example, in Michigan, the issue of ex post facto application of changes in the parole process after sentences were imposed is presently before the judge in *Foster-Bey v. Rubitschun*.⁴³ Recently, the *Foster-Bey* court, in denying prison officials’ motion to dismiss, held that the issue of whether the changes in the parole process violated ex post facto was not ripe for decision, and granted discovery.

“Defendants argue that the amendments to Michigan’s parole hearing procedures do not violate the *Ex Post Facto* clause. There are two ways that amendments to these procedures can create a violation: a significant risk may be shown either (1) “by [rule’s] own terms”—i.e., on its face or (2) “the rule’s practical implementation by the agency charged with exercising discretion” *Garner v. Jones*, 529 U.S. at 255. The latter requires the plaintiff to draw on outside evidence. *See, e.g., id.* at 256 (requiring the court of appeals to determine “whether, as a matter of fact, the amendment to [the rule] created a significant risk of increased punishment”)(emphasis added). The motion to dismiss presently before the court, however, does not permit the consideration of this extraneous information. Thus, the issue is not ripe for consideration.”⁴⁴

Ex post facto challenges to changes in

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the parole review procedures is fact intensive.⁴⁵ In reviewing an ex post facto claim alleging adverse changes in parole procedures after the sentence was imposed, lower courts are to consider (1) whether the changes actually imposed stricter or discretionary review procedures;⁴⁶ (2) whether the likelihood of release on parole decreased after the new parole review procedures were in place⁴⁷ (3) whether the parole board retains discretion to hold earlier hearing;⁴⁸ and (4) whether a full hearing is held or just a file review. This type of inquiry will involve significant discovery.

Conclusion

The courts have become more hostile to prisoners in the last ten years. Even though the above decisions have given prisoners a little breathing space in the areas where the worst atrocities are committed by correctional staff - the writing of false discipline reports to retaliate, the struggle for justice will continue.⁴⁹ Congress and the courts have used the filing of frivolous lawsuits by prisoners to impose draconian restrictions. If you are to have rights that can be litigated, you must not provide ammunition to those who wish to further curtail your rights. This means that you must ensure that the lawsuits you file are not frivolous and do not provide more ammunition to those who care little about your conditions of confinement. You must take these small victories and build on them by bringing meritorious lawsuits. By ensuring that you file only lawsuits that are not frivolous, you also ensure that you will be successful in your endeavors. In this manner you can help ensure that your end result is a victory. ■

(Endnotes)

1. This article is a section from *The Law of Prisoners' Rights*, "Annual Survey of Michigan Law 2004-2005," Wayne State University Law Review ((to be printed) 2006). It has been modified to accommodate this audience.

This article is authored by Daniel E. Manville. He is the author and publisher of the recently released *Disciplinary Self-Help Litigation Manual* and is currently working on a rewrite of the *Prisoners' Self-Help Litigation Manual* with John Boston which should be available in late 2006. Mr. Manville is presently an Adjunct Professor and Clinical Staff Attorney for Wayne State University Law School Civil Rights Clinic, Detroit, Michigan. Neither the Clinic or Staff Attorney Manville are able

to handle lawsuits in other states.

2. See, e.g., *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994) (prisoner cannot use § 1983 to obtain relief where success would necessarily demonstrate the invalidity of criminal conviction); *Edwards v. Balisok*, 502 U.S. 641, 117 S.Ct. 1584 (1997) (prisoner cannot use § 1983 to obtain relief from misconduct guilty finding where success would necessarily demonstrate the invalidity of confinement or its duration).

3. See, e.g., *Huey v. Stine*, 230 F.3d 226 (6th Cir. 2000), where the prisoner filed a section 1983 action seeking to challenge a sentence of administrative detention. The Sixth Circuit held that the "favorable termination rule" of *Edwards v. Balisok*, *supra*, applied even to lawsuits challenging only the conditions of prison confinement where the relief sought by the prisoner would require the court to "unwind the judgment of the state agency." *Id.* at 230. The *Huey* Court used the *favorable termination rule* to hold that the prisoner's section 1983 action for violation of his eighth amendment right failed to state a cognizable claim because to grant the relief he sought would necessarily have implied that the misconduct conviction was wrongfully obtained. *Id.* ("Heck generally does not bar eighth amendment claims, but if the claim is founded solely on an allegation that a corrections officer falsified a disciplinary report, then *Heck* applies.").

4. 540 U.S. 749, 753, 124 S.Ct. 1303 (2004), *on remand*, 379 F.3d 413 (6th Cir. 2004).

5. *Muhammad*, 540 U.S. at 752.

6. *Id.*

7. *Id.* at 754.

8. See *supra*, note 3.

9. See *Muhammad*, 540 U.S. at 753.

10. *Id.* at 754.

11. See *id.* The *Muhammad* Court stated that its previous rulings limited the "favorable termination ruling" to situations where a favorable result from the civil rights action "could affect credits toward release based on good-time served." *Id.* at 751-52.

12. See *Muhammad*, 540 U.S. at 754-55. Contrary to the Sixth Circuit's statement that *Muhammad* had sought expungement of the misconduct charge, the Supreme Court stated that "the Magistrate expressly found or assumed that no good-time credits were eliminated by the prehearing action." *Id.*

13. *Id.*

14. See *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293 (1995).

15. 42 U.S.C. § 1997e(a); see also *Porter v. Nussle*, 534 U.S. 516, 531, 122 S. Ct. 983 (2002) (exhaustion required of all conditions of confinement).

16. See *Sandin v. Conner*, 515 U.S. at 484

("atypical and significant" hardship).

17. 194 F.3d 1313, 1999 WL 801560 (6th Cir. 1999). Author Daniel E. Manville represented Mr. Riley in both the trial and appellate courts.

18. *Id.* at **5-6.

We decline to adopt Riley's argument. Even if he has correctly inferred the direction that the Supreme Court will take in the years to come, the rule he advocates represents a major extension of what the five justices have actually stated in their various concurring opinions. Unless and until the Supreme Court adopts the position Riley advocates, we will continue to follow *Edwards* and the reasoning of the unpublished Sixth Circuit cases cited above.

19. *Austin v. Wilkinson*, 189 F. Supp.2d 719 (N.D. Ohio 2002), *modified*, 204 F. Supp.2d 1024 (2002), *aff'd in part, rev'd in part*, 372 F.3d 346 (6th Cir. 2004), *aff'd in part, rev'd in part*, *Wilkinson v. Austin*, — U.S. —, 125 S.Ct. 2384, 2391 (2005).

20. The State initially conceded this point, but the United States disputed the concession, and when pressed at oral argument, the State backtracked from its concession. *Austin*, 125 S.Ct. at 2393.

21. *Sandin*, 515 U.S. at 483-84.

22. *Wilkinson*, 125 S. Ct. at 2394.

23. *Austin*, 125 S.Ct. at 2394 (quoting *Sandin*, 515 U.S. at 484).

24. See, e.g., *Rimmer-Bey v. Brown*, 62 F.3d 789, 790-91 (6th Cir. 1995) (court applied the *Sandin* test to the claim of a Michigan inmate that the mandatory language of the MDOC's regulations created a liberty interest that he receive notice and hearing before being placed in administrative segregation).

25. Under pre-*Sandin* law, a prisoner had to show that the rule, regulation or statute contained mandatory language and substantive predicates See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 471-72, 103 S.Ct. 864 (1983) (in determining whether a liberty interest existed, courts were to ask whether the State had gone beyond

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Due Process (cont.)

issuing mere procedural guidelines but had used “language of an unmistakably mandatory character” such that the incursion on liberty would not occur “absent specified substantive predicates.”); *Washington v. Starke*, 855 F.2d 346, 349 (6th Cir. 1988) (In determining whether state-enacted rules create a protected liberty interest, the key is “whether or not the state has imposed ‘substantive limitations’ on the discretion of [officers] . . . or, in other words, whether the state ‘has used language of an unmistakably mandatory character.’” “The mandatory nature of the regulation is the key, as a plaintiff “must have a legitimate claim of entitlement to the interest, not simply a unilateral expectation of it.”).

26. *Austin*, 125 S.Ct. at 2394 (citations omitted).

27. *Id.* at 2394-95.

28. *Id.* (citation omitted).

29. *Id.* at 2395.

30. 424 U.S. 319, 335, 96 S.Ct. 893 (1976), where the Court stated that three distinct factors are considered:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

31. Prisoners’ liberty interest “while more than minimal, must be evaluated nonetheless, within the context of the prison system and its attendant curtailment of liberties.” *Austin*, 125 S.Ct. at 2395.

32. *Id.* at 2395-96.

33. *Id.* at 2396.

34. *Id.* at 2397.

35. See, e.g., *Underwood v. Luoma*, 107 Fed. Appx. 543, 544-45, 2004 WL 1859098 (6th Cir. 2004) (unpublished) (placement in administrative segregation for thirteen and a half years does not constitute an atypical and significant hardship on the inmate); see also *Williams v. Vidor*, 67 Fed. Appx. 857, 859, 2003 WL 21085362 (6th Cir. 2003) (unpublished) (holding that placement in administrative segregation for ten years was not an atypical and significant hardship); *Randolph v. Campbell*, 25 Fed. Appx. 261, 263, 2001 WL 1580227 (6th Cir. 2001) (unpublished) (“The fact that [] administrative segregation placement may have a negative implication on [a prisoner’s parole eligibility] is a collateral consequence of . . .

placement in administrative segregation that is insufficient to create a liberty interest.”).

36. See *Randolph v. Campbell*, *id.* The court finding’s that a negative implication on parole eligibility was not sufficient to create a liberty interest was reversed by *Austin*.

37. 544 U.S. 74, 125 S.Ct. 1242. 1245 (2005). A due process claim was brought in the lower court which was not considered by the Supreme Court.

38. *Id.* at 1245 (“*Dotson v. Wilkinson*, No. 3:00 CV 7303 (N.D. Ohio, Aug. 7, 2000); *Johnson v. Ghee*, No. 4:00 CV 1075 (N.D. Ohio, July 16, 2000).”).

39. See *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003) (*en banc*) (procedural challenges to parole eligibility and parole suitability determinations could appropriately be brought as civil rights actions under § 1983, rather than pursuant to an application for habeas corpus), *affirming* 300 F.3d 661 (6th Cir. 2002).

40. See *Dotson*, 125 S.Ct. at 1247 (“In neither case would victory for the prisoners necessarily have meant immediate release or a shorter period of incarceration; the prisoners attacked only the ‘wrong procedures, not . . . the wrong result (i.e., [the denial of] good-time credits).’ (citations omitted).”).

41. *Id.* See also *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506, 115 S.Ct. 1597 (1995) (“[T]he focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of ‘disadvantage’ . . . but on whether any such change . . . increases the penalty by which a crime is punishable”).

42. See, e.g., *Ali v. Tennessee Bd. of Pardon and Paroles*, 431 F.3d 896, 2005 WL 3369877, at *1 (6th Cir. 2005) (inmate alleged Tennessee Parole Board used regulation enacted after his conviction to deny parole; district court dismissal of habeas as untimely was reversed); *Parker v. Kelchner*, 429 F.3d 58, 64 (3rd Cir. 2005) (inmate alleged violation of ex post facto for denial of parole based on newly enacted parole statute after inmate was sentencing; writ dismissed on appeal for failure to exhaust state remedies).

43. No. 05-7138, 2005, WL 2010181, at *7 (E.D. Mich. Aug. 18, 2005).

44. *Foster-Bey*, 2005 WL 2010181, at *7, “Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss.” Prisoners alleged that parole board changed second-degree paroleable life to “life means life” based upon changes to the parole laws that took effect after 1992 even though they were sentenced prior to that date.

45. See *Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362 (2000) (issue was whether change in interval from three to eight years for parole

reconsideration was an ex post facto violation). The Supreme Court remanded the case with instruction to allow plaintiff an opportunity to engage in discovery to show whether the change in the law created a significant increase in punishment.

When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule’s practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule. *Id.* at 255.

46. See *Morales*, 514 U.S. at 509 (“California amendment changed from an annual review to a discretionary postponement of up to three years based upon the nature of crimes committed; Supreme Court stated the changes “create[d] only the most speculative and attenuated possibility of . . . increasing the measure of punishment . . .”).

47. *Id.* (data showed no change in parole release decisions after new procedures implemented; “about 90% of all prisoners are found unsuitable for parole at the initial hearing, while 85% are found unsuitable at the second and subsequent hearings.” *Id.*, at 510-511). See also *Shabazz v. Gabry*, 123 F.3d 909, 914 (6th Cir. 1997), *cert. denied*, 522 U.S. 1120 (1998), the court stated that

[w]here amendments to state parole laws postpone initial mandatory parole hearings and decrease the frequency of subsequent mandatory hearings, but nevertheless provide other viable opportunities for parole, such amendments do not produce a “sufficient risk of increasing the measure of punishment attached to the covered crimes.” The 1992 amendments do not change the standard for parole, but allow prisoners ample opportunity to petition the Parole Board for interviews. Further, the 1992 amendments allow the Parole Board to grant parole interviews of its own volition, and to grant prisoners parole without an interview.

48. *Morales*, 514 U.S. at 512-13 (in finding no ex post facto violation, the Supreme Court placed significant reliance on the State’s representation that its parole board had a practice of granting prisoners’ requests for early review); *Garner*, 529 U.S. at 253 (“[P]resence of discretion does not displace the protections of the Ex Post Facto Clause, [as the] danger that legislatures might disfavor certain persons after the fact is present even in the parole context.”).

49. See *Woodford v. Ngo*, ___ U.S. ___, 126 S.Ct. 2378 (2006), where Justice Alito imposes his anti-prisoners views by requiring prisoners to engage in total exhaustion of the prison grievance system.

Supreme Court: Banning Publications to Punish Recalcitrant Prisoners Trumps Their First Amendment Rights

by John E. Dannenberg

The U.S. Supreme Court held that the Pennsylvania Department of Corrections' (PDOC) policy of banning its most disruptive prisoners' receipt of all non-legal and non religious magazines, newspapers and photographs as a behavior modification tool met the "legitimate penological interest" test of *Turner v. Safley*, 482 U.S. 78 (1987). In so holding, the Court ruled that the prisoners' First Amendment rights were trumped by PDOC's claimed need to impose this acknowledged punishment.

Ronald Banks was a PDOC prisoner housed in the Long Term Segregation Unit (LTSU) for his disruptive behavior. He was initially housed in LTSU-2, the harshest section, for 90 days or unless and until he improved his behavior. One of the LTSU-2 restrictions was to bar prisoners from receiving non-legal newspapers, publications or photographs. Represented by counsel, Banks sued under 42 U.S.C. § 1983 for violation of his First Amendment rights. PDOC Secretary Beard filed a motion for summary judgment, which Banks did not oppose. Rather, Banks only filed a cross-motion for summary judgment on the theory that his First Amendment rights should carry the day. This procedural gamble later proved problematic for Banks. That is, by not having opposed Beard's summary judgment motion, he implicitly admitted all facts alleged by Beard to be true. These facts included PDOC's self-serving reasons for their restrictive treatment of LTSU-2 prisoners. Having

thus unwittingly taken contesting these issues off the table for summary judgment purposes, Banks was left solely with a naked cross-motion based not upon contestable PDOC facts, but solely upon First Amendment legal theory. The U.S. District Court (W.D. Penn.) granted Beard's summary judgment motion and denied Banks'. Banks appealed.

A divided Third Circuit U.S. Court of Appeal reversed, holding that there was no valid, rational connection between PDOC's regulation and either it's alleged rehabilitative objective or security, and that the blanket media prohibition unreasonably violated the prisoners' First Amendment rights. *Banks v. Beard*, 399 F.3d 134 (3rd Cir. 2005).

On certiorari, the U.S. Supreme Court reversed. Its ruling was predicated on applying its alternative precedents of a "legitimate penological interest" test (*Safley*, supra) or "substantial deference to the professional judgment of prison administrators" (*Overton v. Bazzetta*, 539 U.S. 126 (2003)). The court found *Turner's* analysis dispositive based on the first of the three components of PDOC's policy, "to motivate better behavior on the part of these 'particularly difficult prisoners,' by providing them with an incentive to move to level 1 [where they are allowed a few publications], or out of the LTSU altogether, and to 'discourage backsliding' on the part of level 1 inmates." Specifically, the court found that there was a "valid rational connection between the policy and legitimate penological

objectives," i.e., behavior modification. This finding subsumed all other *Turner* analysis. The court pointed out that to defeat this finding, Banks would have had to have disputed Beard's facts alleged in his summary judgment motion, thereby placing the contested facts before a jury to determine. But since Banks never opposed Beard's summary judgment motion, the court accepted Beard's statements and depositions as true and reversed the Third Circuit.

In support of Banks' First Amendment claims, *Prison Legal News* filed an amicus curiae brief.

The Supreme Court's ruling here is nonetheless disconcerting. While the complained-of restriction applied only to the 40 LTSU prisoners (0.0196 of the total PDOC population), the concept of allowing deprivation of basic First Amendment rights as a legitimate punishment tool to be left to the "professional judgment of prison administrators" is scary indeed and harkens back to the judiciary's "hands off" doctrine when it came to the rights of prisoners. It doesn't take a lot of imagination to transmogrify this initial breach in the levee of the U.S. Constitution into a future Katrina-like flood.

Finally, of import to all PLN readers seeking to maximize their success in § 1983 cases, a lesson learned here is that you should not fail to oppose a defendant's motion of summary judgment. This case also exemplifies the need for discovery. See: *Beard v. Banks*, 126 S.Ct. 2572 (2006). ■

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CSC Alien Abuse Class Action Settled for \$2.5 Million

On August 10, 2005, a federal court in New Jersey approved a settlement in *Brown v. Esmor Correctional Services Inc.*, USDC No. 98-1282 (DNJ). Esmor Correctional Services Inc. (Esmor) – later known as Correctional Services Corporation (CSC) – agreed to pay the plaintiff-alien class \$2.5 million for abuses suffered while detained in an Elizabeth, New Jersey facility Esmor ran for the Immigration and Naturalization Service (INS) from August 1994 through 1995. The plaintiffs were subjected to beatings and abuse by guards at the facility, which was a converted warehouse.

After payment of court-approved attorney fees of \$766,667 and \$200,000 in expenses, class members filing valid claims by November 10, 2005, will divide the remaining \$1,533,333. The amount of each claimant's payment depends, in part, upon the number of class members who filed claims. In 1999, class counsel identified and located approximately 1,180 detainees, but by the summer of 2003 only 456 could be found.

A "Plan of Allocation" (POA) allocates money to Qualified Claimants "according to how long they were detained...and by the nature of the injuries they suffered when they were there." The POA assigns "units" for each kind of injury. It "assigns one unit for each day detention" in the unconstitutional conditions. 25 units are assigned "for each day of segregation..." 30 units are allocated "for each incident of a physical beating by an Esmor guard." 20 units are assigned to each detainee who was injured during the June 17, 1995 riot. A one-time allotment of 15 units is assigned to each detainee who was visited by the Esmor ERT Team who conducted searches at night. 15 units are assigned to each detainee who was subject to a digital body cavity search. Finally, 15 units are assigned "to each detainee who was subjected to sexual harassment" including physical touching by an Esmor guard.

"The Plan Administrator [i.e., Class Counsel] will evaluate each claim and compute the total number of units to be credited to each claimant and the total number of units of all claimants. To obtain the value of each unit, the total number of units will be divided into the fund to be distributed. To determine the award of each claimant, his or her total

number of units will be multiplied by the value of each unit."

In approving the settlement, the court concluded that it "is fair, reasonable and adequate" under the nine-factor test enumerated in *Girsh v. Jepsen*, 521 F.2d 153, 157 (3d Cir. 1975). In doing so, the court noted that "in its [September 9, 2004] opinion resulting Esmor's summary judgment motion the court found that... plaintiffs...presented substantial evidence in support of their claims. But "Esmor... denied wrongdoing and liability. It vigorously...defended the action up to the point of settlement and would no doubt continue to do so absent settlement....It is not unrealistic to estimate that, at best, many more years would be required to conclude this case," which was already more than nine years old. Even in settlement, Esmor "vigorously denied and disclaim[ed] any wrongdoing or liability." However, the settlement came about as CSC was in the process of being bought out by Geo Corp. and as *PLN* has noted, it appeared that Geo conditioned its buy out of CSC on CSC settling all of its outstanding major lawsuits.

The court also noted that "[t]he difficulty of proving liability is compounded by the fact that plaintiffs may have great difficulty in arranging for critical witnesses to be available for trial. Some may have been deported; some may have been transferred within the United States to presently unknown institutions."

There also appears to be a question of Esmor's ability to withstand a greater judgment. "It is true that in some single plaintiff claims in prison or detention cases there have been recoveries substantially higher than the individual recoveries that can be anticipated in this case. However, those recoveries "typically came after trial. The court was aware of "at least one substantial judgment" against Esmor/CSC – which was recently acquired by the Geo Corporation – in an unrelated action. "During the course of this case Esmor [was] successfully sued for claims arising from abuses of detainees at its other facilities and one significant case in Texas resulted in a jury verdict of more than \$38 million...Esmor's insurance carriers...commenced litigation disclaiming coverage in that case."


"Esmor maintains insurance for claims arising from this class action in an amount that is greater than \$2.5

million provided for in the settlement, but the extensive expense of these consolidated cases has exhausted most of the excess coverage. During settlement negotiations "it became apparent that the amount of the settlement is the maximum amount [Esmor's primary insurance] carrier is going to pay." Thus, "while perhaps Esmor could pay more now, it is a question whether it would be in a position to pay more after a trial and possible appeals given the existence of other litigation against it and the substantial other liabilities to which it may be subject."

Two other cases were filed concerning abuses at the Elizabeth facility: *Joaquin DaSilva v. Esmor Correctional Services, Inc.*, Civil Action No. 96-3755 (DRD); and *Hawa Abdi Jama v. United States INS*, Civil Action No. 97-3093(DRD). Once *Brown* was certified as a class action, on March 10, 1999, the *DaSilva* and *Jama* plaintiffs were given the opportunity to object out of the class. Nine of the twenty *Jama* plaintiffs opted out. Esmor appealed the opt out order for the appeal which was still pending when the settlement was approved. The remaining *Jama* plaintiffs and all *DaSilva* plaintiffs became members all the *Brown* Class.

DaSilva counsel Carmen E. Mendiola, continue to represent the *DaSilva* plaintiffs in filed objections to the settlement. The court rejected each of those objections, however, noting in quite critical terms that they "were filed after the deadline," "contain[ed] a number of misstatements," and had "no substance."

The nine *Jama* plaintiffs who opted out of *Brown* are not affected by the settlement unless the Third Circuit grants Esmor's appeal of the opt out order. The Settlement Agreement "contemplates waiting until Esmor's appeal is resolved at which time it will be known whether the *Jama* plaintiffs are members although Class. Final computation of the value of the units could be determined at that time."

The *Brown* Class is represented by Ressler & Ressler, 48 Wall St, New York, New York, 10005. See: *Brown v. Esmor Correctional Services, Inc.*, USDC No. 98-1282 (DRD) (D.NJ 8/10/05). The settlement is posted on *PLN*'s website. 

Additional Sources: *The Associated Press*, *New Jersey Law Journal*

Supreme Court Says No to Trial by Military Commission for Gitmo Prisoners

by Matthew T. Clarke

On June 29, 2006, the Supreme Court held that prisoners being held in the military concentration camp prisons at Guantanamo Bay, Cuba (Gitmo), could not be tried by the special military tribunals set up by President Bush in a comprehensive military order dated November 13, 2001 (the Order). See 66 Fed.Reg. 57833. The Supreme Court held that prisoners taken in the "War on Terror" were entitled to some of the protections of the Geneva Conventions.

The Order was intended to govern the "Detention, Treatment, and trial of Certain Non-Citizens in the War Against Terrorism." It allowed the detention and trial of and noncitizens the President determined "there is reason to believe is or was" a member of al Qaeda or has engaged or participated in terrorism against the U.S. It provided for trial by appointed military commissions. One of the salient features of the military commission was that the defendant had no right to review the government's evidence.

In November 2001, Yemeni national Salim Hamdan was turned over to U.S. forces by Afghan militia who captured him during military operations against the Taliban. In June 2002, he was imprisoned at Gitmo. Over a year later, President Bush declared him eligible for trial by military commission for one count of conspiracy to commit war crimes which included being a member of al Qaeda and agreeing with other al Qaeda members to commit terrorism. The overt acts used to support the conspiracy charge are listed as acting as Osama bin Laden's "bodyguard and personal driver" while bin Laden and his associates plotted attacks, transporting weapons used by al Qaeda members and bin Laden's bodyguards, driving bin Laden to al Qaeda-sponsored training camps, press conferences, or lectures at which bin Laden encouraged attacks against the U.S., and receiving weapons training at al Qaeda-sponsored camps.

Hamdan filed habeas corpus and mandamus actions challenging the government's method of prosecuting him. Specifically, while conceding that a court-martial under the Uniform Code of Military Justice (UCMJ) has the authority to try him, he challenged the military commission's authority based largely on two premises:

"conspiracy" is not a war crime and the procedures of the commissions violate the most basic tenants of international and military law—including the right of the accused to see and hear the evidence against him. The district court granted habeas corpus. The government appealed and the court of appeals reversed the district court's ruling. The Supreme Court granted Hamdan's petition for a writ of certiorari.

The government claimed that the Detainee Treatment Act of 2005 (DTA), Pub.L. 109-148, 119 Stat. 2739, removed the Supreme Court's jurisdiction in this case by giving exclusive jurisdiction to the D.C. Circuit Court of Appeals on issues relating to the detention of Gitmo prisoners. The Supreme Court held that the DTA's provisions did not apply to this habeas action which was pending on the date of its enactment as the Congress did not make DTA §1005(e)(1), which applies to this case, retroactive.

The Supreme Court also refused to abstain from "interfering" in the military judicial process because this case involved neither military discipline nor respect for the integrated system of military courts and review procedures set up by Congress.

Ultimately, the Supreme Court held that "the military commission convened to try Hamdan lacks the power to proceed because its structure and procedures violate the UCMJ, the Geneva Conventions and the rules and precepts of the law of nations." The court noted that military commissions are born of emergency conditions and given legitimacy by that exigency. They are not merely a means by which to dispense summary justice. The lack of emergency here makes the necessity of commissions questionable.

The most glaring violations were rules allowing the government to prevent the defendant and his civilian attorney from learning the evidence against them, preventing appointed military counsel from disclosing the evidence to the defendant and allowing into evidence anything the presiding officer believes "would have probative value to a reasonable person." This removed the two most important mechanisms to ensure the veracity of evidence: the Rules of Evidence and the adversarial process (such as cross-examination). Ham-

dan complained that the rules has already resulted in his being excluded from his own trial. The Supreme Court agreed and ruled that, in Hamdan's trial, the rules applicable to courts martial must be applied.

The court shot down the government's argument that the Geneva Conventions did not apply to the government's war with al Qaeda. It noted that at least one provision of the Conventions applied no matter how craftily the government defined the conflict and its participants. Common Article 3 of Geneva Conventions requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Four [of the eight justices hearing the case] also conclude that the offense with which Hamdan has been charged is not an 'offense that by ... law of war may be tried by military commissions.' 10 U.S.C. §821." Justice Roberts did not participate in this case as he had helped write the court of appeals decision. The court of appeals was reversed and the case remanded for further proceedings. It was a fractured court that produced the plurality decision. There were three dissenting and three concurring opinions which, along with the main opinion, consisted of 177 pages. The dissenters complained that this decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy" without explaining how this would happen. See: *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). ■

Additional Source: *Counterpunch*.

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No Room in Prison? Ship 'Em Off

Prisoners have become unwitting pawns in a lowest-bidder-gets-the-convict shuffle game

by Silja J.A. Talvi

It has been an arduous, surreal journey for eight Hawaiian female prisoners sent to do their time on the mainland.

The plight of this group of women housed, most recently, in a prison in the small eastern Kentucky town of Wheelwright, would have escaped unnoticed, had it not been for the death of 43-year-old Sarah Ah Mau, on New Year's Eve 2005. Mau, serving a life sentence for second-degree murder, had been incarcerated since 1993 and had a shot at parole eligibility in August 2008.

She never got that chance. Instead she died of as-yet-unexplained "natural causes" after two days in critical condition—and a month after first complaining of severe gastrointestinal distress. Family members and fellow prisoners say that Ah Mau's pleas for medical care were ridiculed, downplayed or ignored by prison employees. As her stomach distended—and other body parts began to swell visibly—prisoners say that Ah Mau was fed castor oil and told to stop complaining unless she wanted to face disciplinary action.

What was Hawaiian resident Ah Mau doing in Kentucky in the first place? She was a commodity in an increasingly common practice: interstate prison transfers. Prison transfers, while not unusual, have a profound effect on prisoners and family members alike. Children and spouses of "shipped" prisoners have little, if any, opportunity to see their loved ones. And due to special contracts with phone companies, telephone calls are prohibitively expensive. Prisoners themselves are sent to culturally unfamiliar facilities where they are supposed to be treated according to the laws and regulations granted by their home states—but rarely are. Home state law and prison regulation books are rarely available, making the prisoners' appeals or grievance requests even more difficult to file.

Most of the prisoners transferred out of their home states (which include but are not limited to Alabama, Colorado, North Dakota, Vermont, Washington and Wyoming) end up in privately run facilities in rural communities. Many of the guards hired for such prisons are under-trained, ill-prepared for their stressful work environments, and are paid "fast-food restaurant wages," according

to Ken Kopczynski, executive director of Private Corrections Institute (PCI), a prison watchdog group.

"This is a major issue," says Kopczynski. "The private prison companies have found a real niche for themselves."

Hawaii represents the most extreme example of these practices because all of its transferred prisoners are sent to the mainland, and because all of those prisoners are sent to facilities run by just one private prison operator: Corrections Corporation of America (CCA).

Today, Hawaii leads the nation in interstate prisoner transfers. Nearly 2,000 prisoners—roughly half of the state's adults convicted of felonies—are serving out their sentences in CCA-run prisons in Arizona, Kentucky, Mississippi and Oklahoma. Notably, 41 percent of the "shipped" prisoners have been native Hawaiian, although they represent only 20 percent of the state's prison demographic.

Such prisoners have few recourses. A 1983 U.S. Supreme Court ruling based on a Hawaiian prisoner's lawsuit protesting out-of-state relocation, *Olim v. Wakinekona*, held that prisoners have no right to be confined in a particular prison, region or state. More recently, a 7th Circuit Court of Appeals ruling reinforced and enhanced the Supreme Court decision by deciding that neither parents in prison or their children had a right to insist on staying in their home state for the sake of their children. All subsequent legal challenges to out-of-state prison transfers have failed.

"These transfers are very problematic for a number of reasons," notes David Fathi of the ACLU's National Prison Project in Washington, D.C. "Visitation is all but impossible, and visitations are very important to prisoner mental health. [Visits] are usually correlated with positive prison adjustment behavior as well as decreased recidivism rates."

A 1993 study focused on the recidivism rates of Hawaiian prisoners found that 90 percent of prisoners sent to other states to do their time eventually returned to prison. Those incarcerated in their home state had recidivism rates ranging from 47 to 57 percent.

Studies like these notwithstanding, the situation in Kentucky isn't likely to change in the near future. In fact, most of the Ha-

waiian women incarcerated in Kentucky have already experienced four transfers within the continental United States.

Sarah Ah Mau was one of the 62 Hawaiian women who first arrived in Southern Texas in May 1997, at the Crystal City Correctional Center, 40 miles from the Mexico border. The facility was in dire shape, and the heat extremes were completely unfamiliar to the prisoners, according to local news reports. But the prisoners, including Mau, seemed to do what they could to fit in. There, Mau gained the trust of the guards and facility officials, and was even allowed outside of facility walls on work detail.

In August 1998, 64 Hawaiian women were moved to the Central Oklahoma Correctional Facility (COCF) in McCloud, newly built by the Correctional Services Corporation. The women seemed to accept the situation because, at least, the living conditions were acceptable. That is, until February 2003, when the Oklahoma Department of Corrections announced its intent to purchase that facility. By late summer of that year, the Hawaiian women reported to the Hawaii Department of Public Safety (DPS) that the overall operations and security of COCF had gone downhill. According to reports received by Kat Brady, coordinator of the Community Alliance on Prisons in Honolulu, the situation involved disgruntled unionized staff, lack of programs, sick leave abuse and "staff having sexual relationships with inmates."

The Hawaii DPS decided to move the women to another facility. On Aug. 1, 2004, the 64 Hawaiian women were transferred to the Brush Correctional Facility (BCF) in Colorado. There, according to Brady, things went from bad to worse. At BCF, the women were discouraged by leaky rooftops, broken plumbing, lack of drug treatment programs and inadequate medical care.

BCF prison employees were hired quickly and, as it turned out, without the requisite background checks. Allegations of sexual harassment and abuse were soon to follow. Initially dismissed by GRW internal investigators, many of the charges turned out to be true. Not only had five convicted felons been hired as staff members, but four prison employees were ultimately charged and convicted of criminal offenses rang-

ing from running a cigarette smuggling ring to sexually abusing female prisoners. BCF's prison warden resigned and was later indicted as an accomplice in one of the sexual misconduct cases.

It was time to send the women somewhere else. That is, anywhere but back home, where the state's sole female prison was packing three women into cells designed to accommodate one to two prisoners.

"Our women have been moved around like chess pieces," says Brady, who has stayed in close contact with many of the female prisoners from Hawaii. "Most of these women would be better served in community programs to directly address their needs: drug addiction, PTSD resulting from various forms of abuse and anger management." Instead, the Hawaii DPS settled on the CCA-run Otter Creek Correctional Center.

Located in the mountains of Eastern Kentucky, Wheelwright (population 1,048) was once a successful coal-mining town with a Nashville Steel plant that employed 3,000 people. That all changed in 1970, when the plant shut down; the town quickly dwindled in both population and resident income. Building a prison in 1993 on the site of a former coal camp seemed to be a great solution to this town's intractable problem of unemployment. Indeed, when CCA bought the facility in 1999, the corporation quickly became the town's biggest employer.

Private prisons know the advantages of moving into economically devastated rural communities: generous tax incentives, low construction costs and a cheap labor market are key among them. Once built, the private prison companies strive to keep their facilities at maximum capacity.

"Whenever these bed counts go below 10 to 20 percent of maximum capacity, these corporations can't make it. They need to import prisoners," says Frank Smith, field director for PCI.

And that's what CCA did with Otter Creek, initially bringing in male prisoners from Indiana to fill the available cells. In July 2001, the Indiana prisoners staged a nine-hour riot, which was brought under control only after 100 outside law enforcement officers had been brought in to subdue the prisoners. By 2005, Indiana had transferred the last of its state prisoners out of the facility, after which CCA converted Otter Creek into a 656-bed women's prison.

Past riots weren't the concern of

Hawaiian authorities—CCA was offering a great deal. According to the contract, each prisoner would cost the state only \$56 per day—compared to an average of \$108 in Hawaii. (According to Smith's research, costs are kept this low at Otter Creek because entry-level guards make \$7.60 per hour.) CCA also agreed that Hawaii could send out a new group of higher-security "close-custody" inmates. Approximately 40 such prisoners were promptly shipped out.

Today, Otter Creek houses 120 Hawaiian women alongside Kentucky state prisoners. Half of the Hawaiian women are serving crystal methamphetamine-related sentences, and most of them are incarcerated on nonviolent charges. Ninety-five percent of these women are mothers, and according to Brady, not a single woman has gotten a visit from a child or other family member since the September 2005 transfer. Collect phone calls from the prison to Hawaii can run more than 60 cents per minute.

Since arriving at Otter Creek, women at the facility have complained consistently about cold temperatures in cells; loss of property during their transfer; racial and sexual harassment; bizarre medical care and commissary hours (at 2 to 4 a.m.); and "drinking" water that has caused widespread diarrhea and vomiting. In separate letters and phone calls, prisoners have echoed each other's concerns of being threatened with administrative segregation if they complain about medical conditions.

Correspondence from Otter Creek prisoners—received by the Community Alliance on Prisons—has pointed to at least two other serious medical situations in the recent past.

In one situation, a Hawaiian prisoner, who asked to remain nameless, was coughing up blood and asked for medical assistance repeatedly. When she was finally seen by the medical unit at the prison, she was given a nasal moisturizer and told she had a sinus infection. The prisoner's condition worsened, and she was eventually rushed to the Hazard Regional Medical Center—in leg shackles and at gunpoint. The prisoner had to have emergency surgery; one lung had completely filled with blood. Prison officials ignored a follow-up appointment scheduled by the surgeon until Brady intervened on the woman's behalf.

Another female prisoner, who also requested anonymity, told prison staff about severe chest, arm and leg pain for several months, only to be told that she

would be placed in administrative segregation if she continued to complain. When she was eventually taken to the hospital in critical condition, a triple heart bypass surgery had to be performed.

DPS did not respond to a request for an interview on the medical care and general conditions facing state prisoners at Otter Creek. The state agency announced earlier this year that it was sending its own investigative medical team to Kentucky to determine the actual cause of Ah Mau's illness and death, but has yet to release its findings.

"This is inhumane," Brady insists. She and others have called for an independent investigation, stressing that Ah Mau's death is unlikely to be the last tragedy to befall this group of female prisoners.

Postscript from the author: After this story went to press, the *Lexington Herald-Leader* reported that Eldon Tackett, a 43-year-old guard at Otter Creek, had been accused of providing food and candy to a female prisoner in exchange for oral sex. In addition, the Kentucky-based *Floyd County Times* reported that Otter Creek's drug counselor, Tanya Crum, 32, had been arrested for trafficking in methadone. Employees of privately-run prisons often take on second (or third) jobs to subsidize their low prison wages earnings. For the former CCA employee, methadone delivery appears to have been one of those jobs. ■

Silja J.A. Talvi is a senior editor at *In These Times*, an investigative journalist and essayist with credits in many dozens of newspapers and magazines nationwide, including *The Nation*, *Salon*, *Santa Fe Reporter*, *Utne*, and the *Christian Science Monitor*. She is at work on a book about women in prison (Seal Press/Avalon). This article originally appeared in *In These Times*, it is reprinted with permission.

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U.S. Government Settles 9-11 Detainee Abuse Suit for \$300,000

by Matthew T. Clarke

In a document filed February 27, 2006, the U.S. government agreed to pay an Egyptian who was caught up in the post-9-11 sweep and detained for a year at the Brooklyn Metropolitan Detention Center (MDC) \$300,000 to settle his claims of having been abused by MDC guards.

Ehab Elmaghraby, the Egyptian former detainee, and Javaid Iqbal, a Pakistani former detainee, filed a civil rights suit in federal district court in Brooklyn, New York, alleging that F.B.I. Director Robert S. Mueller III and former Attorney General John Ashcroft personally conspired to violate the rights of detainees on the basis of race, religion and national origin. The United States, thirty-three government employees and officials and 19 "John Doe" MDC guards were named as defendants. In the Fall of 2005, the court ruled that Ashcroft, Mueller, and other top administration officials had to answer interrogatories submitted by the plaintiffs as part of the discovery process in preparation for trial. The suit alleges that both plaintiffs were rounded up, along with 760 other people, on charges of immigration violations in the weeks following the September 11, 2001, terrorist attacks. They, and 182 others, were identified as "of high interest" and imprisoned under super segregation conditions until the F.B.I. cleared them of having terrorism ties many months later. The imprisonment allegedly included 23-hours-a-day solitary confinement and denial of adequate medical treatment and nourishment.

During their imprisonment, both claim to have been kicked and punched until they bled while shackled and compliant. They also alleged having been shoved into walls, having been verbally abused with racial slurs and having been subjected to unwarranted body-cavity searches, including a rectal assault with a flashlight that left Elmaghraby bleeding. Elmaghraby, 38, who ran a restaurant near Times Square and had a weekend flea market stand prior to his arrest, reluctantly decided to settle because he is in Egypt awaiting surgery for a thyroid ailment he alleges was aggravated by his mistreatment in U.S. custody, during which the condition was misdiagnosed as asthma. The settlement, which does not include separate attorney fees, eliminates

Elmaghraby as a plaintiff in the suit; however, the suit continues with Iqbal as the sole plaintiff.

Both plaintiffs were allegedly coerced by government officials into pleading guilty to minor federal crimes in exchange for their release from imprisonment and deportation. Elmaghraby pleaded guilty to credit card fraud while Iqbal pleaded guilty to possession of false identity papers and checks. Both maintain they pleaded guilty only to bring the imprisonment and abuse to an end. Both were deported in 2003.

Iqbal and several other former detainees returned to New York this year to give depositions in their lawsuits. However, this was allowed only under the extraordinary conditions that a federal marshal accompany them at all times and that they not make any phone calls while in the U.S. Elmaghraby's poor health kept him from coming. Such high security is odd for ex-immigrants who, to a man, have been cleared of having ties to the armed resistance movements.

Despite the abuse he suffered, Elmaghraby, in imperfect English, expressed confidence in the just termination of the suit.

"I lived 13 years in New York," said Elmaghraby. "I see a lot of big cases on TV. I think the judge's fair."

He may be right about the judge. When faced with the government's claim that the post-9-11 threat of terrorism allowed them to violate the constitution with impunity, Judge John Gleeson of the U.S. District Court for the Eastern District of New York held that, "Our nation's unique and complex law enforcement and security challenges in the wake of the September 11, 2001, attacks do not warrant the elimination of remedies for the constitutional violations alleged here."

A U.S. Department of Justice inspector general's report released in 2003 reported widespread prisoner abuse of "terrorism suspects" at MDC. It also noted that little effort was given to distinguishing people swept up by chance from "legitimate terrorism suspects" and that clearing them of suspicion of terrorism-related activities was assigned a low priority that caused their detention to take months instead of days.

Much of the abuse of detainees at

MDC was videotaped and the videotapes were the basis for many of the report's findings. However, on August 15, 2005, Glenn Fine, the inspector general, revealed that hundreds of previously undisclosed videotapes had been discovered. These included some videotapes improperly containing privileged conversations between attorneys and their clients and others showing guards abusing prisoners. The Justice Department is investigating the failure to turn over the tapes.

According to federal Bureau of Prisons (BOP) spokeswoman Traci L. Billingsley, the BOP began its own investigation of the prison abuse in April 2004, after federal prosecutors declined to prosecute. The investigation resulted in 10 disciplinary actions against federal employees, including two firings, two demotions, and six suspensions of between two and thirty days. Because the disciplinary actions only involved a few low-level officials and little punishment, it is likely that the settlement may have the greater impact on the future conduct of government prison employees.

Elmaghraby was represented by Haeyoung Yoon of the Urban Justice Center; and Joan Magoolaghan and Alexander Reinert of the New York firm of Koob & Magoolaghan.

"This is a substantial settlement and shows for the first time that the government can be held accountable for the abuses that have occurred in Abu Ghraib, Guantanamo Bay and in prisons right here in the United States," said Reinert.

The prisoner abuse led to other lawsuits. A class-action suit alleging prisoner abuse was filed by the Center for Constitutional Rights in 2002 on behalf of hundreds of detainees in Brooklyn and New Jersey who were held on immigration charges. The Legal Aid Society is suing over the unlawful taping of privileged attorney-client conversations. This suit will also continue with Iqbal as the sole plaintiff. See: Stipulation for Compromise Settlement and Release of Federal Tort Claim Act Claims Pursuant to 28 U.S.C. § 2677 in *Elmaghraby vs. United States*, USDC ED NY, Case No. 04-CV-1809-JG-SMG. ■

Sources: *New York Times*, *Associated Press*

Assistant U.S. Attorneys Ordered to Pay Prisoner \$500 For Misconduct

by Michael Rigby

On April 6, 2005, a judge in the U.S. District Court for the Western District of Texas levied a \$500 sanction award against two Assistant U.S. Attorneys for their unethical, unprofessional, and dishonest conduct in a prisoner lawsuit.

Plaintiff Brandon Sample filed a prose federal lawsuit on May 19, 2003, claiming that while imprisoned at the Federal Correctional Institution in Bastrop, Texas, prison officials had repeatedly changed his job assignment and transferred him to another prison in retaliation for his filing numerous grievances. District Judge Sam Sparks ultimately ruled in favor of the defendants holding that Sample had not established "a causal link between his assertion of First Amendment rights" and the prison officials' actions. Even so, the judge specifically noted that Sample's suit was not frivolous or brought in bad faith.

Following Sparks' ruling, Sample moved for sanctions against Assistant U.S. Attorneys Winstanley Luke and Susan Cone Kilgore pursuant to Federal Rule of Civil Procedure 37 for their conduct in the case. Specifically, Sample complained that "he was forced to prepare for trial without the benefit of highly relevant documents" and that "throughout the trial, he was forced to respond to and defend against newly presented evidence."

In an opinion blasting the duplicitous duo, Sparks granted Sample's motion. Sparks noted the defendants had obviously not seen Sample's complaint and were unaware of the specific allegations against them. Moreover, the testimony of certain defendants, including FCI-Bastrop Warden R. D. Miles, was inconsistent with their answers to the interrogatories. Sparks also expressed surprise that the defendants' signatures mysteriously graced the answers to the interrogatories, even though they testified the answers were not theirs. Finally, Sparks noted that Luke and Kilgore refused to produce certain documents during discovery, claiming Sample was not entitled to them, even though they planned all along to use the documents at trial.

Sparks concluded that Luke's and Kilgore's conduct represented "a continuous pattern of unreasonable, unprofessional, grossly inept, and appalling conduct...." He further characterized the attorneys' representation as "so inferior as to be objectively unreasonable" and accused them of wasting the Court's time by their lack of preparation.

Consequently, Sparks found that sanctions were warranted and ordered Luke and Kilgore to pay Sample \$500 within 20 days. See: *Sample v. Miles*, USDC WD TX, Case No. A-03-CA-311-SS. ■

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Nevada Summary Judgment for Non-Exhaustion Reversed

The Nevada Supreme Court reversed a lower court's grant of summary judgment on a former prisoner's suit for failing to exhaust administrative remedies.

Nevada Department of Corrections (NDOC) prisoner George Simmons was brutally beaten by another prisoner on April 14, 1997. He sustained "a broken jaw, fractured vertebrae ... [and] clavicle, and soft tissue swelling around the brain." He was comatose for six weeks. Upon regaining consciousness, Simmons was returned to prison.

"On April 6, 1998, Simmons was paroled and admitted to Nevada Community Enrichment Program (NCEP)" -- "a rehabilitation center that specializes in treating patients who have suffered neurological trauma" -- where he "relearned how to speak, ... walk, and ... redevelop his motor skills."

On May 13, 1999 Simmons brought suit against prison officials in state court, alleging negligence related to the assault. He later added another tort claim and a federal civil rights claim.

The trial court granted the Defendants' motion for summary judgment because Simmons failed to exhaust administrative remedies as required by Nevada law and the Prison Litigation Reform Act (PLRA) before filing suit.

The Supreme Court noted that Nevada Revised Statute (NRS) 41.0322(1) requires current and former prisoners to exhaust administrative remedies before filing suit against NDOC, and 209.243(1) requires that administrative remedies be pursued within six months. NRS 41.0322(3) requires dismissal of any unexhausted actions.

The Court found that "the statutory provision is not jurisdictional. Under 41.0322(2), filing an administrative claim is not a condition precedent to filing suit in the district court." Therefore, the Court reversed summary judgment on "Simmons's state law claims and remand[ed] to the district court to consider whether the doctrine of equitable tolling excuses Simmons's failure to file an administrative claim and to exhaust his administrative remedies."

The Court also reversed summary judgment for failure to exhaust as required by the PLRA. The Court found, as others before it consistently have, that the PLRA applies only to people who are prisoners

when they file their legal action. Simmons was a *former* prisoner and, therefore, the PLRA exhaustion requirement was inapplicable. See: *Simmons v. State of Nevada*,

et al., Nevada Supreme Court, Case No. 42137, July 11, 2005. This decision is unpublished, it is available on PLN's website. ■

Widespread Prisoner Labor Abuse Requires Reform

by Gary Hunter

Lonoke Mayor Thomas Privett and police Chief Jay Campbell were caught abusing the state's prisoner work program. Arkansas Department of Corrections requested, in early August 2005, that the program be suspended after learning that state prisoners had been used to repair the police chief's boat and make improvements to his home.

In a statement issued on August 8, 2005 prison spokesperson Dina Tyler clarified that Act 309 of 1983, which covers DOC policy including the prisoner labor program, prohibits the use of prisoners for private benefit. That Campbell paid the workers to build a walkway from his swimming pool to his house as well as fix his boat did not negate the infraction. Prisoner labor is to only consist of work that benefits the community.

Matters were made worse by the fact that Mayor Privett loaned a vacant building he owned to the sheriff for the boat repairs.

Lonoke was receiving \$15 per day per prisoner on loan from the DOC. The five male prisoners would perform duties around the jail like cooking and emptying garbage as well as community service. All five were returned to the prison and Lonoke was suspended from the program pending a decision from the state's 309 monitoring committee.

Matters were further complicated by an allegation that one or more prisoners, housed at Lonoke, may have had improper sexual contact with a "member of the public."

On August 8, 2005 the DOC requested an investigation, by the Arkansas State Police, of suspected sexual misconduct between a prisoner and a private citizen. Tyler said that concern was fueled by the number of times and the abundance of sources affirming the allegations.

"We just kept running into it," she said.

These continuing problems prompted the monitoring committee to continue Lonoke's suspension when they met again on November

9, 2005. Both Campbell and Privett admitted their guilt before the committee.

"We went in there with our hat in our hand," said Privett. "I did say, and so did the chief that ignorance [of wrongdoing] was no excuse."

Tyler said the suspension would likely continue until the sexual misconduct investigation was completed.

Beginning January 1, 2006 Alabama prisoners ceased to work as furniture movers in Madison County's work-release program. Previously, prisoners would accompany the sheriff to do the heavy lifting when tenants were officially evicted. The service was free to landlords.

Records show that prisoners provided 779 move-outs in 2004.

"We are probably one of the last few sheriffs' departments in Alabama that still performs this service," said Chief Deputy Chris Stevens.

Concerns over injury to prisoners and liability considerations prompted the county to discontinue the service. Veteran Lt. Rufus Fox says the service has been offered during his entire twenty-year tenure. Fox mentioned that one concern was the possibility a prisoner might steal, smuggle or swallow medication found on the job.

Ohio State Highway Patrol is investigating possible illegal use of prison work crews by a Grove City businessman. Larry Booth applied for and was approved the use of prisoners via Correctional Reception Center (CRC) to work on his private business. The prison crew was used to paint, vacuum and wash windows at the Clubhouse, a teen club owned by Booth.

Booth said he got the idea from a friend who is a guard at CRC. The crew's official function is to provide free assistance to schools, charities and churches. Booth's application, which listed his sister's softball league as a phone reference, was likely misleading.

"It's a huge misunderstanding...I'm

in a mess," said Booth. "I did not do anything intentionally wrong." He offered to reimburse the prison for the labor performed.

But Andrea Dean, spokeswoman for the Ohio Department of Rehabilitation and Correction says, "We are very concerned that there may be several infractions."

So far, no guards have been charged in the matter.

Vehicles driven by residents of Bolivar County will be a little dirtier now that the Mississippi Department of Corrections (MDOC) and Mississippi State Audit Department has prohibited the use of state prisoners to wash cars.

Senate Bill 2747 took effect on July 5, 2005 prohibiting prisoners from doing any work for private citizens or county employees. The measure resulted from

state-wide concerns of prisoner labor abuse. Prior to the decision MDOC prisoners were used, and sometimes required, to wash cars at the prison and the local courthouses.

Prisoners are supposed to benefit from laboring in Vo-Tech programs designed to rehabilitate and teach marketable work skills. The program is designed to dovetail with county needs as prisoner ply their plumbing, carpentry and electrical skills to maintain jail and prison facilities. In this case the devil was literally in the details as car washing had become more of an abuse than a benefit.

"Until the MDOC and the Mississippi State Audit Department changes their position on this issue, we're not going to allow it," said Bolivar County Sheriff H.M. "Mack" Grimmer.

County Administrator Adrian Brown

has encouraged county employees to "refrain from any practice that will endanger the good standing of the Bolivar County Sheriff's Department or the correctional facility."

All too many public officials seem to view the free or underpaid labor of the prisoners in their care as a job perk. ■

Sources: *Associated Press, Columbus Dispatch, Huntsville Times, Lenoire Democrat.*

New York Strip-Search Suit Settled for \$1.7 Million

A federal class action suit, challenging a New York jail's blanket misdemeanor strip-search policy has been settled for \$1,783,670.20.

Timothy Maneely brought suit in federal court, challenging the City of Newburgh, New York policy of strip searching all arrestees without reasonable suspicion.

The case was certified as a class action, including all misdemeanor arrestees who were not arrested for the use or possession of drugs or weapons, but who were strip searched between March 27, 1998 and August 24, 2000. See: *Maneely v. City of Newburgh*, 208 F.R.D. 69 (SD NY 2002).

The court denied the plaintiff class summary judgment, *Maneely v. City of Newburgh*, 256 F.Supp.2d 204 (SD NY 2003), and the parties agreed to settle the action on September 6, 2005.

The settlement requires Defendants to pay \$1,200,000 to pay the claims of Maneely and all Eligible Class Members (ECMs). Maneely was awarded \$25,000, with the remaining \$1,175,000 to be divided among all ECM's who filed timely claims. Each valid claimant

is to receive \$1,000 to settle all claims, regardless of the number of times they may have been strip searched. If the number of \$1,000 claims exceeds the settlement fund "every ECM will receive a pro-rata share of the fund". If the claims do not exhaust the settlement fund, the balance "shall be returned to the City of Newburgh". ECMs were permitted to opt-out of the Settlement.

Class counsel was awarded attorney's fees totaling \$550,000 and costs of \$33,670.20. The Class was represented by Dupée, Dupée & Monroe, P.C., 30 Matthews Street, PO Box 470, Goshen, New York 10924, and Robert N. Isseks, Esq., 6 North Street, Middletown, New York 10940. Counsel also settled a similar case against Orange County, New York in *Dodge v. Orange County*, 282 F.Supp.2d 41 (SDNY 2003 [PLN March 2005, p.29]. See: *Maneely v. City of Newburgh*, USDC SD NY, Case No. 01-CIV-2600 (CLB)(MDF). ■

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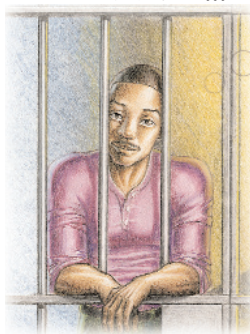
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CCA Fineable in New Contracts With Colorado and Hawaii

by Matthew T. Clarke

Corrections Corporation of America has signed new contracts with Colorado and Hawaii which, for the first time, include the possibility of the states imposing 'liquidated damages' if CCA fails to provide the contracted services. The provisions resulted from a lengthy interruption of services to female prisoners at a private women's prison in Brush, Colorado. The prison, which was not run by CCA, held Hawaiian and Colorado prisoners. The interruption followed allegations of sexual misconduct by staff with prisoners. As reported in the Oct. 2005 *PLN*, the ensuing scandal resulted in guards resigning or being fired and a Colorado Department of Corrections investigation.

Conditions of confinement of prisoners in private prisons is of special interest to Hawaiian officials. Half of Hawaii's state prisoners--a total of about 1,850--are incarcerated in private prisons in Arizona, Kentucky, Mississippi and Oklahoma. The new CCA contract with Hawaii, which was signed in October, 2005, has CCA keeping 120 Hawaiian women prisoners at the Otter Creek Correctional Facility in Wheelwright, Kentucky. According to Frank Lopez, acting assistant Director of the Hawaiian Department of Public Safety, the Otter Creek contract is to serve as a model for all future Hawaiian contracts with private prisons. It calls for Hawaii to pay CCA \$51.90 per prisoner per day. This compares with an estimated per day cost of \$105 on average to incarcerate a Hawaiian prisoner at a state prison in the islands. The Otter Creek contract allows Hawaii to impose 'liquidated damages' should CCA fail to have the required number of drug treatment beds. It also allows Hawaii to impose fines if CCA does not maintain the number of guards, education employees or treatment providers called for in the contract.

"Our problem before was that we weren't able to address the failure to deliver certain services in the past," said Lopez. "It wasn't specific enough. Our contract wasn't tight enough."

In September 2005, the Colorado Department of Corrections signed new contracts with CCA requiring reforms at the four CCA-run private prisons in Colorado. The problems in CCA's management of the prisons surfaced after a major riot

by approximately 300 prisoners at the CCA-run Crowley County Correctional Facility. [*PLN*, Jan 2005, pp. 26, 31]. The new contracting requirements will also be imposed on two private prisons in Brush and Colorado Springs not run by CCA. The contracts require increased staffing levels, improved emergency preparedness and staff training, additional medical and mental health services for prisoners, better food standards and state control of prisoners' trust funds. Some of those issues--especially understaffing and poor training and emergency response--were direct causes of the Crowley riot.

Colorado houses around 3,300 of its approximately 21,000 prisoners in the four CCA prisons. However, staffing shortages remain a problem for CCA, which pays

its guards only about two-thirds of what a Colorado state-employee prison guard makes. This results in a large turnover and causes difficulty in maintaining contracted staffing levels.

The new contracts call for "liquidated damages" if CCA is non-compliant. It allows the DOC to withhold funds if CCA is found in violation. However, only thirteen Colorado DOC staffers will monitor the contract. They are required to monitor compliance at least 20 hours per week. It remains to be seen whether either state will adequately monitor or enforce the new contracts. At first blush, monitoring efforts seem woefully inadequate. ■

Sources: *Honolulu Advertiser*, *Rocky Mountain News*.

Kentucky County Jail Settles Lawsuit Alleging Overcrowded Conditions

by Michael Righy

On November 30, 2005, the U.S. District Court for the Eastern District of Kentucky tentatively approved the settlement of a class action lawsuit alleging unconstitutionally overcrowded conditions at the Campbell County Jail in Newport, Kentucky.

Built in 1991, the Campbell County Detention Center was designed to hold 135 prisoners. It quickly became overcrowded. In the weeks before the lawsuit was filed on April 29, 2005, the jail's population reached a high of 276 prisoners, many of whom were forced to sleep on the floor. On April 18, 2005, the jail held 238 prisoners. During that week at least 20% of the jail population were awaiting transfer to the Kentucky Department of Corrections (KDOC), which was also named as a defendant in the lawsuit. For its part, the KDOC addressed overcrowding at the jail by simply reducing the required floor space for each prisoner from 50 to 40 square feet.

The lawsuit, filed pursuant to 42 U.S.C. § 1983 by attorney Robert B. Newman of the Cincinnati, Ohio, law firm Newman & Meeks, alleged the overcrowding violated the prisoners' Eighth and Fourteenth Amendment rights. The plaintiffs sought injunctive relief and nominal damages. To settle the suit, County officials and the

KDOC agreed to a number of measures aimed at reducing overcrowding. These included the building of a new \$1 million Restricted Custody Center to house felons headed for the KDOC, expansion and remodeling efforts, and the implementation of new policies to prevent overcrowding.

At the detention center, County officials are planning to add 256 beds, and a new \$860,000 kitchen and laundry facility was set to open in December 2005. Once it opens the old kitchen and laundry space will be remodeled to house an upgraded infirmary. A full time nurse position was also created and filled. Further improvements at the jail include the installation of more bunk beds, added table space, and renovated showers in the dormitories; the replacement of a boiler and all air conditioning units; and a \$160,000 upgrade to the security system. Another \$200,000 was spent to replace a leaky roof.

As for policy, the County agreed to decline regular requests to house federal prisoners, and the KDOC agreed to remove prisoners from the detention center within 45 days or sooner after the imposition of a prison sentence. An agreement was also entered into with Boone County to house up to 30 prisoners at Boone County's new jail if necessary. County officials will further

appoint a "Population/Pretrial Officer" responsible for managing the number of prisoners at the detention center; implement a "Pretrial Conditional Release Program" to reduce the number of prisoners housed at the detention center; and initiate an objective jail classification system.

Finally, a Criminal Justice Advisory Council (CJAC) will be created and maintained to foster communication between

judges, defense attorneys, and probation and parole officers in order to address issues that can potentially reduce the number of prisoners housed at the detention center. As an element of the CJAC, Campbell County police chiefs agreed to instruct their officers to simply ticket and release misdemeanor offenders (except those charged with domestic violence or driving under the influence) who are not a

threat to public safety or a flight risk.

If followed, this is perhaps the best bet to reduce overcrowding in the long term. Otherwise, with imprisonment rates continuing to rise in the U.S. [see *PLN*, November 2005], construction and expansion efforts are just a temporary fix to a permanent and pervasive problem. See: *Hollingsworth v. Campbell County*, USDC ED KY, Case No. 05-79-WOB. ■

Virginia Sheriffs Pay for Christian Ministries

by Michael Rigby

Several Virginia sheriffs have used public money to pay for services from Christian groups that minister to prisoners, the *Virginia-Pilot* reported on March 2, 2006. The payments have drawn criticism from some watchdog groups that advocate for a strong separation of church and state.

Portsmouth Sheriff Gary Waters has paid the most. Over a 2-year period Waters paid \$45,650 to the nonprofit Southeastern Correctional Ministry, Inc. (SCM). But Waters isn't the only sheriff doling out public money to Christian groups. During the same 2-year period the Hampton Sheriff's Office contributed \$21,180 to SCM. Another Christian group, the Good News Jail & Prison Ministry, received a \$15,000 donation from the Virginia Beach Sheriff's Office, said Sheriff Paul Lanteigne.

All the payments were made with money from jail canteens--prison stores that sell snacks and other items to prisoners. Under state law, however, canteen funds are designated as public money. Moreover, according to a manual for jail bookkeepers, donations to charities are inappropriate.

"We don't think that the city of Portsmouth jail can provide funds for a sectarian religious organization to bring its message into the prison system," said Kent Williams, who works with the Virginia American Civil Liberties Union. Jail officials should allow prisoners access to Christian groups, Willis said, but a line exists between promoting and ac-

commodating a specific religion.

What's more, all the spending may not be for the prisoners' benefit.

For instance, a records review by the *Virginia-Pilot* found that Sheriff Waters spent \$460 to buy tickets to a retirement dinner for a former SCM chaplain, to sponsor a hole at an SCM golf tournament, and for deputies to play golf at the event.

"When you pay for that golf trip, you've misused public funds," said Walter Kucharski, the state's auditor of public accounts.

Waters' payments to SCM were supposedly based on a per "contact" rate. In February 2004 Waters paid \$16,103 for the ministry's services. He paid another \$13,347 in February 2005. In July 2005, after Waters lost the Democratic election, he agreed to make the scheduled February 2006 payment in advance.

"On your request, I have estimated the cost of ministry for the Portsmouth City Jail using the last two years," SCM chaplain Jack Smith wrote to Waters. After averaging in another 10% for "ministry upgrades," Smith presented a bill for \$16,200. Waters promptly paid the fee.

Waters' successor, Sheriff Bill Watson, was reportedly unable to locate a contract

for SCM. "Why should we pay for ministering?" he said. ■

Source: *Virginia-Pilot*

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\$75,000 Settlement for Untreated Wisconsin Methadone Patient

by Michael Rigby

Outagamie County, Wisconsin, has agreed to pay \$75,000 to a man whose withdrawal from methadone went untreated at the county jail.

Richard Foelker was participating in a methadone treatment program for heroin addiction when he checked himself into the Outagamie County Jail on April 27, 2000, to serve a sentence for driving under the influence. At intake Foelker told jailers and a nurse that he had been taking methadone for approximately five weeks and that he had not taken his dose that day. The next day Foelker was evaluated by the jail's nursing coordinator. She determined his methadone therapy should not be continued since he had already been off it for three days.

Withdrawal from methadone is very serious and can result in death if untreated. Nevertheless, on the afternoon of Foelker's third day, registered nurse Brian Schertz recommended transferring him to the general population. Just an hour later Schertz was told that Foelker had defecated on himself and the cell floor. After opining that Foelker was merely "playing the system," Schertz grudgingly asked social worker Diane Mandler to evaluate him. Mandler noted Foelker was disoriented, confused, experiencing auditory hallucinations, and unaware he had soiled himself. She recommended observing him.

Foelker was still hallucinating the next day so the jail's doctor prescribed thiamine, a vitamin used with alcohol withdrawal. When his condition failed to improve after several hours, Foelker was taken to the hospital. Doctors there diagnosed him with delirium secondary to drug withdrawal and hospitalized him for four days before allowing his return to the jail.

Foelker sued the County, Schertz, and Mandler in the U.S. District Court for the Eastern District of Wisconsin alleging they were deliberately indifferent to his serious medical needs in violation of his Eighth Amendment rights. The district court conceded that Foelker had shown a serious medical need, but ultimately dismissed his complaint after concluding he had not demonstrated the defendants were deliberately indifferent.

As previously reported in *PLN* [February 2006, p. 12], a three-judge panel of

the U.S. Seventh Circuit Court of Appeals reversed. In their ruling--*Foelker v. Outagamie County*, 394 F.3d 510 (7th Cir. 2005)--the majority concluded both that Foelker had demonstrated a serious medical need and that a jury could reasonably infer the defendants were deliberately indifferent to those needs.

After the case was remanded to

the district court, the parties reached a \$75,000 settlement agreement through mediation. Foelker was represented by attorney Jeff Scott Olson of Olson Law Offices in Madison, Wisconsin. See: *Foelker v. Outagamie County*, USDC ED WI, Case No. 00-C-1464. ■

Source: *Wisconsin Verdicts & Settlements*

Washington DOC Settles Mail Censorship Suit with PLN for \$442,500 in Fees and Damages

by John E. Dannenberg

As previously reported in *PLN*, the Ninth Circuit U.S. Court of Appeals affirmed the U.S. District Court ruling (*Prison Legal News v. Lehman*, 272 F.Supp.2d 1151 (W.D. Wash. 2003); see *PLN*, Sep. 2003, p.18) enjoining the Washington Department of Corrections (WADOC) from banning prisoners' receipt of non-subscription bulk mail and catalogs because the WADOC's policy was not related to a legitimate penological objective. However, the Ninth Circuit held that WADOC was qualifiedly immune from damages for this ban because there was no prior clearly established precedent that this was unconstitutional. But WADOC was not qualifiedly immune from damages for its additional policy of allegedly discriminating against *PLN* (only) by banning WADOC prisoners' receipt of 3rd party legal materials from *PLN*. See: *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005). Rather than take this evidentiary issue to trial, WADOC agreed to settle by paying damages and attorney fees/costs totaling \$442,500.

PLN's editor, Paul Wright (then a WADOC prisoner) had had his mail from *PLN's* office censored because it contained, inter alia, legal case material relating to miscreance by WADOC prison staff. The censored materials included: United States and Washington state supreme court opinions, verdicts and settlements in prison and jail cases, legal pleadings and similar items. When *PLN* sent similar materials to other Washington prisoners the material was also censored. Over 100 such instances were documented. The district court had enjoined WADOC from the censorship of mail sent at non

profit rates and the censorship of *PLN's* book and subscription flyers but had held that material issues of fact requiring a trial did not allow it to rule on the censorship of legal materials.

On WADOC's appeal, the Ninth Circuit held that as to WADOC's 3rd party legal mail restrictions, this discriminatory policy "clearly violated *PLN's* First Amendment rights." For this reason, WADOC was not protected by qualified immunity. WADOC's alleged "impure motive" proved to be its own undoing, because its restriction had been aimed solely at *PLN*. While the ultimate resolution of an "impure motive" was reserved for a jury to decide, the matter was resolved when WADOC finally cut its losses and capitulated to a damage settlement. The stipulation covers all liability up to the date of the agreement, August 3, 2005.

Provisions of the settlement are \$100,000 in damages to *PLN* for its injuries, \$52,500 to *PLN's* attorneys for their successful appellate defense in the Ninth Circuit, and \$290,000 to *PLN's* attorneys for their five years of dedicated professional service at the district court level to save *PLN* from WADOC's unconstitutional oppression. *PLN* was diligently and skillfully represented on at the lower court level and on appeal by Jesse Wing, Tim Ford and Carrie Wilkinson of the Seattle law firm of McDonald, Hogue and Bayless. The attorney fee provisions include almost \$30,000 in out of pocket costs advanced by counsel through the course of the case.

This is believed to be the largest settlement or damage award involving First amendment rights in a prison or jail in

US history. While the Washington DOC settled the case at mediation before US District court judge Ricardo Martinez on the eve of trial, it did not agree to stop censoring legal materials sent to Washington prisoners. For its part, PLN did not agree

to stop sending such materials to Washington prisoners. The injunctions entered by the district court are not affected by the settlement and remain intact. See: *Prison Legal News v. Lehman*, USDC WD WA, Case No. CV-01-1911L

Virginia Prisoners Challenge Grooming Policy Under RLUIPA

Get in a fight behind bars and in most states, you'll serve somewhere between a few days or months in segregation. Refusal to cut your hair in Virginia and you'll be segregated until you comply.

In 1999 the Virginia Department of Corrections (VDOC) adopted a prisoner grooming policy prohibiting beards and requiring male prisoners to keep their hair trimmed neatly above the collar.

Numerous VDOC prisoners have been segregated since 1999 for refusing to comply with the grooming policy, on religious grounds. "I'm a Rastafarian," said prisoner Elton Williams. "My dreadlocks and beard are fundamental tenets of my religion". VDOC simply doesn't care, and has locked up Williams and anyone else who refuses to comply with the policy.

"Six years [in segregation] ... strikes me as an extraordinarily long time for refusing to cut your hair," said David Fathi, staff attorney with the ACLU's National Prison Project. Jenni Gainsborough of Penal Reform International agrees, stating "I can't believe this is happening, particularly in Virginia, which makes such a big deal about religion and how important it is that people be able to express religious beliefs."

VDOC officials defend the policy, claiming it was designed to prevent prisoners from hiding contraband or changing their appearance if they escaped. Gainsborough calls their concerns "ridiculous ... because women [prisoners] can actually keep their hair long, as if somehow it was different for women." Fathi also notes that other prison systems around the country "allow prisoners to have their hair at any length so long as it's neatly groomed. So the idea that somehow you can't run a prison without having hair-length restrictions is just not true."

"Right now, we're the [worst] treated inmates within the prison system," observes Williams, noting that even death-row prisoners have better accommodations. The segregation has also caused prisoners' mental state to deteriorate and Virginia State Parole Board Chairwoman Helen Fahey

has "no specific recollection of an inmate in segregation being granted parole." Prisoner Ira Madison believes he would have been paroled long ago if not for his segregation, since 1999, for refusing to comply with the VDOC grooming policy.

Five Rastafarian and Muslim prisoners, represented by the ACLU of Virginia have brought suit, challenging the policy as violating their rights under the Religious Land Use and Institutionalized Persons Act of 2000 RLUIPA, VDOC officials have the burden of proving that the grooming policy is the least restrictive means "of advancing a compelling government interest". We will report on developments in the case.

Source: *Times - Dispatch*

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Sexually Abused Texas Prisoner Loses Federal Lawsuit, Returns To Prison

by Michael Rigby

Roderick Keith Johnson, a prisoner who garnered national attention with allegations that Texas prison officials allowed him to be bought and sold as a sex slave, has lost his federal lawsuit against the Texas Department of Criminal Justice (TDCJ). Following the October 2005 verdict, Johnson was returned to prison for an alleged parole violation.

Johnson, 37, claimed he was passed around like chattel among members of the Bloods, Crips, and Mexican Mafia while imprisoned at the Allred Unit for a 2000 burglary conviction. Johnson, a gay black man described as effeminate and of slight build, says he was forced to endure sexual abuse almost daily because officials at the prison refused to place him in protective custody. Instead, Johnson claimed, they mocked him because he is gay.

A jury in the U.S. District Court for the Northern District of Texas rejected Johnson's claims contending his testimony was inconsistent. Johnson's attorneys with the American Civil Liberties Union (ACLU) said the case was especially challenging because the jurors had a natural bias toward prison officials. "Keep in mind we're in Wichita Falls, Texas," said Kara Gotsch, Public Policy Coordinator for the ACLU's National Prison Project. "Everyone knows someone that works in that prison or used to work in that prison."

Nevertheless, Johnson's attorneys and other advocates are grateful for the attention his case brought to the issue of prison rape. "I think the most important repercussion of this case is that it had really good media coverage, in Texas and throughout the country," said Kathy Hall-Martinez, Executive Director of Stop Prison Rape. "In spite of the negative verdict, and the horrifying set of facts, I think this case shined a light on what happened to Mr. Johnson. This inmate really did go through hell. The fact that he had the courage to go through this trial is quite incredible."

Johnson, who was paroled in 2003, says the things he experienced in prison will haunt him forever. But, he says, they have inspired him to advocate for prisoner rights and to educate others about

the problem. "I am disappointed by the jury's decision yesterday to find in favor of the six officials who failed to protect me from continued sexual abuse while I was confined at the Allred Unit," Johnson said in a statement. "However, I am grateful that I have had the opportunity to tell the world what happened to me. Even though I didn't win my case in court, I know the case has accomplished a great deal. Prison rape is a huge problem. This process has opened some eyes to the violence that takes place every day, and I hope it will encourage others to get involved in doing something about it."

Johnson was rearrested in early December 2005 for reportedly violating his parole. TDCJ officials said he tested positive for cocaine in the weeks leading up to the trial in his civil suit. He was expected to spend about 60 days in prison for the violation. Officials said he would not be returned to the Allred Unit. For more on prison rape in Texas see *PLN*, October 2005. See: *Johnson v. Johnson*, USDC ND TX, Case No. 03-10455. See also defendants' interlocutory appeal at 385 F.3d 503 (5th Cir. 2004). ■

Additional sources: 247gay.com, News

Florida County Bucks Paying \$300,000 in Prisoner Medical Bills

Florida's Brevard County has been sued by three local hospitals seeking payment for medical care rendered to prisoners who incurred injuries during their arrests. The County refused to pay, arguing the detainees technically were not in custody at the time of treatment.

The hospitals -- Parrish Medical Center in Titusville, Cape Canaveral Hospital and Holmes Regional Medical Center in Melbourne -- filed suit in 2001. The hospitals contend that Florida law requires the county to pay the bills for care given to arrestees. Under Florida law the County must pay, regardless of which agency makes the arrest, anytime someone is injured during an arrest and taken to a hospital for treatment if they have no means to pay.

At issue in the lawsuits is payment for care rendered to 11 Brevard County prisoners. Most were treated for injuries incurred during their arrest. Two of them died.

During his arrest for shoplifting, William Washington was shot by an officer from the Melbourne Police Department (MPD). The attempt to save his life, which failed, resulted in a bill for Brevard County of \$45,554. The County was also billed for \$5,829 in costs to treat Percival Wilson, who was shot by MPD while resisting arrest for armed robbery. Because he died, Wilson could not pay the bill.

Seven other cases resulted in injuries caused during arrest, four of which were by the Brevard County Sheriff's Office (BCSU). At least two cases resulted from prisoners who became ill while in the Brevard County Jail.

In the case of Horace Mitchell, the BCSU received a court order to release Mitchell to the Parrish Medical Center as an inpatient and return him to the jail upon discharge. Mitchell's 16-day stay to be treated for his heart condition amounted to \$56,254.

A state appellate court has ordered a lower court to answer three questions: 1) was Mitchell indigent and unable to pay?; 2) were other methods of payment for medical treatment available to Mitchell?; and 3) were Parrish's medical charges reasonable?

The appellate court upheld Florida's law making the County responsible for medical bills until the Legislature acts otherwise. "The Legislature needs to remedy these unreasonable in positions upon governments when natural illnesses occur through no fault of prison officials," the appeals court said. All cases remain pending against the County. See: *North Brevard County Hosp. Dist. v. Brevard County Bd. of County Com'rs*, 899 So.2d 1200 (Fla. App. 5 Dist., 2005). ■

Additional Source: *Florida Today*

Asthmatic South Carolina Prisoner Awarded \$3,200 on ETS Claim

A federal court in South Carolina found that prison officials were deliberately indifferent to an asthmatic prisoner's medical condition by exposing him to environmental tobacco smoke (ETS), from February 1999 to November, 2001. The court awarded \$3,200, or \$100 a month, finding that "while plaintiff's injuries were not de minimis, they were not extreme.

On October 28, 1997, a South Carolina Department of Corrections (SCDOC) doctor noted that prisoner Milo Tudor "has asthma and ... should not be exposed to environmental pollutants or allergens".

On December 16, 1997, the warden at Tudor's facility issued a memo announcing the opening of a non smoking unit and that persons "with medical situations such as asthma would be given first consideration for moving". Tudor was moved to the unit December 23, 1997, "based on his asthmatic condition".

Soon after designating the unit "non-smoking", the warden "vitiating this development and his December 16, 1997 memorandum by moving smokers into the unit" due to overcrowding. Smokers were placed in Tudor's cell despite his requests to be placed in a non-smoking cell.

On February 19, 1999, SCDOC Medical Director Dr. Blackwell ordered that Tudor "not be exposed to environmental pollutants, allergens, chemicals or other irritants; and that he be assigned a non-smoking room". The same day, prisoner Derrick Smith signed an affidavit "stating that plaintiff had been transferred into his cell and that Smith was addicted to smok-

ing and could not stop and that, while he was sensitive to [Tudor's] need to be away from ETS, he would 'have to smoke in cell because that is the only area ... authorized as a smoking area in the unit.'"

September 20, 2000 ETS readings in Tudor's cell and other areas of the unit were "significantly higher than those permitted by all recognizable standards". Tudor was transferred to a different prison in November 2001.

Tudor filed suit "seeking equitable relief in the form of an order that he be housed in a unit free of [ETS], and seeking damages for allegedly exposing him to an unreasonable health risk. "The court denied the parties' cross-motions for summary judgment, finding the presence of genuine issues of material fact.

Following a September 26, 2005 bench trial, the court found "that plaintiff ... presented sufficient evidence of his existing serious medical needs" and deliberate indifference to that need before his November 2001 transfer. However, he presented insufficient evidence after that transfer. In other words, while he failed to prove a substantial risk of serious future harm, he did prove past deliberate indifference.

The court rejected defendants' qualified immunity defense and awarded Tudor damages of \$100 a month or \$3,200, based on the February 1999 date the prison physician indicated he should be assigned a no-smoking room,

until his transfer in November 2001". The award was based upon a finding that "while plaintiff's injuries were not de minimis, they were not extreme. There has been no showing of a shortened lifespan, permanent disability, or extreme discomfort".

Defendants immediately appealed, because all previous ETS suits brought by prisoners had been dismissed, accordingly to Corrections director Jon Ozmint.

While Ozmint noted that Tudor has had a few disciplinary problems, he did throw a rock through a prison window once, breaking it. "If he wins that \$3,200, we'll deduct the amount for the window from it," claimed Ozmint. "The judge won't like it, but we will." See: *Tudor v. Moore*, USDC D SC, Case No. 2:98-1927-RBH(D SC 2005). ■

Additional Sources: *Associated Press*, *News Columnist*

FL Work Releasee's Reporting to Work Late Doesn't Amount to Escape

Leon Williams, a prisoner in a state work release center, left the center to walk to work but was 90 minutes late getting there. When he arrived he was arrested and charged with escape under Fla. Stat. sec. 944.40. That section proscribes a prisoner's escape from "confinement" from a wide variety of penal facilities. But Fla. Stat. sec 951.24(2)(a) says that work release prisoners "continue as ... inmate[s] ... except during the period of ... authorized release," such as when the prisoner is at work. Based on sec. 951.24(2)(a), the trial court dismissed the charge because Williams was not "confined" when he showed up late for work.

On appeal, the Court of Appeal of Florida, 2nd District, categorically agreed with the trial court and affirmed its dismissal of the escape charge. See: *State of Florida v. Williams*, 923 So.2d 506 (Fla.App. 2 Dist. 2006) (table - unpublished). ■

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Delaware Legislature Rejects Bill Upgrading Prison Health Care

by David M. Reutter

After a public outcry condemned the health care services provided to prisoners held by the Delaware Department of Corrections, (DDOC) the Delaware Legislature has passed a bill that provides an “inflation adjustment” for services and created three oversight positions. *PLN* reported upon the lack of health care provided DDOC prisoners. See: *PLN*, December 2005, cover.

The legislature rejected a larger bill that would have required all prisoners entering DDOC to be tested for HIV/AIDS, hepatitis, and tuberculosis. Guards would be trained as medical caregivers and the medical vendor, Correctional Medical Services, (CMS) would be required to send prisoner grievances to DDOC for resolution and provide records of prisoner deaths for review within three days.

The bill would have required special care provisions for pregnant prisoners, which seems to be a particularly lacking area. In March 2005, a female prisoner gave birth to premature twins in a bathroom stall at the Baylor Women’s Correctional Institution. She complained afterwards that a CMS nurse ignored her complaints that she was experiencing labor contractions, which started 24 hours prior to the births.

The legislative bill would have required guards to be advised when a prisoner is pregnant and all decisions concerning the prisoner’s “activity, medication, medical attention, and nutrition made by correctional staff”. Such prisoners would also receive vitamin and mineral supplements, and require the prisoner be taken to a hospital if a medical staff person is not present when labor ensues.

That bill, however, was rejected because it had a \$30 million price tag. “If we’re spending \$30 million to fix a \$29 million system, we’re really in a mess,” said Sen. James Vaughn, D-Clayton. “We need to get a real picture of what’s going on before we do anything like that.”

Instead, the legislature approved a \$2.9 million bill as an “inflation adjustment” for the CMS contract. It also allotted \$238,900 as salary to create two health administrator positions to monitor health care received by prisoners and a person to oversee substance abuse services.

Meanwhile, Sen. Margaret Rose Hen-

ry promised to re-introduce legislation to improve prisoner health care. It is an issue that’s a big concern to a lot of legislatures. Henry said. “It’s not going away.”

The lack of fiscal resources and a company with an interest in cutting services to

increase its profitability means poor health care for DDOC prisoners is not going away. Once again, it’s business as usual for the prison industrial complex. ■

Source: *The News Journal*; newszap.com.

Supreme Court Holds Administrative Remedies Must Be Properly Exhausted Under the PLRA

by John E. Dannenberg

The U.S. Supreme Court held that before filing a 42 U.S.C. § 1983 complaint, a prisoner must first fully, properly and timely exhaust his administrative remedies. Specifically, as here, failure to properly exhaust remedies below may not later be cured by claiming that no other remedies remain available.

Viet Mike Ngo, serving a life sentence in California for murder, grieved his restriction from participating in various institutional programs, including religious activities, at San Quentin State Prison. The restrictions had been placed on him because he allegedly had engaged in “sexual relationships with volunteer Catholic priests,” which he denied. After two months in administrative segregation, Ngo was returned to the mainline population, albeit with restrictions against going to the chapel area. Six months later, Ngo filed a form 602 administrative appeal protesting this restriction, which was denied as untimely because California prison regulations require a 602 to be filed within 15 days of the action being challenged.

Ngo administratively appealed his rejection unsuccessfully and finally sued prison officials under 42 U.S.C. § 1983 in federal district court. The district court dismissed because of failure to exhaust available administrative remedies. Upon appeal, the Ninth Circuit reversed, holding that Ngo had in fact “exhausted available remedies” because, by then, none remained available to him. (*Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005).)

The U.S. Supreme Court interpreted the Prison Litigation Reform Act’s (PLRA) term of art “exhausted” as used in 42 U.S.C. § 1997e(a). Prison officials argued that “exhaustion” implied doing required acts within the time limits set

by procedure, while Ngo argued that § 1997e(a)’s language “available” meant that if one had missed a deadline, the remedy was no longer available and he could therefore proceed anyway.

Reviewing administrative law in general, the Supreme Court found that proper exhaustion demands compliance with an agency’s deadlines because “no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.” The court found further support by contrasting the exhaustion concept embodied in habeas corpus jurisprudence. The court concluded that § 1997e(a)’s language more closely paralleled the administrative model, and that administrative law considerations should therefore control.

Next, the court reasoned that Ngo’s proposed interpretation would be unprecedented in that it would permit a party to deliberately bypass the administrative process by flouting the agency’s procedural rules. It further rejected as implausible Ngo’s attempts to model the PLRA’s exhaustion requirement after the Age Discrimination in Employment Act of 1967. Ngo’s attempts to temporally transmogrify § 1997e(a)’s language “until” and “presently” were unavailing as well. Nor did Ngo’s stab at conflating the AEDPA concept of tolling and the PLRA’s concept of exhaustion pass muster with the court. The court also held that § 1997e(c)(2)’s partial exhaustion provision did not implicitly override short state deadline regulations (e.g., as here, 15 days). When Ngo suggested that the court should imprint the AEDPA’s habeas exhaustion provision onto the PLRA (where the former has sanctions to promote compliance but the latter does not), the court colorfully dismissed this by saying it “would be like

copying the design for an airplane but omitting one of the wings.”

Finally, as to Ngo’s suggestion that California’s 15 day exhaustion time limit is too harsh to impose on unskilled prisoners, and is thus simply a trap for

the unwary, the court found California’s prison grievance system was characterized by “informality and relative simplicity.”

The short answer to Ngo’s attempt to end-run his administrative procedural default is that now state prisons are free

to enforce rigid time limits on prisoner grievances as jurisdictional bars to redress. The court reversed the Ninth Circuit and remanded for proceedings consistent with its opinion. See: *Woodford v. Ngo*, 126 S. Ct. 2378 (2006). ■

Dismissal of Failure to Protect Claim Reversed; No “Showing” Necessary to Survive Rule 12(b)(6) Dismissal

The Seventh Circuit Court of Appeals reversed a district court’s dismissal of a civil committee’s failure to protect and equal protection claims, for failure to state a claim under Fed.R.Civ.P. 12(b)(6).

David Brown was a prisoner of the Illinois Sexually Violent Persons and Detention Facility (Facility), awaiting a civil commitment trial under the Illinois Sexually Violent Persons Commitment Act.

On May 4, 2001, Brown, a Caucasian, was playing cards in an unsupervised day room when “G.B., an African American prisoner who had attacked other Caucasian facility prisoners at other locations ... attacked and severely beat Brown several times in succession, causing Brown to suffer physical injuries.”

Prior to the assault, Facility staff “personally knew of G.B.’s propensity for violence and history of attacking Caucasian residents ... and were aware of a pattern of attacks by African-American residents in general against Caucasian residents at the Facility.” Yet, they “failed to take adequate measures to prevent such attacks from taking place.”

Brown brought suit in federal court, alleging “that Facility employees failed to protect him in violation of his due process rights by allowing [a] fellow resident with ... violent propensities to roam Facility common areas unsupervised.” He also alleged that several Facility employees violated his right to equal protection by intentionally treating him and other Caucasian residents differently from similarly situated African American residents. But the district court dismissed both claims upon the Defendants’ FRCP 12(b)(6) motion to dismiss for failure to state a claim.

Beginning with Brown’s Failure to Protect Claim, the Seventh Circuit explained that since Brown was awaiting a civil commitment trial, but not yet convicted of a crime when the assault occurred, his “status was comparable to that of a pretrial detainee.” Therefore, his claim arose under the Fourteenth Amendment’s Due Process Clause rather than the Eighth Amendment.

Even so, “there is ‘little practical difference between the two standards,’” and “‘claims brought under the Fourteenth Amendment are to be analyzed under the Eighth Amendment Test’” set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994).

Applying this two-prong test, the appeals court found that “having alleged ... exposure to a heightened risk of assault, posed by a specific individual with allegedly known violent propensities, Brown ... alleged sufficiently substantial risk” to his safety. The appellate court then found that “Brown’s complaint, by asserting that the defendants ‘had knowledge’ of G.B.’s violent propensities as evidenced by his alleged history of attacking Caucasians, sufficiently alleges that defendants were aware of an excessive risk posed to Brown.” Additionally,

Brown sufficiently alleged that defendants disregarded those risks, thereby sufficiently stating a failure to protect claim.

In reaching this result, the Seventh Circuit observed that “the district court’s findings misstate plaintiff’s burden going forward... [T]o survive a motion to dismiss under Rule 12(b)(6), he needed only allege ... And Brown has sufficiently alleged an equal protection violation.”

Finally, the appeals court upheld the dismissal of Brown’s claims against individual defendants for failure to train, because those claims may be maintained only against a municipality. It also upheld the dismissal of Brown’s damages claims against the defendants in their official capacities. See: *Brown v. Budz*, 398 F.3d 904 (7th Cir. 2005). ■

Oklahoma Requires Exhaustion of Administrative Remedies For Ex-Prisoner Suits

The Oklahoma Legislature has enacted a law that prohibits former prisoners from bringing a civil action unless the prisoner has exhausted all administrative remedies. To *PLN*’s knowledge, this is the first law of its kind.

The legislation, which was signed by the Governor on April 11, 2006, becomes effective November 1, 2006. It applies to all persons “presently or formerly” in the custody or supervision of the Oklahoma Department of Corrections (ODOC), the Federal Bureau of Prisons, or a county jail.

The law requires a person bringing a suit against any government entity, the ODOC, or “a private company” providing services to the ODOC to exhaust all administrative remedies as a prerequisite to filing the action.

Members of The Citizens for Fair and Clean Government protested the measure in Oklahoma City after it was signed into law. “We’re going to let them know this is not right”, said David O’Conner, founder of the non-profit group. “There are inno-

cent prisoners that are in there”.

Many prisoners fail to file lawsuits or complaints while in prison because they fear retaliation from guards or administrators. “If they say anything inside, they get treated worse and when they get outside they have no way of fighting it”, O’Conner said. ■

Source: *News OK.com*

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California: On July 20, 2006, about 100 prisoners at the California Institution for Men in Chino rioted in Borrego Hall in the Reception Center West. The fight was between white and Hispanic prisoners. No guards were injured and order was quickly restored using pepper spray.

Canada: On July 20, 2006, Toronto police arrested Matthew Sanderson, 37, on charges that he e mailed threats to the office of Maricopa county (Phoenix, Arizona) Joe Arpaio threatening to kill him by either shooting him, poisoning him, blowing him up or burning him alive. Maricopa county officials said that to date 11 people have been convicted of threatening to kill Arpaio who is renowned for his brutal and sadistic jails. Sanderson accused Arpaio of being "a disgusting person who violates, tortures and hurts too many Americans." Sanderson had previously been imprisoned in New York State on various charges before being deported to his native Canada upon completion of the sentence. He may be extradited to Arizona to face trial on these charges.

Colorado: On February 4, 2006, Jarrets Clowers, 25, was arrested on criminal trespass charges for apparently trying to break into the Territorial Prison in Canon City. Clowers had been served three years in the prison before being released on parole a few weeks earlier. Clowers told police he wanted to show his younger brother where he had been in prison. If convicted of the trespassing charge Clowers faces revocation of his parole and will most likely be reimprisoned.

Jamaica: On January 19, 2006, former prison doctor Raymoth Notice told the head of the country's prison system that mentally ill prisoners were being raped on a daily basis in Jamaican prisons. Major Richard Reese, the head of the prison system responded requesting details.

Mississippi: In January, 2006, local media reported the case of Pamela Rose, the wife of state prisoner Kenneth Rose, who was barred from visiting her husband for one year because she sent him six postage stamps in a letter. Stamps are banned at the prison. Officials at the State Penitentiary in Parchman state that prisoners must tell their visitors what is and is not allowed.

New York: On January 20, 2006, New York state prisoner Alton Hutchinson was sentenced to two concurrent terms of 25 years to life in prison after being

convicted of assaulting a female civilian counselor at the Elmira Correctional Facility in January, 2005. A jury had acquitted Hutchinson of aggravated assault and attempted rape but convicted him of assault. He was sentenced as a habitual offender due to prior convictions for attempted rape, murder, assault and other charges. The victim was severely beaten and required seven days of hospitalization and suffered nerve damage to her face. The sentence is consecutive to his current sentences which expire in 2045.

Ohio: On July 19, 2006, police arrested Michael Barnett, 22, an army deserter and his wife, Maria Catini, 21, on robbery and extortion charges. Police accuse the two of targeting sex offenders and using nude photos and videos of Maria to entice sex offenders by claiming Maria was 15 years old and wanted sex with them. When the would be child molesters would show up for a meeting at a church near the couples' home, they would be ambushed by as many as a dozen people wielding baseball bats who would then rob them of money and jewelry. Barnett and his wife would then use the pictures and e mails to blackmail the would be predators into paying more money. Barnett told police he got the idea from the television series *To Catch a Predator* where TV employees set up would be sex offenders and turn them over to police, making millions in advertising money for NBC in the process. Dale Williams, a spokesman for the Carroll County Sheriff's office dryly noted: "The victims don't want to talk to us."

Oklahoma: On January 18, 2006, Charles Bowes, 25, was charged with manslaughter for the death of fellow Ottawa county jail prisoner Frank Crownover, 51. Crownover was in the jail for failing to pay child support, a felony, while Bowes was awaiting trial on assorted rape charges. The two men supposedly argued over Crownover making noise at night and Bowes allegedly rammed Crownover's head into a cinder block wall, killing him. Bowes told investigators Crownover had charged him and he had merely stepped out the way. The fight and death occurred in the protective custody unit of the jail. Crownover was in PC due to health problems.

Panama: On February 7, 2006, Jose Calderon, the head of the nation's prison system resigned citing differences with his boss, Justice Minister Hector Aleman.

The prison system is undergoing a series of investigations into the beating of at least 20 prisoners by guards, black out cells, to complaints about how prisoners are fed. Calderon admitted to media that improvements are desperately needed in the nation's prison system but that he was not being given the funds to implement them

Pennsylvania: On July 17, 2006, Delton Doran, 33, a guard at the Federal Detention Center in Philadelphia was criminally charge din federal court with having sex with an unidentified prisoner at the facility.

South Carolina: In July, 2006, the Broad River Correctional Institution was locked down for over a week after an employee lost a set of keys on July 12. The lockdown was imposed while locks were modified.

South Carolina: On January 20, 2006, William Hartman, 46, an investigator with the Aiken Public Defender's Office was charged with planning to smuggle Valium and Oxycontin into the Trenton Correctional Institution on behalf of an unspecified prisoner.

Texas: On January 19, 2006, Russell Nelson, was sentenced to 75 years in prison for aggravated kidnapping stemming from a November, 2004 incident in which he took another prisoner hostage aboard a Grayson county jail bus. While guards had left the bus to oversee the dismounting of the prisoner passengers Nelson took a female prisoner hostage by holding a razor blade to her throat. Jail guards subdued Nelson and no one was injured. Nelson testified the incident was caused by his addiction to methamphetamine.

Texas: On July 10, 2006, prosecutors charged Gabriel Perez, 44, with the 1990 murder of state parole supervisor Richard Tinajero. Tinajero was found naked, bound, stabbed and beaten to death in his Arlington apartment. In 1992 a Dallas jury acquitted Roberto Gonzalez of the murder. In 1993 Perez was named as a suspect supposedly based on a fingerprint match of his fingerprints and prints found at the crime scene. Witnesses have told police that Tinajero was gay and frequently brought male prostitutes to his home. Police believe robbery was the motive behind the murder.

Texas: On July 4, 2006, prisoner Victor Rocha, 26, was stabbed to death in the Mark Stiles Unit in Beaumont. Prisoner

Jose Alonzo, 37, is accused of killing him. Both men were armed.

Virginia: On January 21, 2006, federal prosecutors charged David Hicks, 37, a guard at the Buchanan county jail with perjury for lying about the death of Tina Stiltner, a prisoner in the jail who either hanged herself or was strangled to death in the jail on January 31, 2002, while Hicks stood guard a few feet away. The indictment alleges Hicks lied during a civil deposition to an attorney who has filed a civil suit over Stiltner's death when he told counsel he did not know how Stiltner died, did not notice marks on her neck and did not see pieces of rope in her cell. Stiltner had been arrested for DUI and child neglect. The indictment does not indicate who killed Stiltner, or if she committed suicide, merely that Hicks lied about his knowledge of her death.

Washington: On July 19, 2006, Patrick Clay, 41, was sentenced to four years in prison for attempting to escape from the Yakima jail on May 8, 2006, by crawling into a hole he made in the ceiling. Clay was serving a misdemeanor sentence for King County which has sent over 300 misdemeanor prisoners to the Yakima jail to serve their sentences. 📧



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\$470,000 Paid in Pennsylvania Jail Prisoner's Seizure Related Death

The Estate of a Pennsylvania prisoner has settled its civil rights action alleging Eighth and Fourteenth Amendment violations for the wrongful death of Virginia Brejcak, 42, at the Bucks County Correctional Facility (BCCF) for \$470,000. The federal lawsuit was brought against various medical personnel at BCCF, Bucks County, the Bucks County Health Department, Diamond Pharmacy Services, and Diamond Drugs, Inc.

Brejcak was incarcerated at BCCF from July 2001 through December 2001. She was known by BCCF staff to have physiological and psychiatric problems. She also had a severe case of MRSA (Methicillin-Resistant Staphylococcus Aureus). Her medical record documented a seizure disorder, bipolar disorder, and that she suffered from severe witnessed and unwitnessed seizures. Because BCCF did not have a female mental health unit, Brejcak was placed in medical isolation.

As part of her treatment, BCCF doctor prescribed and administered a decongestant drug, Naldecon, which contains the ingredient Phenylpropanolamine (PPA). PPA was the subject of an FDA Public Health Advisory that recommended that all products with PPA be removed from the market, due to the high risk of hemorrhage stroke in woman.

Despite that advisory, BCCF continued to prescribe "Naldecon by mouth

twice daily." The Diamond defendants dispensed to Brejcak "Decon Tablet SA," a generic version of Naldecon, which contained PPA.

Brejcak began experiencing multiple seizures, was losing control of her bowel and bladder, began hitting her head on the floor and other objects during seizure activity, was losing memory of these seizures, began developing visual lumps and bumps on her forehead and skull, and experienced severe headaches. Brejcak's repeated requests for hospitalization were denied.

On December 25, 2001, Brejcak had another seizure and failed to respond to verbal stimuli. Suffering from a brain hemorrhage, she was taken to the emergency room and died the next day.

The Estate claimed the defendants ignored Brejcaks medical history and failed to properly treat her MRSA infection. It further claimed the doctors and Diamond defendants continued medication they knew posed a significant risk of harm to Brejcak. Finally, it was claimed there

was a policy of and practice of ignoring prisoners' complaints for medical care, and it placed Brejcak in "lock down" as punishment for her mental illness because it failed to provide mental health care for females.

The district court dismissed the individual defendants because their conduct did not rise to the level of deliberate indifference, but the remaining entity claims remained. The Buck County Health Department paid the Estate, through its insurer Admiral Insurance Co., \$200,000; The Diamond defendant's insurer; Pharmacist Mutual paid \$110,000; and Bucks County paid \$160,000 for acts in Brejcaks' death. The settlement occurred on November 2, 2005.

The Estate was represented by Michael F. Barrett and Donna Lee Jones, of Saltz, Mongeluzzi, Barrett, & Bendesky of Philadelphia. See: *Brejcak v County of Bucks*, USDC, Eastern District Pennsylvania, Case No: 03-4688. ■

Source: *Verdicts Search Pennsylvania*

Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 915 15th St. N.W., 7th Floor, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. FAMM-gram, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

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Justice Denied

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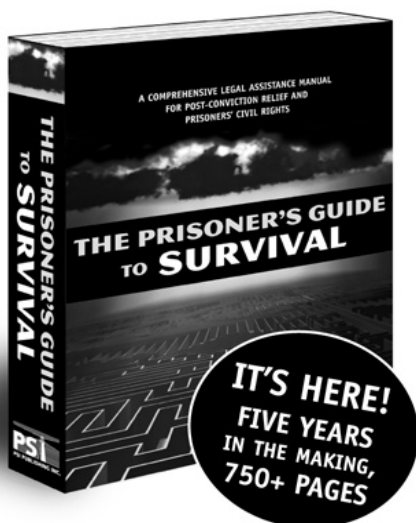
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Dedicated to Protecting Human Rights

October 2006

Taser—The “Less Lethal” Weapon with a Fatal Attraction to Prisoners

by John E. Dannenberg

“**E**xtensive medical evidence strongly supports the Taser devices will not cause lasting aftereffects or fatality.”

Taser International literature

Tasers, fifty-thousand volt electronic stun guns manufactured by Arizona-based Taser International, are killing and injuring ever more prisoners. Classified in the oxymoronic category of “less lethal” weapons (see, e.g., California Penal Code § 12600 et seq.), Tasers have killed unlucky recipients of the devices’ painful shocks just as dead as “more lethal” weapons.

In many cases, death has resulted when the Taser exacerbates a victim’s

underlying medical weakness such as a heart condition, or when it is used on a person who is under the influence of drugs or in a state of “excited delirium.” In other incidents, Taser use is in addition to pepper spray, restraint chairs and physical abuse which results in death by positional asphyxia. While the interrelated causes of such Taser-related deaths are being debated in myriad lawsuits brought by Taser victims’ families [and even by one police department – see *PLN*, March, 2006, p. 18], prisoners continue to be electrically injured and killed in jails across the United States.

PLN originally addressed this issue in a comprehensive article entitled “Shocked and Stunned” in our June 2005 issue. As indicated below, Taser-related deaths and abuse remain a disturbing, on-going problem that has yet to be resolved. Also note that Tasers have been implicated in numerous deaths caused by police or other law enforcement agencies during arrests where the victims did not die in jail, which are not detailed here.

California

On December 23, 2004, Sacramento Sheriff’s deputies gave an unseasonable present to Marjorie Pino – they Tasered her 31-year-old son Ronnie to death, and he died in the Sacramento County Jail on Christmas Eve. “I told them he had a bad heart,” Marjorie told reporters, referring to the Vega Nerve Stimulator implanted in Ronnie’s chest to control grand mal seizures (which resulted from abnormal electrical discharges in his brain). He took medications six times a day for anti-psychotic, heart and epilepsy

conditions. Ronnie died 17 hours after being Tasered.

Suffering from frequent hallucinations that he was talking with Governor Schwarzenegger, Ronnie had been taken earlier that day to a psychiatric hospital, where he broke a glass door and was confronted by the police. He was Tasered twice, cuffed, and hauled to jail. The next morning a jail doctor phoned Marjorie to inquire what medications Ronnie was on, adding, “they were having problems with him.” She came to the jail with a bail bond check to take Ronnie home, only to learn that he had died. The cause of death was ruled Sudden Unexpected Death Syndrome, and although Taser injuries were noted in the autopsy report, Taser use was not cited as a factor in Ronnie’s death.

Davis Cross, 44, died of asphyxiation on September 17, 2005 at the Santa Cruz County Jail. He had been incarcerated on a domestic violence charge, and began yelling and hitting his head against the cell door. He was Tasered after he refused to stop, and then stopped breathing after he was restrained. County Forensic Pathologist Dr. Richard Mason later reported “good news,” finding “the Taser was not the cause of death.” Mason found amphetamines in Cross’s body and determined that the deputies who restrained him had simply choked him to death. However, the conflation of Taser and being under the influence of drugs is known to be particularly lethal.

On October 20, 2005, 33-year-old Jose Maravilla Perez was Tasered multiple times by police after he violated a restraining order, tried to flee and fought with officers. He was placed in restraints

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Tasers (cont.)

and taken to the San Leandro jail, where he continued to fight and was Tasered again. He stopped breathing and became unresponsive, and died the same day.

Cedric Davis, 26, a prisoner at the Merced County jail, was involved in a fight with five guards on March 11, 2006. He was shot several times with a Taser and one guard stated he punched Davis twice in the head. Previously, Davis had been handcuffed behind his back for almost a day and a half in a padded cell, as he was behaving erratically. Guards pepper sprayed him when they tried to put him in a restraint chair, which was also when he was Tasered. After being placed in the chair David stopped breathing; he was transported to a local hospital where he was revived, but died about a week later. According to a medic who transported Davis, he had suffered a heart attack. "This was an unfortunate situation, but it was not our doing," stated Sheriff Mark Pazin. "We did everything right by the numbers."

And on May 15, 2006, Los Angeles County agreed to pay \$75,000 to the family of Jerry Moreno to settle two federal lawsuits filed after Moreno died at the Pitchess Detention Center in January 2005. Moreno, 33, was declared brain dead three days after he attacked other prisoners at the jail and was subdued by an emergency response team that used tear gas and a Taser. He was reportedly under the influence of drugs at the time, and died of a heart attack precipitated by impaired breathing.

Colorado

Taser shocks and a restraint chair were factors in the death of Raul M. Gallegos-Reyes, who died at Arapahoe County's main jail on August 17, 2006. Gallegos-Reyes was reportedly agitated, began screaming in his cell early in the morning, and fought with and bit two deputies, whose names were withheld by the sheriff's office. He was Tasered once, then placed in a restraint chair and checked by medical staff. He lost consciousness and died before he could be taken to a hospital. Questioned whether Taser use had contributed to Gallegos-Reyes' death, Sheriff Grayson Robinson stated, "That's still part of the investigation that's being conducted.... Across the country, wherever a Taser has been

deployed, as far as I know, the Taser has not been the cause of death. It's been the result of something else."

Florida

Byron Black, 39, died on November 27, 2004 after deputies both pepper-sprayed and Tasered him in his cell at the Lee County jail. Black, an insurance salesman, had been arrested for setting his own van on fire. Lee County Associate Medical Examiner Barbara Wolf determined that the struggle and the Taser shock contributed to Black's death from cardiac arrhythmia, a condition Black had developed from alcohol withdrawal and seizures. The January 2006 autopsy report also revealed that all drug tests were negative. Sheriff's Department Sgt. Larry King declined to comment pending possible litigation.

Truck driver Robert Boggan had been in the Escambia County jail for 11 days in August 2005, detained for aggravated assault and assault with a deadly weapon which occurred at a Dollar Tree store during a "mental episode." County officials vigorously denied that the August 29 death of the 65-year-old prisoner was due to his being Tasered. They may have a latent defense: Boggan was treated by personnel from notorious medical care contractor Prison Health Services (PHS).

In a lawsuit filed by his family in October 2005, it was claimed that guards maliciously shocked Boggan as punishment for not following orders. Jail Director Dennis Williams said Boggan was acting irrationally, and stated no Taser shock was administered the day of his death. The suit alleges quite a different story. After guards had stripped Boggan naked and placed him in a shower cell, "each of the four times the Taser's darts were shot into Mr. Boggan's wet chest and he was shocked with 50,000 volts, the entire shower cell walls flashed as if lightning were striking in that small space. Mr. Boggan screamed for his life on each occasion." The complaint goes on to say that Boggan collapsed, was put in a restraining chair and dragged back to his cell, where he remained without medical attention until found dead seven hours later.

Things heated up on October 25, 2005, when 200 citizens marched past the jail in a protest, while sympathetic prisoners pounded on windows and waved toilet paper. Estelle Boggan, Robert's widow, described him as a "hardworking,

Tasers (cont.)

church-going man” who suffered from schizophrenia. His son Donnell said, “we will not stop until we get justice.”

On November 30, the State Attorney’s Office announced it was seeking a coroner’s inquest to determine if criminal charges should be filed. At the inquest, Dr. Andrea Minyard testified that “being in jail for 11 days caused him to die.” She added that Boggan died from heart disease and paranoid schizophrenia, with being placed in a restraint chair and injected with the tranquilizer Haloperidol being contributing factors. The 48 hours Boggan spent in the restraint chair (14 of them in one stint) exacerbated his “moderate” heart disease, and even trace amounts of Haloperidol can cause cardiac problems, she stated. Dr. Joseph Montastero, the jail’s PHS medical director, testified that Boggan was given two injections of a “drug cocktail” containing 10 mg. of Haloperidol.

Testifying for the defendants, Florida Department of Law Enforcement special agent Christopher Rigoni stated that the last two times Boggan had been Tasered were four days and three days before he died. The Medical Examiner eventually concluded that the Taser use was not directly linked to Boggan’s death. In the history of Escambia County, nine coroner’s inquests have been conducted since 1998; none has resulted in criminal charges.

Another Escambia County jail prisoner, Jerry Preyer, 45, who suffered from mental illness, died on June 13, 2006 after being Tasered. Preyer, who became aggressive, was initially strapped into a restraint chair. He was released after he calmed down, but then fought with jail guards and was shocked twice with a Taser. The Florida Dept. of Law Enforcement is investigating the incident.

Following Preyer’s death, in July 2006 Sheriff Ron McNesby restricted the use of Tasers at the jail and asked the county commission for \$625,000 to equip four cells with rubber padding to hold mentally ill prisoners. He refused to get rid of Tasers entirely, however, saying it would be “unpopular” with the jail guards. Further, Florida Gov. Jeb Bush signed a bill into law on June 27, 2006 that requires mandatory training for law enforcement officers who use Tasers, and limits the use of Tasers to situations where suspects or

prisoners are physically threatening or attempting to escape.

On September 4, 2006, spurred by the deaths of Boggan and Preyer, over 125 people protested in downtown Pensacola, calling for the removal of Tasers from the jail. Participants in the demonstration, which was organized by Movement for Change, chanted “Tasers kill, stop the abuse” as they marched.

Georgia

Graphic videotapes of the May 25, 2004 death of prisoner Frederick Williams in the Gwinnett County Jail shocked viewers who watched him lose consciousness after being Tasered five times in 43 seconds. In April 2005 the grand jury, relying solely upon an 11-month police investigation, decided not to investigate the incident. The grand jury was criticized because it declined to view the damning tape, although they were told about it. And what they missed was Williams, shackled and cuffed, pleading for his life before being carried into the jail by 11 deputies, who then Tasered the bucking prisoner in the chest while he was in a restraint chair located in a holding cell. Williams lost consciousness after five minutes, and was then tended to by PHS contract personnel. He died two days later in a Gwinnett hospital.

Williams, 31, a Liberian native, had been arrested on domestic violence charges at his Lawrenceville home after his wife, Yanga, called 911 and said he had failed to take his epilepsy medication and had become violent and irrational. District Attorney Danny Porter had asked the grand jury to consider the case, but limited the question to the county’s use of the controversial stun guns.

The jail’s in-chair Tasing policy was tested by two Gwinnett police officers. They reenacted Williams’ situation by letting themselves be shocked (but only twice) while strapped in. As expected, they reacted in exactly the same manner as Williams had, arching their backs and trying to push out of the restraint chair, not from disobedience but due to the pain of the electric shocks. “The pain was so intense that I would have done anything to get away from it,” said Gwinnett Police Corporal Damon Cavender. “It caused me to scream involuntarily.” Lt. William Walsh, the second stun gun guinea pig, reported identical reactions.

This was not surprising, because Sgt. Michael Mustachio, who Tasered Wil-

liams, selected the “drive stun mode” of the Taser, applying it directly to Williams’ chest instead of shooting from a distance. Using the weapon in this way causes intense pain but does not incapacitate a person, according to Taser International. Mustachio’s sadism was again revealed when he was fired in February 2005 for killing a neighbor’s dog because its barking disturbed him, and then trying to conceal the crime. Sheriff Butch Conway, who viewed the video of Williams being Tasered, said his deputies did nothing wrong. He did, however, change department policy nine months later to forbid the direct application of the Taser (“drive stun mode”) to a prisoner who is “partially controlled in the restraint chair or otherwise immobilized,” or when “sufficient” deputies are present.

Melvin Johnson, an attorney representing Williams’ wife and four children, argued there was no reason to Taser him after he was shackled in the restraint chair. While one deputy had his arm around Williams’ neck and chin and others held his shackled and cuffed arms and legs, Sergeant Mustachio bravely pressed the Taser into Williams’ midsection, asking after each lurching reaction, “Do you want another one?” The *Atlanta Journal-Constitution* showed the video to two former prosecutors and a defense attorney, all of whom said the grand jury should have been allowed to decide if a crime had been committed by deputies. In September 2005, the U.S. Attorney’s office announced there was insufficient evidence to pursue federal charges against the Gwinnett deputies involved in Williams’ death.

Johnson filed a federal civil rights lawsuit on behalf of Williams’ family on December 7, 2005. They gained public support when 200 members of the Southern Christian Leadership Conference marched in memory of Williams to the Gwinnett Justice Center in Lawrenceville, calling for an economic boycott of the county to protest those “who don’t respect human life” by Tasing them to death in jail. On January 20, 2006, Gwinnett county attorneys responded by assigning the blame to Taser International, accusing the company of providing false training documents, using biased safety studies, and failing to warn users that repeated use of the stun guns could be lethal. Taser International responded that they were “confident” their product had nothing to do with Williams’ death.

Gwinnett County's legal problems multiplied in September 2005, when attorney Brian Spears, representing the family of deceased prisoner Ray Charles Austin, sued Sheriff Conway and Prison Health Services, the jail's contract medical care provider, for Austin's September 23, 2003 jailhouse Taser death. The suit alleges that Austin, 24, would not have died if deputies and a PHS nurse had not forced him to take medication, shocked him eight times in a 13 minute period, and choked him. Austin, a schizophrenic, had been arrested for a probation violation. While in jail he bit a deputy; he was injected with psychotropic drugs and restrained in a chair, where he died shortly thereafter. Although the autopsy determined that Austin died of a heart attack, it did not reveal what caused the heart attack. The forced medication was contrary to doctors' orders in Austin's medical file. Sadly, it was Austin's resistance to the forced medication that started the altercation which resulted in his death.

In Sept. 2005, Gwinnett's chief medical examiner, Dr. Steven Dunton, reported that Taser shocks may have contributed to both Austin and Williams' deaths, though he ruled their deaths were due to undetermined causes. Not all of Gwinnett's jail fatalities have involved Tasers, however. In the same four-month period that the two Taser-related deaths occurred, Harriett Washington, 43, died in her cell on October 17, 2005 while cellmates begged PHS employees to provide her with medical care, and Jon Eskew, 49, killed himself on December 1, 2005 by slashing his wrists with a metal jail key. The Gwinnett facility, designed for 1,200 prisoners, housed 1,736 at the time – some triple-celled – with 476 more farmed out to other Georgia jails. Seventy-seven guard positions were vacant at the facility.

Illinois

A 13-year veteran deputy sheriff of Champaign County was arrested and suspended with pay on November 15, 2005 for aggravated battery after he "used a Taser device on [31-year-old prisoner Ray Hsieh] outside the course of his official duties." Sgt. William Alan Myers was also charged with obstruction of justice for lying in an attempt to cover up his crime. He was booked into the neighboring Piatt County Jail to avoid being housed with prisoners he had been guarding in the Champaign County Jail, and was released hours later on a \$1,000 cash bond.

On August 25, 2006, prosecutors filed a third charge against Myers, a felony charge of disorderly conduct, for having submitted a report falsely claiming that Hsieh had spit on two other guards. Myers is due in court on all three charges on Oct. 3, 2006. Hsieh received a confidential settlement from the county as a result of the Tasing incident, in an amount under \$10,000.

Indiana

Former Monroe County jailer David Shaw is facing two felony charges of battery after using a Taser to shock a prisoner, who later died, in November 2003. Shaw repeatedly used the Taser on 47-year-old James Borden while Borden was being booked into the jail on a probation violation. He was handcuffed at the time. According to an autopsy, Borden had a heart disorder and an enlarged heart, and both drug intoxication and the Taser shock contributed to his death. Shaw is scheduled to go to trial on October 16, 2006; a civil lawsuit filed by Borden's family resulted in a \$500,000 settlement.

Michigan

On September 14, 2006, former Powell County deputy Michael Brown pleaded guilty to misdemeanor counts of assault and official misconduct for Tasing a prisoner without cause. In accepting the plea bargain, Brown avoided a more serious felony charge. He was arrested following a March 28, 2006 alternation with jail prisoner Reuben Heath, who was being held for resisting arrest. Brown was the arresting officer. While handcuffed in a holding cell and lying on a bunk, Heath was Tased by Brown through the cell door's food slot, reportedly because he refused to comply with Brown's orders. Brown, who was running for Sheriff at the time of the gratuitous Tasing, was sentenced to two years probation and forced to surrender his police certification.

North Carolina

Non-English-speaking Honduran citizen Carlos

Claros-Castro, 28, was arrested on January 6, 2006 for drunk driving, speeding, not reporting an accident and not having a license. Less than a day later he was dead in the Davidson County Jail after an altercation with two guards. Apparently Claros-Castro failed to understand a command by guards, which led to a confrontation. Alone in a secure cell, he was Tased three or four times, pepper sprayed, placed in a restraint chair and

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Tasers (cont.)

beaten with an ASP baton, after which he died. Sheriff David Grice's original report stated that Claros-Castro was "out of control." An attorney provided by the Honduran Consul said calling this an "altercation" was "putting it lightly," and asserted that "an injustice has certainly been done."

The district attorney's office agreed, and second-degree murder charges were filed against jailers Brandon Huie and Ronald Parker. Two autopsies concluded that Claros-Castro's death was a homicide, citing bruises, bleeding in his neck and brain, wounds from Taser shocks and signs of asphyxiation. Huie pleaded guilty to involuntary manslaughter; he received a 16-20 month sentence on June 30, 2006. Parker decided to take the case to a jury trial in August 2006, where he was found guilty of involuntary manslaughter and received 13-16 months in prison. Claros-Castro's family is preparing to file a civil lawsuit against the county.

Ohio

While the proverbial feline may survive nine fatal events, nine 5-second 50,000 volt jolts by Tasers proved deadly to 41-year-old Jeffrey Turner after he was arrested on January 31, 2005 in Toledo.

According to his family's attorney, Turner was holding his Bible and praying silently outside the closed Toledo Museum of Art when police, after challenging him for refusing to identify himself, Tasered him five times. Becoming combative, Turner was carried to the Lucas County jail by deputies, where guards Tasered him four more times. A nurse sent to his cell to check on him found him dead.

The coroner reported evidence of pre-existing cardiac disease, including an enlarged heart. Turner was also on schizophrenia medication. The coroner ruled on April 13, 2005 that the repeated Taserings "contributed to the death," making it a homicide.

Steve Tuttle, Taser International's vice-president of communications, reiterated his company's belief that Tasers save lives, adding, "we are unaware of any scientific data that suggests the use, or multiple uses of a Taser device would result in this regrettable outcome." The U.S. Securities and Exchange Commission (SEC) impliedly disagreed – in early 2005 the SEC opened an informal inquiry into

Taser International's statements concerning the safety of their devices, though the agency eventually concluded that no enforcement action should be taken. Dr. Bruce Wilkoff, a cardiologist at the famed Cleveland Clinic, opined that because of the timing proximity, "it sounds like the Taser is likely to have caused [Turner's death]."

Toledo Police Chief Mike Navarre apparently was similarly concerned. After Turner's death, Navarre suspended the use of Tasers and enacted a proactive policy requiring any suspect shocked by a stun gun to first pass a medical examination at a hospital before being booked into the county jail.

The matter may well be resolved in Lucas County Common Pleas Court, where Turner's mother, Betty, filed a lawsuit on January 30, 2006 against the nine Toledo police officers and three Sheriff's deputies involved. On February 14, 2006, county commissioners approved \$75,000 to hire three law firms to defend against the suit. Separately, the NAACP has asked the FBI to investigate possible civil rights violations.

South Carolina

Maurice Cunningham died in the Lancaster County Jail on July 23, 2005 after a Sheriff's deputy Tasered him for an uninterrupted 2 minutes, 49 seconds before he collapsed during a fight with four guards, according to the autopsy report. The minutes-long electrocution came after Cunningham was shocked five other times, ranging in length from five to nine seconds each, the report said. Taser International's X-26 Taser records the duration of each shock. While normally the weapon activates automatically for 5 seconds, the X-26 can be continually energized by holding down the trigger. In this case, the Taser's darts connected between Cunningham's left thigh and left arm, which completed a circuit that disrupted the electrical system controlling his heart. His heart had been damaged at the cellular level by the shocks; Coroner Mike Morris ruled that the Taser caused fatal cardiac arrhythmia of the 29-year-old prisoner.

Pathologists at the Medical University of South Carolina also noted that Cunningham, who had a history of schizophrenia, had no medications detectable in his blood at the time, although Abilify and Risperdal had been prescribed. The night before the attack, Cunningham

had reported "seeing snakes in his cell." Guards stated they subdued Cunningham after he had stabbed two guards in the eyes with pencils and lunged at two others, according to the Sheriff's office and two prisoner witnesses. Cunningham was in jail awaiting trial for assault and battery with intent to kill.

Amnesty International spokesman Ed Jackson stated he had never heard of such a long Taser shock, recalling the previous record was 50 seconds in a Chicago incident. "They train officers to shock them until they comply... There needs to be serious examination of training programs to make sure they're consistent with what we now know about Tasers," he said. In fact, in June 2005, Taser International issued a bulletin warning police to avoid uninterrupted and multiple shocks, admitting that certain people could suffer from "potentially fatal health risks" as a result of over-exertion or impaired breathing. The Charlotte chapter of the Harlem-based National Action Network called for an end to the use of Tasers.

Tennessee

Chris McCargo is fortunate that he didn't die after a deputy at the Bradley County jail shocked him in the neck with an M26 Taser. He did, however, remain in a coma for months. Jailers attempted to put McCargo, who was charged with public drunkenness, in a restraint chair. According to Alonzo Howard, a prisoner who witnessed the incident, "That's when [jail] Lieutenant Michael Cooper pulled a Taser out and stuck it to the right side of his neck. Just Tased him right there, you know." Hours later McCargo had a seizure and lapsed into a coma. The sheriff said cameras at the jail had failed to record several hours during the time that McCargo was restrained and shocked, and refused to comment further. The FBI is assisting with an investigation into the incident.

Other former prisoners have since come forward, stating they were subjected to inappropriate Taserings by jail guards. Brian Woodby said he was shocked 4 to 6 times on the lower stomach and genitals while strapped to a gurney by Lt. Michael Cooper, the same guard who used a Taser on McCargo. Woodby had been a passenger in a car in which the driver was arrested for DUI, and had not been charged with any crime. Jason Adams, another former prisoner, claimed he was Tasered while laying facedown on a shower floor at the jail. In November 2005,

three former Bradley County jail prisoners filed a federal lawsuit alleging the use of Tasers on handcuffed prisoners, among other claims.

Texas

On Friday the 13th, January 2006, 29-year-old Daryl Kelley's luck ran out in the Harris County Jail. Kelley, who was 6'2" and weighed 300 lbs., collapsed in his cell 40 minutes after an Emergency Response Team guard Tasered him to facilitate a cell move. Sheriff's Department Maj. Don McWilliams said, "It is fully routine to use Tasers to move large, violent inmates."

It may also have been routine to beat him as well, as alleged by his relatives. Quanell X, a Black Panther Nation spokesman, accused deputies of murdering Kelley. Pearlina Kelley, Daryl's mother, said her son had bi-polar disorder and became violent only when not on his medications. "He was just sick," she lamented. "They Tasered him to death," she continued. "They killed him at the county jail." Kelley's crime was the unauthorized use of a car.

Just three days later, 24-year-old African-American Shmekia Lewis died in Jefferson County's Mid-County Jail in Beaumont, two hours after she was Tasered during booking. Adjacent holding cell occupant Jason Chambliss related, "She was arguing and hollering and carrying on so they decided to go in there and beat up on her a little bit. They hog-tied her hands and feet to the toilet, which is metal, and Tasered her over and over again. They also gave her a shot of something with a syringe. She was real quiet after that. One guard was yelling, 'turn it up, turn it up, hit her again.' They wanted to throw her in the shower next and Taser her there, but changed their minds and left her where she was." Noel Casper, another prisoner in a nearby cell, corroborated Chambliss' account by telephone, adding, "When they were done they just left her there. When they came back about two hours later and saw she wasn't moving that was when all hell broke loose."

Several days later, on January 21, 2006, in sworn affidavits, both prisoners recanted the statements they

originally made to the *Port Arthur News*. Sheriff Woods denied having hog-tied Lewis, claiming she was restrained in an upright position and only Tasered once. One can only wonder, with the two percipient witnesses having inexplicitly recanted their previous statements (while still in the sheriff's custody), why the preliminary autopsy report revealed "no obvious cause of death."

Washington

In sharp contrast to "Texas justice," Spokane County Sheriff Mark Sterk was open to a fair determination of the cause of death of 39-year-old Benites Saimon Sichiyo, who died during surgery after being Tasered and three fights with guards. Autopsy results indicated that Sichiyo died from a lacerated liver, which came from blunt force to his torso. Although Spokane guards admitted kneeing Sichiyo in the torso twice during violent scuffles, and admitted Taser-ing him three times, they were unsure if their actions caused the fatal injury.

Sichiyo had already garnered a black eye, bruised lip, swollen face, and neck and groin abrasions, which may have come from pre-arrest fights. However, his niece, Sisi Rudolph, said the pre-arrest altercation only caused the black eye and facial abrasions. During a cell move Sichiyo allegedly bit a guard on the arm, at which point the kneeing occurred and he lost consciousness. Jail staff administered CPR while they awaited an ambulance. Medical examiner reports expressed doubt that Taser-ing caused Sichiyo's death.

Regardless, Sheriff Sterk wanted to ascertain if a homicide occurred from pre-arrest injuries or in-custody injuries. "If we're involved in this and we caused these injuries, we want to make sure that we document them well ... and the truth

comes out about how we handled the situation," he stated. Sheriff Sterk will have company. The FBI joined the investigation in February 2006. All eight guards involved in altercations with Sichiyo were placed on routine administrative leave but were reinstated a few days later.

Taser International Under Scrutiny

Not surprisingly, Taser International has been scrutinized due to the shocking number of deaths caused by its products. Many investors who took stock in the numerous reports of in-custody Taser-related fatalities have sold their stock

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Tasers (cont.)

(NASDAQ symbol TASR), driving the price down from a high of \$33 to \$7.59/share as of September 15, 2006. Not only did sales slump, but profits plummeted as well. Jittery investors were further spooked by a U.S. Securities and Exchange Commission probe into whether manipulated information tainted stock sales. Additionally, the SEC questioned company executives who dumped their own shares just before a large drop in the stock price in November 2005.

A class-action suit was filed in U.S. District Court in Arizona on behalf of shareholders alleging securities fraud, and on August 9, 2006 it was reported that Taser International had agreed to settle the case and several similar lawsuits for \$20 million plus \$1.75 million for the plaintiffs' attorney fees. The company also took a charge of \$18 million for its own litigation and related expenses.

Taser International further bowed to an investigation by Arizona's Attorney General's office, which demanded more accurate product warnings, particularly to limit the use of the term "non-lethal." The Attorney General's complaint was that Taser International's safety claims "may have understated the risks of serious harm." The firm agreed in December 2005 to an 18-point product warning and made changes in its training materials, including acknowledging the stun gun's dangerousness, changing the way the company uses the word "safe," limiting medical safety claims, and deleting statements that Tasers are "harmless."

Nonetheless, while the company continues to maintain that its stun guns have never caused a death or serious injury, with the same fervor of Tobacco Institute scientists who once insisted that smoking had no relationship to lung cancer, in a March 2006 report Amnesty International found there have been 156 deaths following Taser use in the U.S. and Canada since 2001. In seven of those cases medical examiners or coroners determined that Tasers were the cause of death, while in 16 cases Tasers were found to be a contributing factor.

Separately, the Metropolitan Municipalities EMS Medical Directors Association, representing doctors in emergency medical departments in 30 major cities, recommended in February 2006 that Tasers be used only sparingly, when possible. They acknowledged the "syndrome"

of lethality that attends psychologically medicated victims who are shocked. Their recommendation came shortly after a study published in the January 2006 *Journal of the National Academy of Forensic Engineers*, which concluded that electric shocks from Tasers were 39 times more powerful than the manufacturer claimed, and sufficiently strong to cause fatal heart rhythms. The study's author, James Ruggieri, found that the Taser M18 produced 14 pulses per second at 50 watts per pulse, versus the manufacturer's claim of 10 pulses per second at 1.76 watts per pulse. "These findings place the weapon well into the lethal category," he concluded.

Taser International begs to differ and is suing Ruggieri for defamation, including for his expert testimony in a wrongful-death lawsuit in 2005. Taser brands Ruggieri as lacking in requisite technical expertise (calling him "a high school dropout with no medical training," despite Ruggieri's master's degree in computer science and professional engineer licensing in five states), and labels his claims "exaggerated, erroneous and beyond the laws of physics." Independent Stanford graduate engineer Robert Nabours found Ruggieri's conclusions credible, including Ruggieri's observation that the electrical resistance of skin tissue breaks down under shock, permitting Tasers to deliver 704 watts of power as opposed to the advertised 18 watts. The *Journal* article was peer reviewed prior to publication.

Additional research may bolster or undercut the company's claims regarding the safety of its products. Dr. Christine Hall, a Canadian emergency room physician, is presently working on a proposed national research project to understand the effects of Tasers and pepper spray on people who exhibit an agitated state known as "excited delirium." The three-year study, funded by \$1.5 million from the Canadian Police Research Centre, will examine suspects who die in police custody as a result of Taser shocks or pepper spray exposure. Taser International already admits that its "less lethal" weapons "could be deadly" when used on people suffering from excited delirium. A June 2005 bulletin from the company cautioned against repeatedly Taser-ing such victims.

A Not-So-Stunning Outlook

If Taser International suffers financially from lawsuits for wrongful deaths caused by its "less lethal" stun gun weapons, it won't cause any pain to the firm's

chairman, Phillips Smith (who recently announced his retirement), its president, Tom Smith, or its CEO, Rick Smith. The trio sold their stock in the company in late 2004 for over \$90 million, far exceeding the \$25 million Taser earned in the past four years – even in cumulative revenues. And just in time. Taser's 2005 fourth-quarter report revealed a 98% drop in profits "on lower sales and higher expenses as the company fought lawsuits," including \$7 million the firm invested in public relations efforts to shore up its flagging image. CEO Rick Smith reported that 40 new lawsuits were filed against Taser in 2005, leaving a "backlog" of 43 lawsuits after 12 were dismissed.

The firm's future profitability may well be tied to its latest products. The company has marketed a camera-equipped Taser, the Taser-cam, which is being touted in a "The Truth is Undeniable" ad campaign. Taser International is also developing 12-gauge shotgun shells that deliver "less lethal" shocks up to 300 feet away. Funded by \$500,000 from the U.S. Office of Naval Research, Taser hopes to release the product in 2007. "It will truly cause incapacitation," said company spokesman Steve Tuttle. The eXtended Range Electra-Muscular Projectile (XREP) will reportedly deliver the blunt-force trauma of a fast-moving baseball plus the electrical shock of a stun gun.

Presumably, Taser will continue its practice of training its law enforcement customers to test the company's "less lethal" weapons on their own officers, to verify the product's safety. But not everyone is willing to try Tasers on their own personnel. The Aberdeen Proving Grounds, where the Army develops and tests weapons, found that testing Tasers "on Army personnel in training is not recommended, given the potential risk." ■

Sources: *Associated Press*, *Arizona Republic*, *Barron's*, *Palm Beach Post*, *Sacramento Bee*, *San Francisco Chronicle*, *San Jose Mercury News*, *Sun-Sentinel*, *The Ledger*, *Pensacola News Journal*, *Miami Herald News*, *Orlando Sentinel*, *www.bradenton.com*, *Gwinnett Daily Post*, *Atlanta Journal-Constitution*, *Kansas City Star*, *Urbana News-Gazette*, *New York Times*, *USA Today*, *Spokesman Review*, *Seattle Post-Intelligencer*, *Charlotte Observer*, *The Herald*, *Tuscaloosa News*, *WFMY News2 (Greensboro)*, *Beaumont Enterprise*, *Port Arthur News*, *KBTv4 News*, *KPRC2 News*, *UPI*.

Board of Commissioners Clears PHS In Three Leon County (Florida) Jail Deaths

by John E. Dannenberg

After three jail deaths between May 2003 and October 2004, the Leon County Board of Commissioners met to consider the Sheriff's reports on the three deaths and any implications regarding the jail's healthcare provider, PHS. Two of the deaths were in litigation. In spite of highly suspicious circumstances in the overmedication death of one prisoner, the Board approved the report clearing PHS.

PHS was hired in 2002 for approximately \$3.5 million/yr. to provide medical, mental health, and dental services for the 1,250 prisoners in the Leon County Jail. Approximately 90-100 prisoners visit the jail's clinic daily, including those receiving medication. Medications are shipped daily from Secure Pharmacy Plus, PHS's subsidiary.

Leon County maintains oversight of PHS through Alliance Medical Management Corp. Leon County Jail is one of 21 county lockups in Florida accredited by the National Commission on Correctional Health Care. Accreditation must be renewed annually, although site evaluation only occurs every three years. In addition, a medical review committee is convened whenever three prisoner complaints surface on the same subject. In 2002, the Board approved mental health peer review oversight of the jail's mentally ill, hiring both a Mental Health Coordinator and Florida Partners in Crisis, Inc.

The Three Deaths

On October 31, 2004, prisoner Steven Tomaino, 32, hung himself in his cell before dinner. He had not given any suicidal indications either to staff or other prisoners, and had no mental health record. However, the required hourly cell checks were not made that day. It was determined that guard Patricia Harris had made false entries in her log to the effect that she had conducted searches at 1650 and 1750 hrs. When confronted with prisoner and fellow guard statements that she had not searched, she finally admitted that "she doesn't have time for that." She had left to make a personal phone call that day, and falsified her log -- at Tomaino's expense. She was found administratively guilty of gross violation of integrity.

Clyde Fuller, 26, died in a restraint chair on June 12, 2003. He had been disruptive during booking and screamed and spat at staff. After he was pepper sprayed, he was placed in the restraint chair in the back of the jail medical unit, where he was discovered dead approximately 23 minutes later. On his intake medical inquiry, Fuller answered that he had "seizures" as a currently treated medical problem, but that he had not taken his prescribed medication. He also stated that he had not taken any drugs or alcohol prior to his arrest. The autopsy showed marijuana and significant cocaine in his system, plus revealed ongoing heart and vascular disease. His death was ruled to fit "sudden custody death syndrome."

On May 16, 2003, 40 year-old Ruth Hubbs also died in a jail medical unit cell, two days after being booked. She appeared to be acting overmedicated, talking incoherently to herself for hours while sitting on the floor. She had been prescribed Doxepin, but her autopsy showed an extensive overdose condition. It could not be determined whether she secretly saved (cheeked) pills and took an overdose or if PHS had overmedicated her. PHS physician Dr. Sadat Mansouri indicated he had switched Hubbs' medication from Prozac to Doxepin and increased her dose from 100 mg. to 250 mg. per day, in addition to prescribing 600 mg. of lithium for bipolar disorder. He said that the drug switch was made expressly to cut costs, even though Doxepin was an older drug. Dr. Mansouri stated that these drugs would not build up over time in the body and become toxic. But the toxicology report showed 3.9 mg./liter of Doxepin in Hubbs' blood, whereas the recommended therapeutic level was 0.02 mg./liter. Researching the pharmacy records, there was an unaccounted-for excess of 900 mg. of Doxepin taken by Hubbs in the two day period prior to her death. As we reported in the April, 2006 issue of *PLN*, on August 29, 2005, PHS settled the wrongful death lawsuit filed by Hubbs' parents for \$350,000.00.

PHS can't explain

No one from PHS could explain how Hubbs got this excess. No one, except former PHS Director of Nursing Em-

ily Beck, who told Hubbs' attorney that Hubbs' medical file had been materially altered, with some key reports removed. Beck called PHS "a train wreck waiting to happen." Beck stated that she believed Hubbs' death was preventable and that Hubbs received substandard care from PHS. The investigative report also found that PHS used employees who were not licensed, certified or didn't hold RN or LPN degrees to evaluate mental health patients, counsel them, and dispense narcotic medications to them. Moreover, there was no medication-cart inventory. When one medication is substituted for another, there is no accounting for the disposition of the now unused drugs. At last report, the State Attorney General's office was reviewing the case for possible criminal charges and a Grand Jury review. ■

Source: Board of County Commissioners Agenda Request 43 (August 30, 2005), with Sheriff's reports.

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From the Editor

by Paul Wright

As the year comes to an end we will soon be sending out PLN's annual fundraiser letter. A PLN supporter who wishes to remain anonymous has pledged to match all donations to PLN, up to the amount of \$15,000, dollar for dollar that are made between October 1, 2006 and January 31, 2007. As most readers probably know, the amount charged for subscriptions and advertising income, do not completely cover all of PLN's operating expenses. The difference between what magazine subscriptions and advertising income and what our costs actually are has always been made up by reader donations.

PLN just celebrated its 16th anniversary of monthly publishing. We are the only independent nationally circulated prisoner rights publication that is still publishing, as well as the longest lived at this point. In addition to bringing our readers the latest news and information on detention facilities we are also advocating on behalf of prisoners locally and nationally; standing up for the rights of prisoners and publishers to send literature to prisoners; seeking transparency and accountability in prisons and jails via public records laws and a lot more.

There are a lot of worthy causes out there but not only is no one else doing what PLN is doing, we're small enough that even a small donation goes a long way and makes a difference. We have no bloated administrative overhead, paid consultants or similar expenses. Every penny raised goes into the magazine and advocacy on behalf of prisoners, period. And that money goes a long way. In the past year alone PLN won a Freedom of Information Act lawsuit against the federal Bureau of Prisons seeking information on all money paid out in litigation by the BOP; submitted amicus briefs in several US supreme court cases on behalf of prisoner plaintiffs; successfully urged Yale University to divest itself of Corrections Corporation of America stock; confronted and questioned former US attorney general John Ashcroft about the racist application of the federal death penalty; has sought to stop the resumption of medical experiments on prisoners and a lot more. That's in addition to publishing a monthly magazine, speaking at events, conferences and schools, litigation, etc. And we are doing this with 4 full-time employees!

Nowhere else will your donation, large or small, generate as much bang for the buck. Needless to say, with more money we could do a lot more.

Between now and January we will report on the status of the fundraiser. Please make a donation to ensure we get the entire \$15,000 matching grant.

Overall I am very happy being *PLN's* editor and there is nothing else I would rather be doing than this. However, the saddest thing about being *PLN's* editor and also the bad thing about being around this long, is that inevitably our friends and supporters die. It is with great sadness that I report that on August 8, 2006, Thomas Sellman, 47, died in Seattle, Wash.

Thomas was originally a cameraman in film and television. Among the movies he helped film was a documentary on the Louisiana State Penitentiary in Angola and the *Field of Dreams*. Shortly after moving to Seattle he became active in the Prison Awareness Project, a volunteer group at the Washington State Reformatory in Monroe, Wash., which is where I first met him. Thomas had a keen sensitivity and empathy for the plight and suffering of others.

In 1999 he was arrested while handing out leaflets at demonstrations against the

World Trade Organization in Seattle and spent two days in jail as a result. He was later one of the named plaintiffs in a class action lawsuit filed by the ACLU which challenged the assorted restrictions on free speech imposed on WTO protestors. See: *Hankin v. City of Seattle*, 444 F.3d 555 (9th Cir. 2005).

It was his arrest and two days in jail for exercising his right to free speech that led Thomas to go to law school. He graduated from the University of Washington law school in 2003. While he was attending law school Thomas worked as a work study student in PLN's Seattle office where he did everything from lay out for the magazine to research, fact checking and answering the phone. Not only was Thomas a tireless advocate for the rights of prisoners but he was always friendly, well spoken, cheerful and thoughtful. Upon graduating from law school Thomas was working on both prisoner rights and criminal defense cases.

Everyone at PLN is sad and mournful at Thomas's untimely passing. We have all lost both a friend and a colleague. He is survived by his parents Thomas and Zelda and his brother James. We extend our condolences to his family. ☞

Focus on Sex Offenders Increases While Number of Sex Offenses Decline

In September, 2006 the U.S. Bureau of Justice Statistics released its annual Crime Victimization report for 2005, which indicated a dramatic drop in the number of rapes and sexual assaults nationally. The 191,670 reported incidents represent an almost 10 percent decline in rape and sexual abuse from the previous year and a reduction of more than 25 percent since 2000.

In fact, since 1993 the number of reported rapes and sexual assaults has dropped over 60 percent. Criminal justice experts attribute this decline to longer sentences for sex offenders as well as more therapy and a wider use of psychotropic drugs used to treat them. Also, the number of people convicted of sex crimes is rising more quickly than for all other crimes except drugs, and the increased incarceration of sex offenders has helped drive down the number of sexual assaults.

The decline in reported sexual of-

fences also applies to children. According to David Finkelhor, director of the Crimes Against Children Research Center at the University of New Hampshire, who analyzed incidents of child abuse reported to protection agencies, sexual assaults of children aged 12 to 17 dropped by 79 percent between 1993 and 2003.

However, in 2005 state legislators passed over 150 sex offender-related laws, more than double the number the year before, according to the National Conference of State Legislatures. And this trend shows no sign of slowing; indeed, the volume of sex offender legislation appears to be increasing nationwide.

Within the past year states have passed laws that are increasingly restrictive, with at least 16 states imposing limits on where sex offenders can live and requiring GPS satellite tracking after they are released. Two states, Oregon and South Carolina,

enacted laws in 2006 that permit the death penalty for certain sex offences.

State and local officials have also considered a broader range of punitive measures for sex offenders. Officials in Florida and Louisiana recently enacted rules prohibiting registered sex offenders from staying in emergency shelters during hurricanes. In Ohio and Kansas, state legislators introduced bills that would require sex offenders to use pink license plates on their vehicles. At least half a dozen states have passed laws barring sex offenders from participating in Halloween. A proposed law in Florida would make it illegal for sex offenders to possess or use Viagra, Cialis or other sex-enhancement drugs.

The recent deluge of sex offender-related legislation began with the May 2005 passage of Jessica's Law in Florida, named after Jessica Lunsford, a 9-year-old-girl who was murdered by a convicted sex offender. The issue has been taken up by the American Legislative Exchange Council (ALEC), an organization that bills itself as "a bipartisan membership association for conservative state lawmakers," which in April 2006 developed model sex offender legislation it is pushing in a number of states. On the federal level, on July 27, 2006 President Bush signed into law the Adam Walsh Protection and Safety Act, which establishes a national sex offender registry and strengthens federal penalties for sex crimes involving children.

But some experts worry that the sudden proliferation of new sex offender laws indicates a trend driven by emotion and politics rather than social science and sound policy, and that some of the new measures may in fact be counterproductive. One area of concern is residency restrictions, which bar sex offenders from living within a certain distance from schools, parks, daycare centers and other areas where children are present.

"Residency restrictions may give a false sense of security to the public, because they focus on where offenders live rather than barring them from traveling into a prohibited area or rather than preventing them from working certain jobs where they have access to children," said Carolyn Atwell-Davis, director of legislative affairs at the National Center for Missing & Exploited Children. "We fear that restricting where sex offenders live may result in these offenders not telling police when they move."

John Q. La Fond, a retired law professor at the University of Kansas-Missouri

and author of "Preventing Sexual Violence: How Society Should Cope with Sex Offenders," said that new laws also risk misdirecting attention by focusing on strangers when more than 80 percent of sex offenders are acquaintances of their victims. "Many of the new rules end up pushing offenders out of one area and concentrating them in the few remaining areas they have left to go," he said.

Despite such misgivings, restrictions on sex offenders have proliferated on the federal, state and local levels and are now being implemented by private entities, too. In Kansas, a developer has begun building "sex offender free subdivisions" that block sex offenders from moving in; if someone in the community is convicted of a sex crime, the subdivision will fine the person \$1,500 daily until he or she moves out.

With the approaching midterm elections, sex offender-related issues – mostly along the lines of who-can-be-tougher-on-sex-offenders – have been raised in attorney general races in New York, Ohio, Alabama and Rhode Island, and in governor's races in California and Vermont. Sparring over sex offender laws has become a partisan political issue in Washington state and Illinois. In New York, Republican Assembly candidate Paulette Barlette has proposed implanting microchips in released sex offenders to better track them. Alabama's incumbent Attorney General, Troy King, also a Republican, has pledged to seek the death penalty against certain child sex offenders.

Leigh L. Linden, who teaches eco-

nomics at Columbia University, disagrees that restrictions on sex offenders are strictly a matter of politics. "I do believe there is something more there than politicians trying to outdo each other by being tough on crime," said Mr. Linden, who studied data in communities around Charlotte, N.C. and found that a home's value fell 4 percent when a registered sex offender moved in within a 1/10-mile radius. "People are really worried about this issue but I'm not sure why they seem to be more concerned now than before."

However, given the recent dramatic increase in sex offender-related laws while for the past decade the number of sex crimes has been falling, and considering that some of the legislation being passed may actually be counterproductive, it appears that punitive restrictions for sex offenders are less about protecting the public and more about getting politicians, primarily Republicans, elected. ■

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Attempted Arrest of Federal Prison Guards in Florida Turns Deadly

by Michael Rigby

The events of June 21, 2006, were so outrageous they seemed impossible (except, of course, to the regular readers of *Prison Legal News*). That day, two people were killed and a third was wounded when a prison guard at the Federal Detention Center in Tallahassee, Florida, opened fire on federal agents attempting to arrest him and five others. An indictment issued a day earlier accused the six guards of a contraband-for-sex racket involving female prisoners at the Federal Correctional Institution-Tallahassee, which is adjacent to the detention center.

The shootout began at 7:42 a.m. as agents with the FBI and the Justice Department's Office of the Inspector General (OIG) arrived to arrest Ralph Hill, 43, and five other guards as they ended their overnight shifts at the detention center. As the agents moved to make the arrests, Hill pulled out his personal gun, which he had smuggled into the prison, and began firing. When the shooting ended Hill and Justice Department Special Agent William Sentner, 44, were dead. An unidentified prison lieutenant was also shot but expected to recover.

One of the indicted guards, Vincent Johnson, said through his court-appointed attorney, Alex Morris of the law firm Banks and Morris, that Hill opened fire first. Hill had been in a secure part of the lobby at the detention center behind glass windows where he would have been able to see what was happening outside. Hill then apparently came out of the secure area and opened fire. The agents returned fire, shooting Hill's finger off and hitting him multiple times, Morris said. Tallahassee police dispatched every available unit to the prison after receiving the 911 call at 7:45 a.m., but the shooting was over when they arrived. The facility was immediately placed on lockdown.

The detention center is a Bureau of Prisons (BOP) intake facility that houses mostly men; the larger FCI-Tallahassee is a low-security female prison that is part of the same complex. Together the facilities hold 1,445 prisoners.

Five of the indicted guards – Alfred Barnes, Gregory Dixon, Alan Moore, E. Lavon Spence and Hill – were accused of having sexual contact with at least

10 female prisoners in exchange for contraband. The sixth guard, Johnson, allegedly tried to dissuade a prisoner from cooperating with investigators during the 8-month investigation, which included recorded telephone conversations and an undercover agent.

The 13-page indictment, returned by a grand jury in the U.S. District Court for the Northern District of Florida on June 20, 2006 (Case No. 4:06-cr-00036-RH-WCS), lists 40 specific crimes committed by the guards between September 2003 and May 2005.

During that time the guards allegedly swapped shifts, covered for one another, passed messages, and obtained cash to facilitate their sexual rendezvous. They hid cash, marijuana, alcohol, food and messages around the prison to be picked up by the prisoners. The guards bought some prisoners' silence with cash and contraband; others they threatened, saying they would have them transferred farther from home or would plant contraband in their cells if they cooperated with investigators. The six also monitored prisoner phone calls to ensure their crimes weren't reported. In addition, the indictment says the guards extorted the families and friends of prisoners by having them mail, wire and hand deliver money – up to \$600 at a time – to pay for the contraband. The guards also allegedly used cleaning products to destroy evidence of their sexual encounters with the prisoners.

The original indictment charged the six guards with conspiring to commit acts of bribery, mail fraud, and interstate transportation in aid of racketeering. A federal grand jury added additional charges, including witness tampering, in a superseding indictment in July.

Despite the seriousness of the charges against them, which carry up to 20 years in prison, U.S. Magistrate Judge William Sherrill allowed Johnson and Spence to post bond. Judge Sherrill initially ordered Barnes, Dixon and Moore held without bail. Barnes, said the judge, “appeared more substantially involved” in the scandal than the others. Dixon and Moore, said a prosecutor, tried to evade arrest after the shooting. All five guards pleaded not guilty at hearing on June 22. Barnes, Dixon and Moore were later

placed on supervised release with orders not to contact other prison employees or prisoners.

One former prisoner at FCI-Tallahassee, Ashley Turner, said the sexual abuse had been happening at the facility for years and involved more than just the six guards who were indicted. “That list should probably be three times longer,” said Turner, who was released in 2004 after serving three years for bank fraud. “These are just the ones who hung around long enough to get arrested.”

Unfortunately, the sexual abuse of prisoners, especially female prisoners, by staff is not uncommon. “The bottom line is that women in correctional facilities should be guarded by women,” said Alison Parker, acting director of the New York-based Human Rights Watch. “Men have been assigned to inappropriate tasks in inappropriate locations, for example: Male corrections officials guarding women where they take showers.” Dr. Roger Guthrie, a former employee at the Carswell Federal Medical Center in Fort Worth, Texas, claims he was fired after reporting the sexual abuse of prisoners there, which he claimed was rampant. “There's no such thing as consensual sex with an inmate,” Guthrie said. “It's rape. And it's still going on.”

But as *PLN* has reported so many times, sexual abuse of prisoners is not limited to the BOP, or even to female prisoners. [See: *PLN*, Aug. 2006, p.1]. A 2004 study by the Bureau of Justice Statistics found that all but one of the nation's 2,700 male and female prisons reported charges of sexual misconduct by employees. Similar accusations were made at more than 2 of every 5 jails. About 12% of the OIG's annual investigations involve sexual abuse of prisoners by staff members. In sheer numbers, the Justice Department investigated 351 federal prison employees for sexually abusing prisoners between 2000 and 2004.

Even juveniles aren't safe from predatory guards. Just two days before the FCI-Tallahassee shooting, nine former guards at a juvenile prison in Indianapolis were charged with sexually molesting girls as young as 13. And in May 2006, the Florida Department of Juvenile Justice fired a female guard, Pamela Watson, for having sex with a mentally retarded prisoner in

Okeechobee County. During the month-long investigation, prison officials found several love letters supposedly written in Watson's handwriting and containing her signature in the prisoner's cell. Watson, who officials believe is pregnant, also failed a lie detector test. Even so, officials dropped the investigation in June citing a lack of evidence.

The Tallahassee shooting has also rekindled calls for federal prison officials to search guards coming to work. That guards bring in most of the contraband found in prisons is no secret. In fact, a 2003 report by the OIG recommended searching guards when they reported for duty. Prison officials fought the recommendation, claiming the searches would hurt staff morale. After the recent shooting, however, officials conceded a reassessment of current policies was needed. "The events of yesterday further emphasize the need to re-evaluate this and other of our policies, including investigations of staff and others," Carla Wilson, a BOP spokeswoman, said the day after the shooting. Currently, the 35,000 guards employed at the BOP's 115 prisons aren't searched unless there is "irrefutable evidence" that they possess illegal contraband. The BOP

has since noted it intends to modify the Code of Federal Regulations to search guards as they enter prisons. For their part, no comment from the FBI over the practice of arresting people at their workplace to send a message to their co-workers.

Ashley Turner, who now lives in Rome, Georgia, said she knew all of the indicted Tallahassee guards. "One is known as 'the Rev,'" she said. "He's a minister away from the prison. He was very, very bad. He'd pretend to be ministering with the girls." She said she is still troubled by what she experienced at the prison. "You don't get over a place like Tallahassee overnight," Turner said. "It's not doing the time, but it's what happens to you when you're there trying to do the time."

The five indicted guards will soon know what it's like to do time, too. On Sept. 6, Vincent Johnson pleaded guilty to a charge of conspiracy to commit mail fraud; he was not charged with any sexual offenses. Eight days later, on Sept. 14, Alfred Barnes also accepted a plea bargain in exchange for most of the charges against him being dropped. Barnes admitted that families of three female prisoners had sent him money

orders, and he provided the prisoners with contraband cosmetics, cigarettes, alcohol and jewelry. He also testified that he had had sex with two of the prisoners. Barnes agreed to cooperate with the prosecution of the remaining guards, who are scheduled to go to trial on October 30. Johnson may testify against his former co-workers, too.

The employment status of the guards is unclear. Moore reportedly received a letter from the BOP stating he was still on paid status but had been reassigned to work from his home. Johnson was notified by the BOP that he had been suspended without pay. According to BOP spokeswoman Traci Billingsley, "in the rare cases that staff are indicted on criminal charges, it is not uncommon to place them on some kind of administrative leave."

As previously noted by *PLN*, even when prison staff are convicted of raping prisoners, suspended sentences, probation and light, if any, jail sentences are the norm. ■

Sources: *Associated Press, tallahassee.com, headlinenews.com, CNN.com, orlandosentinel.com, New York Times, Palm Beach Post, Washington Post*



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Panel Suggests Using Prisoners in Drug Trials

by Ian Urbina

An influential federal panel of medical advisers has recommended that the government loosen regulations that severely limit the testing of pharmaceuticals on prison inmates, a practice that was all but stopped three decades ago after revelations of abuse.

The proposed change includes provisions intended to prevent problems that plagued earlier programs. Nevertheless, it has dredged up a painful history of medical mistreatment and incited debate among prison rights advocates and researchers about whether prisoners can truly make uncoerced decisions, given the environment they live in.

Supporters of such programs cite the possibility of benefit to prison populations, and the potential for contributing to the greater good.

Until the early 1970's, about 90 percent of all pharmaceutical products were tested on prisoners, federal officials say. But such research diminished sharply in 1974 after revelations of abuse at prisons like Holmesburg in Philadelphia, where prisoners were paid hundreds of dollars a month to test items as varied as dandruff treatments and dioxin, and where they were exposed to radioactive, hallucinogenic and carcinogenic chemicals.

In addition to addressing the abuses at Holmesburg, the regulations were a reaction to revelations in 1972 surrounding what the government called the Tuskegee Study of Untreated Syphilis in the Negro Male, which was begun in the 1930's and lasted 40 years. In it, several hundred mostly illiterate men with syphilis in rural Alabama were left untreated, even after a cure was discovered, so that researchers could study the disease.

"What happened at Holmesburg was just as gruesome as Tuskegee, but at Holmesburg it happened smack dab in the middle of a major city, not in some backwoods in Alabama," said Allen M. Hornblum, an urban studies professor at Temple University and the author of *Acres of Skin*, a 1998 book about the Holmesburg research. [PLN distributes this great book, ordering information is on pages 45-46] "It just goes to show how prisons are truly distinct institutions where the walls don't just serve to keep inmates in, they also serve to keep public eyes out."

Critics also doubt the merits of pharmaceutical testing on prisoners who often lack basic health care.

Alvin Bronstein, a Washington lawyer who helped found the National Prison Project, an American Civil Liberties Union program, said he did not believe that altering the regulations risked a return to the days of Holmesburg.

"With the help of external review boards that would include a prisoner advocate," Mr. Bronstein said, "I do believe that the potential benefits of biomedical research outweigh the potential risks."

Holmesburg closed in 1995 but was partly reopened in July to help ease overcrowding at other prisons.

Under current regulations, passed in 1978, prisoners can participate in federally financed biomedical research if the experiment poses no more than "minimal" risks to the subjects. But a report formally presented to federal officials on August 1, 2006 by the Institute of Medicine of the National Academy of Sciences advised that experiments with greater risks be permitted if they had the potential to benefit prisoners. As an added precaution, the report suggested that all studies be subject to an independent review.

"The current regulations are entirely outdated and restrictive, and prisoners are being arbitrarily excluded from research that can help them," said Ernest D. Prentice, a University of Nebraska genetics professor and the chairman of a Health and Human Services Department committee that requested the study. Mr. Prentice said the regulation revision process would begin at the committee's next meeting, on November 2, 2006.

The discussion comes as the biomedical industry is facing a shortage of testing subjects. In the last two years, several pain medications, including Vioxx and Bextra, have been pulled off the market because early testing did not include large enough numbers of patients to catch dangerous problems.

And the committee's report comes against the backdrop of a prison population that has more than quadrupled, to about 2.3 million, over the last 30 years and that disproportionately suffers from H.I.V. and hepatitis C, diseases that some researchers say could be better controlled if new research were permitted in prisons.

For Leodus Jones, a former prisoner, the report has opened old wounds. "This moves us back in a very bad direction," said Mr. Jones, who participated in the experiments at Holmesburg in 1966 and after his release played a pivotal role in lobbying to get the regulations passed.

In one experiment, Mr. Jones's skin changed color, and he developed rashes on his back and legs where he said lotions had been tested.

"The doctors told me at the time that something was seriously wrong," said Mr. Jones, who added that he had never signed a consent form. He reached a \$40,000 settlement in 1986 with the City of Philadelphia after he sued.

"I never had these rashes before," he said, "but I've had them ever since."

The Institute of Medicine report was initiated in 2004 when the Health and Human Services Department asked the institute to look into the issue. The report said prisoners should be allowed to take part in federally financed clinical trials so long as the trials were in the later and less dangerous phase of Food and Drug Administration approval. It also recommended that at least half the subjects in such trials be nonprisoners, making it more difficult to test products that might scare off volunteers.

Dr. A. Bernard Ackerman, a New York dermatologist who worked at Holmesburg during the 1960's trials as a second-year resident from the University of Pennsylvania, said he remained skeptical. "I saw it firsthand," Dr. Ackerman said. "What started as scientific research became pure business, and no amount of regulations can prevent that from happening again."

Others cite similar concerns over the financial stake in such research.

"It strikes me as pretty ridiculous to start talking about prisoners getting access to cutting-edge research and medications when they can't even get penicillin and high-blood-pressure pills," said Paul Wright, editor of *Prison Legal News*, an independent monthly review. "I have to imagine there are larger financial motivations here."

The demand for human test subjects has grown so much that the so-called contract research industry has emerged in the past decade to recruit volunteers for

pharmaceutical trials. The Tufts Center for the Study of Drug Development, a Boston policy and economic research group at Tufts University, estimated that contract research revenue grew to \$7 billion in 2005, up from \$1 billion in 1995.

But researchers at the Institute of Medicine said their sole focus was to see if prisoners could benefit by changing the regulations.

The pharmaceutical industry says it was not involved. Jeff Trewitt, a spokesman for the Pharmaceutical Research and Manufacturers of America, a drug industry trade group, said that his organization had no role in prompting the study and that it had not had a chance to review the findings.

Dr. Albert M. Kligman, who directed the experiments at Holmesburg and is now an emeritus professor of dermatology at the University of Pennsylvania Medical School, said the regulations should never have been written in the first place.

"My view is that shutting the prison experiments down was a big mistake," Dr. Kligman said.

While confirming that he used radioactive materials, hallucinogenic drugs and carcinogenic materials on prisoners, Dr. Kligman said that they were always administered in extremely low doses and that the benefits to the public were overwhelming.

He cited breakthroughs like Retin A, a popular anti-acne drug, and ingredients for most of the creams used to treat poison ivy. "I'm on the medical ethics committee at Penn," he said, "and I still don't see there having been anything wrong with what we were doing."

From 1951 to 1974, several federal agencies and more than 30 companies used Holmesburg for experiments, mostly under the auspices of the University of Pennsylvania, which had built laboratories at the prison. After the revelations about Holmesburg, it soon became clear that other universities and prisons in other states were involved in similar abuses.

In October 2000, nearly 300 former inmates sued the University of Pennsylvania, Dr. Kligman, Dow Chemical and Johnson & Johnson for injuries they said occurred during the experiments at Holmesburg, but the suit was dismissed because the statute of limitations had expired.

"When they put the chemicals on me, my hands swelled up like eight-ounce boxing gloves, and they've never gone back

to normal," said Edward Anthony, 62, a former prisoner who took part in Holmesburg experiments in 1964. "We're still pushing the lawsuit because the medical bills are still coming in for a lot of us."

Daniel S. Murphy, a professor of criminal justice at Appalachian State University in Boone, N.C., who was imprisoned for five years in the 1990's for growing marijuana, said that loosening the regulations would be a mistake.

"Free and informed consent becomes pretty questionable when prisoners don't hold the keys to their own cells," Professor Murphy said, "and in many cases they can't read, yet they are signing a document that it practically takes a law degree to understand."

During the Holmesburg experiments, prisoners could earn up to \$1,500 a month by participating. The only other jobs were at the commissary or in the shoe and shirt factory, where wages were usually about 15 cents to 25 cents a day, Professor Hornblum of Temple said.

On the issue of compensation for prisoners, the report raised concern about "undue inducements to participate in research in order to gain access to medical care or other benefits they would not normally have." It called for "adequate protections" to avoid "attempts to coerce or manipulate participation."

The report also expressed worry about the absence of regulation over experiments that do not receive federal money. Lawrence O. Gostin, the chairman of the panel that conducted the study and a professor of law and public health at Georgetown University, said he hoped to change that.

Even with current regulations, oversight of such research has been difficult. In 2000, several universities were reprimanded for using federal money and

conducting several hundred projects on prisoners without fully reporting the projects to the appropriate authorities.

Professor Gostin said the report called for tightening some existing regulations by advising that all research involving prisoners be subject to uniform federal oversight, even if no federal funds are involved. The report also said protections should extend not just to prisoners behind bars but also to those on parole or on probation.

Professor Murphy, who testified to the panel as the report was being written, praised those proposed precautions before adding, "They're also the parts of the report that faced the strongest resistance from federal officials, and I fear they're most likely the parts that will end up getting cut as these recommendations become new regulations." ■

Barclay Walsh contributed research for this article.

This article originally appeared in the New York Times. It is reprinted here with permission. PLN has reported extensively on the medical exploitation of prisoners, see indexes and our website for more information.

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PLN's Publication-Ban Suit Against Kansas DOC Set For Trial On Declaratory And Injunctive Relief

by John E. Dannenberg

Seeking to overturn restrictive bans on prisoner receipt of publications in the Kansas Department of Corrections (KDOC), two former KDOC prisoners and Prison Legal News sued KDOC for damages and declaratory/injunctive relief in U.S. district court. However, in a November 2005 pre-trial ruling, the court granted defendants' motion for qualified immunity, thus foreclosing claims for monetary damages.

The cases began in federal court when KDOC prisoners Jacklovich and Zimmerman and PLN in separate suits challenged KDOC's (former) regulations §§ 44-12-601 et seq. This policy barred outsiders from gifting subscriptions to KDOC prisoners because it would allegedly circumvent KDOC's behavior-based program for prisoners in disciplinary detention, a graduated incentive regimen with a strict \$30/month limit on books and magazines. The district court rejected the prisoners' First Amendment claims of the right to receive gift subscriptions of PLN, and rejected PLN's Due Process claim to be notified of non-delivery. (See: *Zimmerman v. Simmons*, 260 F.Supp.2d (D. Kans. 2003); *PLN*, Apr. 2004, p.6.) The prisoners and PLN, represented by Lawrence, Kansas attorney Bruce Plenk, appealed.

The Tenth Circuit held that PLN had a due process right to be notified whenever KDOC refused to deliver its mail to a KDOC prisoner. The appellate court also ruled that because there remained genuine issues of material fact, the district court's summary judgment against plaintiffs was in error, and reversed and remanded for trial. (See: *Jacklovich, Prison Legal News and Zimmerman v. Simmons*, 392 F.3d 420 (10th Cir. 2004); *PLN*, Feb. 2005, p.7.)

Back again in district court, KDOC defendants moved to dismiss claims against them in their individual capacities, based upon qualified immunity. The court first held that because qualified immunity may be raised at any point in the proceedings, defendants were not barred from raising it now. The court then turned to determine if the challenged right was clearly established at the time in question, putting defendants on notice that their behavior was proscribed.

The Tenth Circuit held that such

notice is established by a prior ruling on point in either the U.S. Supreme Court or the Tenth Circuit. The court then considered the precedential value of state court rulings and those from lower federal courts and from other circuits. This was central to their ruling because plaintiffs relied heavily upon 9th Circuit precedent in *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999) and *Sorrells v. McKee*, 290 F.3d 965 (9th Cir. 2002), which found that banning gifts of *PLN* and the *Georgetown Law Journal* was unconstitutional. But the Tenth Circuit set the bar higher. It required that in order to gain a "clearly established" rating in the Tenth Circuit, it would take citations on point from three other circuits to carry the day. In addition, the Tenth Circuit found that the timing of the challenged bans (mid-2000) pre-dated *McKee* and therefore *McKee* could not be held against defendants.

The court then parsed *Crofton*, narrowly construing it as not the "watershed" case plaintiffs made it out to be because it did not hold that such subscription bans were "categorically unconstitutional." The court opined that *Crofton* might represent only the "first crack in the dike regarding the legitimacy of bans on gift subscriptions for prisoners."

Plaintiffs offered other precedents, post-2000 and also from lower courts, which the Tenth Circuit rejected. The court finally held that "a prisoner's right to receive gift subscriptions to otherwise protected publications (assuming there is such a right) was not clearly established at the time of the violations alleged in these cases." The court further found plaintiffs' claims against the \$30 (later \$40) monthly limit and a ban placed on Level-1 prisoners not sufficiently supported by evidence and not proven to be a clearly established right. Thus the plaintiffs were not entitled to damages. As the prisoner plaintiffs have been released from prison, their claims for equitable relief were dismissed as moot, leaving Prison Legal News as the remaining plaintiff. PLN had originally filed its lawsuit separately and the court had consolidated its case with those brought by Zimmerman and Jacklovich.

Accordingly, the court dismissed all damages claims except those raised in Case No. 02-4054, which "will continue for disposition ... for declaratory and injunctive relief," and set the matter for trial in February, 2007. See: *Prison Legal News v. Simmons*, 401 F.Supp.2d 1181 (D.Kans. 2005). The Kansas DOC ban on gift publications continues for now. ■

Massachusetts Prisoner Awarded \$60,000 For Electrical Shock

In March 2005, a jury in Suffolk County, Massachusetts, awarded \$60,000 to a state prisoner who was shocked by a faulty light fixture in his cell.

As Michael Paolillo arose from a nap to urinate in his prison cell, he placed his right hand on the wall behind the toilet. His hand brushed against a light fixture, which shocked him and knocked him to the ground. A guard later found him lying unconscious on the floor, his face bloody. A nurse was summoned and Paolillo was transferred to the prison infirmary.

Paolillo, 30, remained in the infirmary for a week. He suffered bruising to his right eye, wrist, and elbow, and to his left thigh. The shock also caused nausea, dizziness, and vision and hearing problems. Paolillo recovered from all the injuries

except for calcifications that developed on his thigh and arm. Surgery was recommended but never performed.

At trial prison officials contended that Paolillo had tampered with the fixture. However, several guards testified that Paolillo had not tampered with it; rather, maintenance personnel had dismantled the fixture after Paolillo was removed from the cell.

Paolillo was represented by Waltham attorney John N. Santangelo. Judge Janet L. Sanders presided. See: *Paolillo v. Massachusetts Department of Corrections*, Suffolk County Superior Court, Case No. SUCV2000-03203. ■

Source: *The Massachusetts, Connecticut, Rhode Island Verdict Reporter*

Delaware Law: Punishing Prisoners for Reporting Sexual Abuse by Guards

by David M. Reutter

In July 1980, the state of Delaware criminalized all sex in its prisons. Critics cry that the law requires a prisoner to be convicted even when the sex is non-consensual, preventing prisoners from reporting sexual abuse by guards.

Delaware's law prohibits sexual intercourse and "deviate sexual intercourse," but does not apply to oral sex. A conviction can merit up to two years in prison. Only two guards have been convicted since the law's enactment.

One of those is ex-guard Rudolph Hawkins, who in 1996 pled no contest to having sex with Valerie Stewart. When Stewart, who was serving time for robbery, became pregnant, she named Hawkins as the father. DNA supported that claim. The baby was taken by the state and put up for adoption.

Hawkins not only lost his job as a guard, but also faced a civil suit filed by Stewart. A jury ordered Hawkins to pay Stewart \$25,000 in compensation and \$100,000 in punitive damages. "I felt empty-like I didn't have a soul-like the walking dead," Stewart told the jury. According to her lawyer, she only has an IQ of 80 and the mental capacity of a 14-year-old.

Women's rights advocates say that prisoners like Stewart and those with mental illness or juveniles are incapable of freely consenting to sex behind bars because guards and detention facility employees control every facet of their lives. They criticize Delaware's law because if they report what could be termed "consensual sex," they may be charged with a felony and have another two years tacked on to their sentence.

Insiders, however, say that prison officials act to protect guards that have sex with prisoners. This is accomplished by transferring the guard and putting the prisoner in Unit 8, a special wing of the women's prison reserved for troublemakers and the mentally ill.

According to Dorothy Anderson, who worked at Baylar Women's Correctional Institution from 1996 to 2003, sex between guards and prisoners is wide spread. "They believed that when a woman was in there with no man around except for them, they were there for the

taking," she said, "It was happening all the time. It was just sick."

Anderson said the women would have sex with guards for extra privileges or food. "They'll bring them Little Debbie Cakes, a Pepsi or a couple of pieces of KFC."

Delaware prison officials say they are aware of only three substantiated cases of guards having sex with prisoners in the last five years. "Each resigned before being terminated," says Beth Welch, Delaware's prison spokeswoman. "Sexual relations between employees and inmates are against the law. It results in terminations of the employee. There are no mitigating factors or second chances awarded in such cases."

Anderson disagrees. "They're handled by the wardens-quietly, she said.

"What happens on the property stays on the property," former prisoner Sharon Wall agrees with Anderson. She said one of the women on her unit at Baylor openly discussed having sex with a guard. "We all knew it was going on," Wall said. "They suspended the guard. They put her in isolation-Unit 8."

Most states have laws prohibiting sex in their prisons. Only in Delaware, Nevada, and Arizona can both the guard and prisoner be charged, which effectively prevents prisoners from reporting such incidents experts say. In Delaware, it seems that cases like Stewart's, which result in pregnancy, are the only one's prison officials act upon. Otherwise prisoners try to hide it to obtain extra favors or to avoid punishment or retaliation from prison officials for reporting sex with guards. ■

Oregon Guard Gets 32 Months For Sex With Prisoner

The first guard caught in the snare of Oregon's new law criminalizing sex with prisoners is a 36 year old mother of three. The judge called the case a tragedy, as he sentenced the 11-year veteran prison employee to 32 months in prison.

The law, which makes it a felony for any prison employee to engage in sexual intercourse with prisoners, became effective July 13, 2005 [*PLN*, Feb. 2006, pg. 23].

Rebecca McLauchlin was indicted on 16 criminal charges for a summer 2005, relationship with Cory Ogden, a prisoner at the Oregon State Penitentiary. Those charges included custodial sexual misconduct, official misconduct, and bribery for engaging in sexual intercourse with Ogden and supplying him with tobacco in exchange for a least \$200.

McLauchlin remained free on bail until she was arrested on April 9, 2006 for violating terms of her release agreement, when prison officials intercepted telephone calls between McLauchlin and Ogden.

On April 25, 2006, McLauchlin pleaded guilty to seven counts, including four counts of custodial sexual misconduct, indicating at least four separate sexual encounters. Under Oregon Law,

McLauchlin must serve 25.6 months of her sentence.

"The quick resolution of this case speaks volumes about the accountability and transparency of our agency and how seriously we accept our responsibility to Oregon Citizens," said Oregon Department of Corrections Director Max Williams. "We hope that Oregonians look beyond the transgressions of an individual to the good work our 4,000 employees perform daily to promote public safety." ■

Source: *Statesman Journal*

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Habeas Hints

by Kent Russell

This column is intended to provide “habeas hints” to prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is habeas corpus practice under AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

Statutory Tolling: The “Timeliness” Requirement

A federal court will not consider a federal habeas corpus petition after AEDPA’s 1-year period runs out, unless the Petitioner can establish “equitable tolling”, which is extremely hard to do. Therefore, in most cases, “statutory tolling” is necessary to save a federal habeas corpus petition from dismissal.

“Statutory tolling” is the period of time that AEDPA allows a petitioner to exhaust potential habeas claims on state habeas corpus. It is defined as the time that a “properly filed” state habeas corpus petition is “pending” in the state courts. The U.S. Supreme Court (USSC) has made clear that a state habeas corpus petition is “pending”, not only when it is actually on the docket of a state court, but also during the time that is spent in between a habeas denial in a lower state court and a filing in the next state court up the ladder on the way to the state’s highest court. This in-between time is commonly referred to as “gap tolling.” *Carey v. Saffold*, 536 U.S. 214 (2002).

Gap tolling is simple to apply in most states, which provide a specified number of days – usually 30 to 60 – within which to apply to a higher state court after a habeas denial in the lower court. The process is trickier, however, in California, where a prisoner is permitted to file a brand new writ instead of an appeal in the next highest court; and where the time limit for the writ is not a specified number of days, but rather a “reasonable time”. Nevertheless, in *Carey*, the USSC held that gap tolling applies in California as well as in other states, because California’s writ system, in practice, functions in pretty much the same way as the systems in other states, except that California uses a reasonable-time limitation rather than a specific number of days. Even so, the Court could not decide whether 4 ½ months – the gap between

Mr. Carey’s petitions -- was or wasn’t too long a delay to be timely under California law, so the USSC sent the case back to the Ninth Circuit to decide that specific issue. When the Ninth Circuit got the case back from the USSC, it looked at other cases in which delays longer than 4 ½ months had occurred, and found that the California Supreme Court had not said anything about those periods being too long. Hence, at least without some indication from the California Supreme Court or the California Legislature to the contrary – which the Ninth Circuit, in a footnote, invited California to provide, but which was not forthcoming – the Ninth found that 4 ½ months was not an unreasonable delay under California law. See: *Saffold v. Carey*, 312 F.3d 1031 (2002).

In 2005, the USSC held in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), that a state petition that was untimely under state law was not “properly filed” under AEDPA, no matter whether the determination of untimeliness was made by the clerk before the petition was filed, or by a judge after the clerk had filed it. *Pace* raised alarm bells across the country, by removing any “safe harbor” for timeliness that might have been assumed to exist once a petition was file-stamped by the clerk. Nevertheless, it had little effect on California petitions, because the vast majority of those were being denied via post-card (one-word) denials, and the Ninth Circuit was assuming, as it had in *Carey/Saffold*, that a petition was timely so long as the California courts did not specifically state that it was untimely.

This prisoner-friendly state of affairs in California ended on January 10, 2006, with the USSC’s decision in *Evans v. Chavis*, 126 S.Ct. 846 (2006). In *Evans*, the petitioner had waited 3 years between California habeas filings; nevertheless, the Ninth Circuit still allowed statutory tolling for that entire gap because the California Supreme Court hadn’t said anything about untimeliness in its post-card denial. The USSC reversed. First, the USSC found that, just because the California Supreme Court says “denied” doesn’t mean that it is saying “timely”. Furthermore, seemingly exasperated with the Ninth Circuit’s refusal to rein in gap delays on its own, the USSC decided to make up its own mind as to how long

a gap delay was sufficient to constitute “unreasonable delay” in California. Turning to the facts, the Court found that, although Mr. Evans had suggested a number of excuses for his 3-year delay, he had nevertheless conceded that at least 6 months of that period was unexcused. Focusing, then, on this 6 month period of unexplained delay, the USSC held that this was “far longer” than the 30-60 days that was allowed in other states; and, for that matter, far longer than the time periods which California allowed for filing a notice of appeal (60 days); or for filing a petition for review in the California Supreme Court on habeas (10 days). Reasoning in this fashion, the USSC had no trouble finding that Mr. Evans had engaged in unreasonable delay, which meant that he was not entitled to the statutory tolling that he needed to make his petition timely under AEDPA.

With the USSC’s decision in *Evans*, it’s now clear that a California petition that is delayed 6 months or more between California courts is going to be found untimely by a federal court, and therefore won’t get statutory tolling under AEDPA. But that’s not all: Relying on the reasoning in *Evans*, which presumes that California’s timeliness system functions similarly to the rest of the country, the California Attorney General is now taking the position that any gap delay in California of more than 60 days – which is the longest gap period allowed in any of the other states – makes a petition “untimely” in California. Furthermore, because Evans puts the federal courts in the business of deciding whether any California petition is timely, the A.G. is now arguing that Evans can be applied retroactively to petitions filed before Evans ever came down, and even in cases where the A.G. had previously conceded timeliness under AEDPA.

Habeas Hints

Prisoners in all states should consider the following:

- It’s always better to avoid an untimeliness ruling in the first place than to try and deal with one down the road. Therefore, start your habeas corpus investigation early, find out what time limits are permitted in your state for going up the ladder on state habeas corpus, and file within all the applicable time limits if it is

humanly possible to do so.

- If your state time limit is coming up at an intermediate stage up the state habeas ladder and you're still not done with your investigation, don't wait for the investigation to be completed and file a late petition. Instead, file on time, and explain in your petition the what kind of investigation you're doing, what you've accomplished to date, and what you hope to accomplish after you make a timely filing. Then, if the ongoing investigation pans out, add in the results at a later stage, either in your next petition or by moving to amend an existing one.

- As a fall-back position, argue equitable tolling. Explain in detail how any external causes beyond your control made it impossible for you to file earlier than you did. Some of the most hopeful bases for equitable tolling are "egregious" attorney misconduct and prison restrictions on library usage for petitioners pursuing state habeas corpus.

California prisoners should consider the following in dealing with motions to dismiss based on *Evans v. Chavis*:

- No matter what the gap delay is in your case, argue that it's improper to retroactively impose a standard of timeliness that was not even in existence at the time the gap delay occurred. This argument can be framed in two ways: (1) Argue that California's time limit is a "reasonable time", and that was "reasonable" for you (or your attorney at the time) to rely on the state of the law as it existed at the time that the gap(s) in your case occurred. (2) Argue that the prohibition on ex post facto laws prohibits the State from imposing a harsher procedural law than the one that was in effect when the "default" in question occurred. See, e.g., *Carmell v. Texas*, 529 U.S. 513, 522 (2000).

- If the gap in your case was more than 60 days but less than 90 days, argue that, even under *Evans*, the excess over 60 days is so short a time that it is not "substantially longer" than the outer limit of

60 days that applies in other states. (See, e.g., a decision from the Eastern District in which a district judge used this kind of reasoning to grant statutory tolling to a petition that had been filed after a gap of 87 days. *Stowers v. Evans*, 2006 WL 829140 (Dkt. # 05-2067) (E.D. Cal. 3/29/06).)

- If the gap in your case was more than 90 days but less than 4-½ months, argue that your own gap is less than the 4-½ months that was found to be timely in *Carey*.

- If the gap in your case was more than 4-½ months but less than 6 months, argue that *Evans* only bars statutory tolling for gaps that are longer than 6 months.

- If the gap in your case is more than 6 months, argue equitable tolling. (See above.)

- Challenge the A.G.'s argument to the effect that 60 days is all one needs to file a habeas corpus petition in California, because that's all the time that is allowed for filing a notice of appeal. Explain that a notice of appeal is simply a one-page document which identifies the judgment one is appealing from, and that full briefing of the appeal is not ordered until several weeks or months after the notice of appeal is filed. In contrast, a habeas petition has to allege with particularity all the facts on which it is based, supported by all available documentary evidence, investigation, and expert witness declarations, or the habeas claims will be subject to dismissal in federal court for lack of exhaustion.

- Challenge the A.G.'s argument that California only allows 10 days to file a habeas petition for review in the California Supreme Court, and that this is the "preferred" way of raising habeas corpus claims in that court rather than by an original writ. Respond by arguing that: (1) The time limit for filing a petition for review is actually 40 days on direct appeal, since the 10 days doesn't start running until the Court of Appeals decision becomes final,

which takes 30 days. (2) The 10-day time limit for using the petition for review alternative on habeas corpus, which cannot be extended, is so short that many prisoners won't even receive the previous denial in the prison mail before the time is up, and those who do will have only a couple of days left to draft and file a petition in the California Supreme Court. Therefore, the petition for review, although routinely used on direct appeal, is almost never used on habeas corpus, which is undoubtedly why California has chosen to provide the alternative of filing a new writ within a "reasonable time". Thus, the 10-day limit is essentially irrelevant in California habeas practice, whereas the California Supreme Court allows 6 months after the due date for the appellant's opening brief for a petitioner to file a habeas petition in a capital case. ■

Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which explains state and federal habeas corpus and AEDPA. The brand new 5th Edition (completely revised as of September 1, 2006) is now shipping, and can be purchased for \$39.99 (cost is all-inclusive for prisoners; others pay \$10 extra for postage and handling). No particular order form is necessary; just send your check or money order to the Law Offices of Russell and Russell, 2299 Sutter Street, San Francisco, CA 94115.

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Report on Status of Guantanamo Prisoners Released; Controversy Continues

by Matthew T. Clarke

In February 2006, a report on the status of 517 prisoners being held in the military prison at Guantanamo Bay, Cuba compiled by Seaton Hall law professor Mark Denbeaux, seven of his law students and attorney Joshua Denbeaux, was made public. The report, entitled *The Guantanamo Detainees: The Government's Story*, is solely based upon documents regarding the Guantanamo prisoners released by the U.S. government. Meanwhile, the Bush administration's use of military trials for Guantanamo detainees has come under attack, the government has been criticized from both within and without, and in December 2005, Witnesses Against Torture (WAT), a Christian group opposing the torture of Guantanamo prisoners, marched 70 miles from Santiago, Cuba to Guantanamo in an attempt to visit the detainees and draw attention to their plight.

The Guantanamo Detainees report calls into question the government's criteria for designating captured persons "enemy combatants" and sending them to Guantanamo. According to the report, the government has determined that 55% of the Guantanamo prisoners committed no overt hostile act toward the U.S. or its coalition allies. Only 87 were designated al Qaeda fighters, while 40% had no definitive connection with al Qaeda and 18% had neither a definitive connection with al Qaeda nor the Taliban. Many of the prisoners are detained merely on allegations of being affiliated with certain organizations, only 22% of which appear on the Department of Homeland Security's terrorist watch list. Sixty percent of the prisoners are designated as being "associated with" groups the U.S. considers terrorist organizations; 30% are allegedly "members of" such groups, and 2% have no connection to any such group.

Most striking is the low percentage of prisoners captured by the U.S. military – a mere 5%. Eighty-six percent were captured by Pakistani or Northern Alliance Afghan forces and turned over to the U.S., which paid large bounties for the capture of suspected Taliban or al Qaeda members and associates. Most of the persons determined not to be enemy combatants are Uighers, a Muslim Turkish-speaking

Chinese ethnic minority, many of whom fled to Pakistan or Afghanistan to avoid arrest by the Chinese government. The report calls into question the government's designation of the Guantanamo prisoners as the "worst of the worst" enemies of the U.S.

Much of the report is based on Combat Status Review Board Letters, government documents summarizing the evidence that a prisoner is an enemy combatant that are presented to a Combat Status Review Tribunal (CSRT). This is essentially a summary of the proof the government used to support a finding of "enemy combatant" status. "Enemy combatant" is defined by the government as "an individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy forces." This allows an enemy combatant designation to apply, for example, to people who gave to a charity that in turn gave food or medical supplies to a group the government claims is a terrorist organization.

Furthermore, Evan Kohlman, the government's expert on al Qaeda membership, has indicated that merely having been selected for membership would qualify a person as a "member" of al Qaeda under the government's definition, even if that person never swore an oath to al Qaeda, never met Osama bin Laden and never attended a training camp. This means that the 60% of prisoners designated as "associated with" rather than "members of" a group did not have even this minimal level of contact with al Qaeda.

In analyzing whether a prisoner has committed a hostile act against the U.S. or coalition members, the government readily admits that only 45% of the prisoners meet that criteria; however, closer examination of the government's definition of "hostile act" reveals that the level is probably much lower. For instance, it is considered a "hostile act" if a prisoner fled when the U.S. bombed his camp, or if he is Uigher and was captured in Pakistan along with other Uigher fighters. In the

government's bizarre world, fleeing an attack by the U.S. is a hostile act against the U.S.

Of the prisoners designated enemy combatants, the government alleges 32% to be al Qaeda, 28% to be al Qaeda and Taliban, 22% to be Taliban, and 7% to be al Qaeda or Taliban. Ten percent have no identified affiliation and 1% are listed as "other." The report assumes that four years was an adequate amount of time to determine whether an enemy combatant was either Taliban or al Qaeda, and concludes that 40% of them are not affiliated with al Qaeda and 18% are affiliated with neither al Qaeda nor the Taliban.

The report acknowledges that the evidence against some of the prisoners was formidable. Eleven percent had met with Bin Laden, and some were high-ranking Taliban or al Qaeda officials. However, the evidence against the vast majority of the prisoners held at Guantanamo was much less solid. Notable is the absence of Taliban regional governors, mayors, police chiefs, senior administrators and secretaries of national governmental departments among the prisoners at Guantanamo. Instead, the prison camp's rolls are replete with many young, conscripted Taliban soldiers with no decision-making authority. The report concludes that these prisoners have been afforded no meaningful opportunity to put the U.S. government's proof that they are enemy combatants to the test.

The Bush administration's indefinite detention of prisoners at Guantanamo, and practice of parading them through what are largely considered sham military trials, has not been without controversy. On June 29, 2006, the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) that the government could not use military commissions to try suspected members of al-Qaeda. In a 5-3 ruling, the justices found that the commissions, which were approved by Bush on Nov. 13, 2001, were not authorized by federal law and did not meet the requirements of the Geneva Convention.

The case was brought by Salim Ahmed Hamdan, a former driver for Osama bin Laden, who is being held at Guantanamo. Michael Ratner, president

of the Center for Constitutional Rights, which represents nearly half of the Guantanamo prisoners, stated, "What this says to the administration is that you can no longer decide arbitrarily what you want to do with people. It upheld the rule of law in this country and determined that the executive has gone beyond the constitution and international law."

Ratner's assessment is shared by high-ranking officials. During a Sept. 13, 2006 speech, the head of Britain's judiciary, Lord Chancellor Charles Falconer, who also holds the position of Secretary of State for Constitutional Affairs, said Guantanamo was a "shocking affront to democracy" and warned that moral values must not be sacrificed in the war against terrorism. The Bush administration is further facing dissent from within its own ranks. On Sept. 14, four Republican members of the Senate Armed Services Committee, including Sen. John McCain, who was a prisoner of war himself, objected to the government's plans regarding trials for enemy combatants and joined Democrats in voting for a less draconian piece of legislation. Former Secretary of State Colin Powell, who opposes the administration's plans for the interrogation and trial of Guantanamo prisoners, stated, "The world is beginning to doubt the moral basis of our fight against terrorism."

The prisoners at Guantanamo have expressed their concerns about indefinite confinement and kangaroo military courts, too – through hunger strikes, suicides and resistance against their captors. From August 2005 through June 2006, up to 131 Guantanamo prisoners took part in a hunger strike. U.S. military guards responded by placing them in solitary confinement, strapping them into restraint chairs and forcibly inserting nasal feeding tubes.

A number of Guantanamo prisoners ambushed guards at the base on May 18, 2006 by staging a suicide attempt; when the guards tried to intervene, they were attacked by prisoners wielding improvised weapons. Six prisoners were injured. The next day a United Nations panel responsible for monitoring the Convention Against Torture rebuked the U.S. government and called for the closure of Guantanamo, as has Amnesty International and a number of other non-governmental organizations (NGOs), including Prison Legal News.

On June 9, 2006, three Guantanamo prisoners who had participated in the

hunger strike managed to hang themselves with bedsheets despite surveillance by guards. The military quickly termed the synchronized suicides a form of "asymmetric warfare," and banned all media from the base. A state department official called the deaths a "good PR move." There have been 39 attempted suicides at Guantanamo since prisoners were first housed at the base in January 2002, indicating the level of desperation.

In December 2005, seven members of Witnesses Against Torture participated in a peace march from Santiago, Cuba to Guantanamo to draw attention to allegations of torture of Guantanamo prisoners. The march took five days to cover the approximately 70 miles with the marchers walking along the road by day and camping at the roadside by night. Cuban military authorities would not let the marchers approach the U.S. base, which is ringed with a mine field, but allowed them to cross into the Cuban military zone that borders the base in a gesture of solidarity with their cause. The protestors camped about five miles from the prison,

praying and fasting for four days. Upon their return to the U.S. the WAT marchers were served papers by the U.S. Treasury Department's Office of Foreign Assets Control stating they had violated the U.S. prohibition against travel to Cuba and could face 10 years in prison or a \$250,000 fine for their actions. The people who torture prisoners at Guantanamo face no such investigation or punishment.

Ironically, U.S. officials have refused to discharge about 150 Guantanamo prisoners who were never charged with any crime and who have been cleared for release, claiming concern for human rights violations if they are returned to their home countries. Only ten of the prisoners housed at Guantanamo have actually been charged with offenses against the U.S. and face military trials. ■

Sources: *The Guantanamo Detainees: The Government's Story* (the text of which is available on the PLN website), *Washington Post*, *Associated Press*, *WAT Press Release* (available at www.witness torture.org/node/158)

California Guard Convicted of Abetting Prison Gang

A twenty-year veteran California state prison guard was convicted on February 14, 2006 in Los Angeles U.S. District Court of federal charges of "participating in a corrupt organization's conspiracy, violent crimes in the aid of racketeering, and deprivation of rights under color of law."

Shayne Allyn Ziska, 44, aided the white supremacist Nazi Low Riders gang (NLR) at the California Institution for Men (Chino). He helped NLR distribute hard drugs, carried messages between gang members, and fed information to gang "shot callers." He also unlocked cell doors to permit gang members to assault other prisoners, including one who was stabbed under the eye.

Prison staff and over ten prisoners testified at the bench trial. Martin Aroian, Chapter President of the powerful prison guards union (California Correctional Peace Officers Association, CCPOA), testified for Ziska's character.

Ziska drew heat from the state legislature in 2003 when it was revealed that he had been on paid administrative leave since October 2000, collecting \$150,000 to stay home pending an investigation.

(See: *PLN*, Nov. 2003, p.3.) He was then recalled to work on non peace-officer status doing clerical duties until he was indicted and jailed in July 2004.

On June 26, 2006, Ziska was sentenced to 17 1/2 years. As a federal prisoner he will have to serve at least 85% of his term. He reacted to the lengthy prison sentence by cursing at the federal judge, Terry J. Hatter, Jr. ■

Sources: *Inland Valley Daily Bulletin*; *San Jose Mercury News*.

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Texas Prisoner Gets 40 Years For Cellphone; Guards Get Probation

by Michael Rigby

In April 2006 a Texas prisoner was sentenced to 40 years in prison for possessing a contraband cell phone--8 years more than the 32-year sentence he was already serving for auto theft.

The sentence, the longest anyone has received since the Texas legislature made possession of a cell phone in prison a third degree felony, is extreme. Prosecutors in Brazoria County never alleged that Manor, 41, used the cell phone to carry out illegal activity or circumvent prison security. Rather, the evidence shows only that he used it to call his sister. "I was so surprised just to hear my brother's voice," said Shirley Manor, a contract worker for the Texas Department of Health. "He just asked us how we were doing." Before the call, said Ms. Manor, she hadn't seen or heard from her brother in years.

Lawmakers in most states worry about contraband cell phones because the calls can't be monitored. This allows prisoners to maintain gang ties on the outside or to conduct criminal activity, they say. In Texas, however, this is not the case. Prisoners in the Lone Star State have no access to pay phones, and, in most cases, are imprisoned much too far from home for regular visits.

"Drugs take you out of the prison psychologically," said David P. O'Neil, a defense attorney in Huntsville and former head of the prison system's public defender's office. "Phones place you outside the prison in a different sense. There is a premium on escaping in that sense."

Phil Hall, who prosecuted the case, was elated with the long sentence. "We are trying to remove him from society. He doesn't deserve to have a cell phone," said Hall. "The jury really bought into the argument." Prosecutors initially offered Manor a 20-year plea deal. He opted for trial instead, hoping for a more reasonable sentence.

Manor had been caught with the cell phone after it dropped from his bunk at the Darrington Unit near Houston. Darrington, along with another South Texas prison, the Connally Unit, have experienced the most problems with contraband cell phones. Large caches of drugs and tobacco are also routinely found at Darrington, prompting officials to label it a "hotbed of corruption."

In 2005, Texas prison officials seized

135 cell phones. In just the first 4 months of 2006 they seized another 90. Most of the cell phones--if not all of them--are brought in by prison workers, according to investigators and prosecutors. In one case, a Brazoria County guard was arrested during a sting operation after she agreed to smuggle a cell phone and heroin into the Darrington prison for \$250.

With prisoners receiving such harsh sentences for merely possessing a cell phone, it would stand to reason that guards are also receiving stiff prison terms for providing them. After all, they're the very ones responsible for the prison security--and ultimately the public safety--that prosecutors say is so threatened by the phones. But incredibly, this is not the case. As of April 2006, not one guard had been sentenced to prison for smuggling in a cell phone. If they

receive anything, it's probation.

Herb Hancock, a special prosecutor in South Texas, said it is more difficult to prosecute guards because of who the witnesses are. "If you want to watch a room go cold, come watch a voir dire when I mention 'inmate witnesses,'" he said. "They're like, 'Is this all you've got?'"

Meanwhile, there are no such hurdles to prosecuting prisoners. After Manor was sentenced to 40 years--meaning he could very well spend the rest of his life in prison--another Darrington prisoner accepted a plea agreement of 25 years. [See *PLN*, May 2005, p. 24 for more on contraband cellphones in Texas, the U.S., and throughout the world.] ■

Sources: *Dallas Morning News*, *Associated Press*

Audit Criticizes Management of ODOC Financial Computer System

An Audit found that the main financial accounting system of the Oregon Department of Corrections (ODOC), "was in a general state of disrepair and the...project to upgrade [the system] was in jeopardy of failure." Additionally, "approximately \$177,000 in contract payments...were made contrary to state contracting rules."

In the early 1990's, the ODOC purchased and implemented the Automated Financial Accounting Manufacturing Inventory System (AFAMIS), its main financial accounting system. The Audits Division of the Oregon Secretary of State Office conducted an audit "to evaluate the effectiveness of computer controls governing AFAMIS, including system development, security, data integrity, and disaster recovery and contingency planning."

Auditors found that "Department management did not use generally accepted controls for system development and maintenance...many critical system development phases and processes were not adequately performed during the department's project to upgrade...the system." Additionally, "controls to secure AFAMIS programs, data and online functions were...insufficient and ineffective. Access to...data and programs was not properly restricted and the department's

ability to provide reliable internal control was limited. As a result, the integrity and confidentiality of the system was at significant risk of compromise."

"Key data files...were not always complete, accurate, or valid" undermining the department's ability "to safeguard or manage its financial assets and resources [so] the financial information it provides to outside entities may not accurately reflect the operations. For example, during a 2003 financial audit, various expenditure accounts were deemed unauditible because of posting errors and misclassifications." Accounts payable and receiving totals did not reconcile. "In a sampling of 87 transactions, auditors found 50 that were signed by someone who had no authority."

Auditors reported that "very few individuals understood that system sufficiently to answer even routine inquiries regarding AFAMIS data or data integrity issues."

The ODOC generally agreed with the numerous recommendations of auditors. "We realize that the upgrades could have been managed more effectively," said ODOC spokeswoman Perrin Damon. See: OR Secretary of State Audit Report No 2005-5 (1/14/05). Copies of the report are available online at: www.sos.state.or.us/audits/audithp.htm, or by calling 503-986-2255. ■

Years Long Pattern of Medical Neglect Defeats Summary Judgment

by David M. Reutter

The Seventh Circuit Court of Appeals has held that a prisoner's claim showing years of failure to adequately treat a medical problem is sufficient to defeat summary judgment. This civil rights action was filed by Wisconsin prisoner Donald F. Greeno, over the alleged failure of prison employees to adequately respond to his vomiting and severe heartburn, symptoms that appeared in 1994 and became progressively worse until he was eventually treated in 1997 for an esophageal ulcer.

The district court initially dismissed Greeno's suit for failure to state a claim. In an unpublished opinion, the Seventh Circuit reversed and remanded, holding that Greeno's complaint stated a claim for deliberate indifference to an objectively severe medical condition. On remand, the district court granted the prison employees summary judgment and denied Greeno's motion for appointment of counsel.

Greeno alleged that he first began experiencing severe heartburn in the summer of 1994 at Racine Correctional Institution. He was given antacid and instructed to avoid spicy foods. By the time of his July 1995 transfer to Fox Lake Correctional Institution, Greeno's condition included severe heartburn and vomiting. He was given Maalox. Despite advising Dr. José Lloren that his family had a history of peptic ulcers, no tests were performed and Greeno did not see a specialist.

Greeno was seen by Dr. Lloren in September and October, and was prescribed Tagament and Maalox for his continued vomiting and severe heartburn. Greeno advised these medications were ineffective. He was denied a special diet, being "instructed to eat bread and potatoes and learn to live with his condition." Moreover, despite complaining that ibuprofen (given for a back injury) was aggravating his esophageal condition, he was told to continue taking it with "caution."

When transferred to Jackson Correctional Institution in June 1996, Greeno requested to see the doctor, as his condition persisted. He was not seen until mid-September. In the meantime, Nurse Judith Nordahl refused to provide Greeno with Maalox because his usage exceeded the normal dosage, leaving him with nothing to combat his pain and vomiting.

By time he saw Dr. Rizalino Yray in September, Greeno's vomit was bitter, yellow and tinged with blood. Dr. Yray performed a rectal exam to test for blood. He did not change Greeno's treatment. Greeno began filing complaints. This resulted in placing him on a liquid diet and holding him for observation for three days. Nordahl warned Greeno upon release "that if [he] did not cease filing complaints and harassing Health Services staff, he would be 'locked up' again, but for a longer period of time."

In early 1997 Greeno was sent to Dodge Correctional Institution, where he stayed for two weeks of medical observation. During that time he was given a bland diet and Prilosec, which resolved his heartburn and vomiting. However, when he returned to Jackson the old pattern of neglect continued. The Prilosec was discontinued and Greeno was given Pepto-Bismol.

Despite complaining that he was vomiting blood, Dr. George Daly ordered Greeno to receive "no PT, no pain medication, no gastroscopy." Finally, in April 1997 Greeno saw a gastrointestinal specialist, who performed an endoscopy and diagnosed Greeno with a distal ulcer in his esophagus and prescribed Prilosec.

The Seventh Circuit held that a layperson would recognize the need for a doctor's care to treat severe heartburn and frequent vomiting. To state an Eighth Amendment claim for deliberate indifference to a serious medical need, "a prisoner is not required to show that he was literally ignored." Although Greeno received some treatment, the possibility exists that the treatment Greeno did receive was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. The Court thought "a fact finder could infer

as much from the medical defendants' obdurate refusal to alter Greeno's course of treatment despite his repeated reports that the medications were not working and his condition was getting worse." As such, the Court reversed the summary judgment in favor of the medical defendants.

The Court, however, affirmed a judgment for the defendants who handled Greeno's administrative complaints, for they investigated the complaints and referred them to medical providers who could be expected to address Greeno's concerns.

The Seventh Circuit also reversed the district court's dismissal of unserved defendants on grounds the complaint failed to state a claim against those defendants, holding that the district court was bound to follow the prior appellate decision finding a claim was stated. The appeals court further found that this case was "legally more complicated than a typical failure-to-treat claim because it requires an assessment of the adequacy of the treatment that Greeno did receive, a question that will likely require expert testimony." Accordingly, the district court abused its discretion in denying Greeno's motion for appointment of counsel.

The matter was affirmed in part and reversed and remanded in part with instructions to appoint counsel. See: *Greeno v. Daley*, 414 F.3d 645 (7th Cir. 2005). ■

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Arkansas County Pays \$40,000 To Handicapped Man Raped In Jail

by Michael Rigby

On May 22, 2006, Saline County, Arkansas, agreed to pay \$40,000 to a deaf man who was raped by other prisoners in the Saline County Detention Center.

Johnny Jones, a deaf man who is unable to speak, was arrested and charged with rape in May 2002. He was subsequently booked into the detention center and housed in a pod with hearing prisoners, some of whom immediately began abusing and sexually harassing him. One of the prisoners, Joseph Griffith, 28, was a convicted sex offender.

Jones, 57, made numerous requests for an interpreter so he could report the abuse, but jailers ignored him saying they would get one "later" and that "we will work out things between us."

On June 2nd Jones was attacked by Griffith and two other prisoners, Shawn Curtis, 29, and Ben Adams, 22. The trio entered Jones's cell and began hitting him in the arms with their fists while pulling his pants down. Curtis and Adams then acted as lookouts while Griffith sodomized him. Several days later Griffith sexually assaulted Jones again, this time pulling him into the shower and forcing him to perform oral sex.

Jones continued to ask for an interpreter, but to no avail. In the meantime the other prisoners teased and harassed him. Jones was finally able to get a letter out to his sister detailing the rapes, and on June 16 she notified the Saline County Sheriff's Department. Only then was Jones removed from the general population and placed in a solitary cell.

Griffith, Adams, and Curtis were all charged in the attacks. Adams and Curtis entered negotiated guilty pleas to one count each of false imprisonment and were sentenced to 10 and 12 years in prison, respectively. Griffith was convicted on 2 counts of rape and 1 count of sexual assault in June 2003 and sentenced to 18 years in prison.

In his 42 U.S.C. § 1983 civil suit, filed in the U.S. District Court for the Eastern District of Arkansas in May 2005, Jones claimed the County violated his civil rights by not segregating him because of his handicap. He further alleged that overcrowding played a role in the attacks. As a result of the rape, Jones claimed he suffers from insomnia, anxiety, and depression. The depression

led to a suicide attempt, he says.

The \$40,000 settlement includes attorney fees and costs. The County admitted it wasn't much compensation for Jones's ordeal. "We know that \$40,000 does not go far in attorneys' fees alone, much less in compensation itself," said County Attorney George "Bucky" Ellis. He also said overcrowding should be eased when the County's new jail opens in the fall.

The rape charge that originally put

Jones in jail was dropped in April 2003. He pled guilty to making a terroristic threat and was sentenced to 12 months' probation. Jones was represented in the civil case by Little Rock attorneys Orin Eddy Montgomery--of Montgomery, Adams & Wyatt--and Stephen W. Tedder. See: *Jones v. Saline County*, USDC ED AR, Case No. 4:05CV00821-WRW. ■

Additional source: *The Benton Carrier*

Florida DOC Cuts Prisoner Collect Call Costs by 30%

by David M. Reutter

For over 10 years, the family and friends of Florida prisoners have paid exorbitant costs to communicate with their imprisoned loved one. "I don't think that's right," said interim secretary of Florida's Department of Corrections, James McDonough, upon hearing of those costs. "Why are (the families of prisoners) being punished?" In April 2006, McDonough took action to reduce those phone costs by 30%.

McDonough knows what it is like to be separated; he has three sons in the military overseas. He said he pays 3 cents a minute to make international calls.

In contrast, a collect call from a Florida prisoner to an in-state party costs \$1.50 "when you pick up the phone" and 26 cents a minute after that. Calls out-of-state are upwards of \$20 for a 15 minute call.

FDOC's contract with its phone vendor: Verizon/MCI requires that FDOC receive 53 percent of all call revenue. In fiscal year 2004-2005, FDOC netted \$17.6 million in phone revenue. The reduction of 30 percent will reduce that take by about \$10 million. Verizon/MCI's revenue will not be affected.

"Although this action may in fact cause a decrease in the return to the general revenue fund, I feel this is the appropriate thing to do," said McDonough in a letter to lawmakers chairing Florida's House and Senate Committee overseeing FDOC's budget. "However, by reducing the rates charged, it is anticipated the number of calls will also increase and may result in offsetting a portion of the

revenue loss."

McDonough explained he took the action to reduce charges because he felt it was unjust to place a "burden on family members of incarcerated individuals, an already generally disadvantaged section of the population". He has also scheduled to solicit bidders for a new phone contract in early 2007, a year ahead of schedule. McDonough has said he wants a contract tailored to have a less onerous impact upon those who accept collect calls from prisoners.

Florida prisoners are very appreciative. "I think it's great," said prisoner Donald Kelly. "It's nice to see integrity and justice being restored to the secretary's office."

Prison watchdog groups feel the reduction of phone costs will make it easier for prisoners to maintain contacts with their social network. "To better prepare inmates for release, they have to maintain community contacts," said Randall Berg, executive director of the Florida Justice Institute. "This will result, in my opinion, in saving Florida money because it will hopefully cut recidivism."

Prisoner's of Tomoka Correctional Institution are saying that their family will have more money from the reduction, but most are excited at the prospect of being able to call home more often. Either way, McDonough's move will result in a positive outcome for those impacted by incarceration in Florida. ■

Sources: *Gainesville Sun*; *Palm Beach Post*; *Florida Prison Legal Perspectives*

EMSA, Florida County to Pay \$500,000 for Untreated Ectopic Pregnancy

by Michael Rigby

Broward County, Florida, and BEMSA Correctional Care, Inc., must pay \$500,000 to a county prisoner who suffered permanent injury and weeks of unnecessary pain because jail medical personnel failed to diagnose or treat her ectopic pregnancy, a federal jury decided on January 8, 2004.

Charleen Foree, 38, was imprisoned in the North Broward Jail on April 17, 2000, for failing to appear in court on a cocaine possession charge. In early May Foree began experiencing severe abdominal pain and was unable to get out of bed. Medical personnel employed by the jail's for-profit medical provider, EMSA, treated her symptoms with milk of magnesia and an over-the-counter pain reliever. Foree was never taken to the hospital, tested for pregnancy, or even seen by a doctor.

On May 26--20 days after she began experiencing symptoms--Foree was released to a halfway house. There another nurse told her to tolerate the pain as long as she could. The next day Foree called an ambulance and was taken to a local hospital. After diagnosing her with an ectopic pregnancy (a pregnancy in which the ovum implants somewhere other than the uterine wall) doctors performed emergency surgery. During the operation they removed a large abscess and a pint of congealed blood from her abdomen.

Foree sued the jail's medical director, Erin Cody, M.D., and EMSA--a subsidiary of the infamously inept Prison Health Services (PHS)--in the U.S. District Court for the Southern District of Florida under 42 U.S.C. § 1983. She alleged cruel and unusual punishment in violation of her Eighth Amendment rights and medical malpractice. Specifically, Foree claimed the delay in treatment caused her to suffer a ruptured fallopian tube and ovary. As a consequence Foree claimed she suffers continuing gynecological problems and cannot bear children without in vitro fertilization.

At trial Cody and EMSA argued that their diagnosis of pelvic inflammatory disease was reasonable. The jury sided with Foree, however, and found that the defendants were deliberately indifferent to her serious medical needs.

The jury took just 2 hours to reach

its decision and award Foree a total of \$500,000. The award included \$300,000 for past pain and suffering, \$100,000 for loss of organs, and \$100,000 for future medical costs. In deciding the award, the jury was apparently influenced by the argument of Foree's counsel, Jeffrey Norkin of Planta-

tion, Florida. Norkin argued that Foree had suffered about 22 days, or 528 hours. At \$10 per hour, he contended, an award of \$250,000 against each defendant was not unreasonable. See: *Foree v. EMSA Correctional Care, Inc.*, USDC SD FL, Case No. 02-61356-CIV-Marra. ■

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Arkansas Mayor, Sheriff, Wife Jailed for Burglary, Drugs, Sex and More

by Gary Hunter

On February 6, 2006, just weeks after Lonoke Arkansas Mayor Thomas Privett, 68, and Sheriff Jay Campbell, 46, admitted to a state monitoring committee that they had illegally used state prisoners for personal benefit, the two were arrested on multiple charges of corruption.

Arkansas' Act 309 program was designed to serve the dual purpose of alleviating prison overcrowding while providing a service to local communities. State prisoners assigned to Lonoke County were removed after Mayor Privett and Sheriff Campbell were using those prisoners for personal duties. But the sheriff's wife, Kelly Campbell, proved to be the biggest problem when it was discovered that, among other things, she was having sex with the prisoners.

Originally, Mayor Privett had admitted only to letting Campbell use one of his properties to allow state prisoners to work on the sheriff's boat. [See *PLN*, Sep. 2006] An investigation revealed that Privett had also used state prisoners to work on an air conditioner and hang Christmas lights at his home. The mayor was charged with theft of services and released from jail on a \$500 bond.

Sheriff Campbell's life began to crumble when Bobby Cox, a Little Rock bail bondsman, enlisted his help in returning a bail-jumper. Campbell conspired with Cox to have Roger Light cook a batch of methamphetamine. The idea was to bust Light and pressure him to reveal the location of his fugitive friend.

Since it was unlikely that Light would willingly make any meth for the sheriff, Campbell and Cox enlisted the assistance of known meth user Ronald Adams. But when Adams demanded that his record be cleared, in exchange for betraying Light, the deal collapsed.

Sheriff Campbell is currently charged with illegally employing state prisoners for personal gain; he is also charged with conspiracy to manufacture methamphetamine, hindering apprehension or prosecution, criminal conspiracy to commit residential burglary, theft by receiving and theft of services.

Kelly Campbell, the sheriff's wife, was arrested and charged with residential burglary, conspiracy to commit residential burglary, theft of property, furnishing

prohibited articles to prisoners, tampering and escape, four counts of obtaining a controlled substance by fraud and having sex with at least two prisoners.

Reports charge Mrs. Campbell with illegally entering several private residences and stealing prescription drugs and antique jewelry. Sheriff Campbell attempted to retrieve the jewelry from a Little Rock pawn shop where his wife had pawned it.

Kelly Campbell also supplied marijuana, alcohol and cell phones to prisoners. She also took two prisoners out of the jail in order to have sexual relations with them.

Lonoke jailers said that "they could not keep the chief's Wife out of the jail and that when they tried she became irate." Jailers said that the sheriff also

"became irate" when he learned they were keeping a log of his wife's visits.

Sheriff Campbell previously worked for the Pulaski County Sheriff's Department, but was fired in 2000, after he tried to use his lieutenant's rank to intimidate his subordinates. His appeal for reinstatement and monetary damages was denied in 2001. In 2002 Campbell became Lonoke police chief.

Campbell, his wife and bail bondsman Bobby Cox were arrested without incident and released on \$50,000 bond. Lonoke prosecutor Lona McCastlain said that the investigation is not concluded and "I'm not ruling out additional charges." ■

Source: *Associated Press*

Audit Reveals California DOC Employees Illegally Received Holiday Pay for Scheduled Days Off

The California State Auditor found that Sierra Conservation Center (SCC) State Prison management permitted "exempt" health and social services professional employees to accrue holiday credits when a holiday fell on a scheduled day off, notwithstanding that their union agreement expressly provided that they do not accrue holiday credits on days they do not work. The result was an illegal gift of public funds.

For example, when one employee was credited with 48 hours of holiday credits for days that she was not scheduled to work, a \$1,653 gift of public funds was made to that employee. The Auditor found nine SCC exempt employees whose unearned holiday credits amounted to 516 hours between January 2002 and May 2005, worth \$17,164.

Some of the employees benefited from another gimmick. Because they were on 10 hours/day, 4 days/week work schedules, when they gained a "day" of leave, it was only charged at the standard work-week rate of 8 hours/day. Nonetheless, they got paid for their "day" at the 10-hour equivalent rate. (Part time employees gained even more, earning a 10-hour "day" for a part day.) One employee netted \$6,831 in the 3-year audit period via this mechanism. Interviews with SCC supervisors revealed

that they had no procedure to recover these two-hour shortages. All told, considering holiday and work-week "excess" accruals, the Auditor found \$49,094 worth of illegal gifts of public funds at SCC. When confronted for an interview by the Auditor, the Warden confirmed the practice but refused to certify it under penalty of perjury.

The Auditor determined that seven of the nine employees under question still continued to work alternate schedules and charge only four to eight hours of leave when absent from a 10-hour workday. And when in January 2004, a new payroll specialist transferring into SCC began charging the leave balances at the rate of actual work hours missed (i.e., hour for hour), five union employees filed grievances contending that only 8 hours should be charged whenever they missed 10 hours. California Department of Corrections and Rehabilitation headquarters approved the practice, permitting the illegal public gifts to persist.

The Auditor recommended simply disallowing the alternate work schedule policy. CDCR replied that it had passed the buck to its Labor Relations Office, which had not reported back to the Auditor as of early 2006. See: California State Auditor Report No. 12006-1. ■

Female Missouri Prisoners Make \$291,000 as Sexy Pen Pals, AG Wants His Cut

Some Missouri prisoners have been making money by soliciting donations from pen pals found using internet web sites. Attorney General Jay Nixon says Missouri wants a piece of the action. Well, actually, the state wants all of the action.

Thirty-three female Missouri prisoners used web sites such as www.writeaprisoner.com, www.inmate-connections.com, www.thepamperedprisoner.com, www.inmates-foryou.com and www.cellpals.com to find men wanting pen pal relationships with incarcerated women. They then solicited money from the men, receiving a total of \$291,860. When Nixon heard about this, he filed a lawsuit under Missouri's 1988 Incarceration Reimbursement Act with the intention of taking the money to partially repay the costs of the women's incarceration. Nixon is asking the court to freeze the accounts of the 33 prisoners.

"Under Missouri Law, for certain serious felonies like murder, arson and others, we are allowed to go after and make sure they pay for their own jail time," said Nixon.

He should know: his office recovered \$884,000 in reimbursement from prisoners in 2004. The Missouri DOC's budget that year was \$574 million.

"If you're going to be using a Missouri prison cell as a base of operations for your business, you owe it to taxpayers to pay for room and board," said Jim Gardner, Nixon's spokesman.

The prisoners pay the internet services between \$5 and \$40 a year to list their names and post a photo on the services' web sites. According to Adam Lovell, founder of www.writeaprisoner.com, prisoners register for an ad by mail or have someone outside the prison register them, while the people interested in writing the prisoners contact the web site via email. The site forwards a letter to the prisoner and further communication is directly between the prisoner and pen pal via mail.

Lovell's site has about 5,000 prisoners nationwide, 100 of them from Missouri. He charges them \$40 per year to maintain an ad on the site. Like the others, his site allows prisoners to indirectly access the internet.

Lovell sees nothing wrong with prisoners soliciting funds from their pen pals, so long as no fraud is involved. Lovell's site is unique in listing the prisoners' crimes along

with their ads. However, some may see the ads, which feature sexy, often explicit photos, and promises of a steamy relationship with an incarcerated person in exchange for money as borderline fraudulent. The idea that men surfing the net might be attracted by the photos and seductive introductory statements with titles like "Captive Angel" and "A Beauty Seeking a Long-Term Relationship" coupled with offers to fulfill

sexual fantasies online for money seems more like a mail or email variation of phone sex, an accepted service business.

That seems to be Nixon's assessment as well. The "men were paying 50 to 75 dollars a month to get excited," said Nixon. ■

Sources: www.technologynewsdaily.com, *Saint-Louis Post-Dispatch*, www.ksdk.com.

\$600,000 Settlement for Abuse at Maine Juvenile Prison

In 2004 the state of Maine paid \$600,000 to settle with a former prisoner at the Long Creek Youth Development Center (LCYDC), a juvenile prison.

In his lawsuit, filed in 2001, plaintiff Michael Taylor alleged he was placed in solitary confinement for more than a month at a time and tied down for up to 47 hours during five separate periods of imprisonment at LCYDC in the 1990s.

The lawsuit spawned two state investigations and led to the reassignment of Superintendent Lars Olsen and senior psychologist Barbara Heath, both of whom had signed off on Taylor's "treatment." The duo have no direct contact with juveniles in their new jobs.

Since reports of abuse first surfaced in the mid-1990s, the state has built two new juvenile prisons to replace LCYDC, said Department of Corrections spokeswoman Denise Lord. The emphasis is now on rehabilitation and treatment, she said, and the use of isolation and restraints has been curtailed.

Still at issue is whether juvenile prisoners have a legal right to treatment. Taylor's lawyers say they do; the state says they don't. Rehabilitation is a goal of the DOC, wrote Assistant Attorney General Diane Sleek, but imprisoned children do not have a right to rehabilitative services.

Mark Soler, an attorney with the Youth Law Center in Washington, D.C., said Maine's position is similar to that of other states. "It's not unusual," he said. "It doesn't mean it's correct, but it's not unusual." Superior Court Judge Thomas Humphrey had planned to decide the issue, but the lawsuit was settled before he issued a ruling.

Lawsuits like Taylor's do more than

compensate the individual victims of institutional abuse. They have also been effective in driving reform in juvenile prisons, and tend to widely impact conditions for prisoners who are not directly involved, said Soler. See: *Michael T. v. Magnusson*, Cumberland Co. Superior Ct., Case No. CV-01343. ■

Sources: *Portland Press Herald*, *Associated Press*



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Michigan Prisoner Wins \$20,000 on Failure to Protect Claim

by Michael Rigby

On March 29, 2006, a federal court in Michigan awarded \$20,000 to a state prisoner who was attacked and cut with a razor after prison officials repeatedly ignored his requests for protection.

Reggie Williams, a prisoner serving 2 to 15 years in the Massachusetts Department of Corrections since 1999, claimed that on June 14, 2000, he was transferred from another prison to the Gus Harrison Correctional Facility in Adrian. On the prison yard the next day Williams encountered another prisoner, Kevin Stepney, with whom he'd had an altercation in 1985 at the Wayne County Jail. Williams was accused of sexually assaulting Stepney—who is serving a 60 to 90 year sentence—after their 1985 fight, but the charges were later dropped.

After seeing Stepney, Williams went to Doug Wells, the Assistant Resident Unit Supervisor, and asked to be placed in protective custody. Williams told Wells of the fight in county jail and said that Stepney had made veiled threats against him on the recreation yard. Wells refused to move Williams claiming there was not enough information. The situation continued to escalate. Williams even skipped meals to avoid Stepney, he claimed.

Williams talked to Wells a second time on June 16 and again on June 26. Wells merely opined that Stepney would not attack him because he was bigger. (Williams is roughly 6' 4" and 300 pounds; Stepney is 5' 10" and 170 pounds.) Williams ultimately went to Wells' immediate supervisor and the warden, but neither took any action.

Williams talked to Wells again on July 3. On July 4 Stepney attacked him with a weapon made from razor blades melted into a toothbrush. As Stepney stabbed at him, Williams turned and was cut on the back. Stepney then turned and ran. Williams was treated in the infirmary for a superficial cut. The wound took 3 weeks to heal and left a 6 to 9 inch scar.

Williams sued Wells under 42 U.S.C. § 1983 for failing to protect him from Stepney. Along with the physical injury Williams claimed he is now afraid to have other prisoners stand behind him and that he has trouble sleeping in open areas.

He was still seeing prison mental health workers when the bench trial was held on December 13-14, 2005.

At trial in the U.S. District Court for the District of Eastern Michigan, Judge J. Roberts held that Williams met the requirements for proving a violation of the Eighth Amendment's proscription against cruel and unusual punishment.

To prove an Eighth Amendment claim for failure to prevent harm, a prisoner must show that prison officials were deliberately indifferent. Deliberate indifference, in turn, requires a showing of "sufficiently serious" risk and a "sufficiently culpable state of mind." In Williams' case, the threat of bodily injury satisfied the first prong, Judge Roberts

held. The second prong was also satisfied because, according to Roberts, Wells had actual knowledge that Williams faced a substantial risk of serious harm. Additionally, Roberts noted that Wells' refusal to immediately place Williams in protective custody after requested it directly contradicted MDOC Policy Directive 04.05.120(T).

Based on the above, Roberts awarded Williams \$4,000 in compensatory damages and \$16,000 in punitive damages. Total award: \$20,000. Roberts also held that Williams was entitled to attorney's fees. Williams was represented by Carl H. Von Ende of Detroit. See: *Williams v. Wells*, USDC ED MI, Case No. 02-74530. ■

Iowa Prisoners Settle Sexual Abuse Lawsuits For \$160,000

Iowa taxpayers and former state prison guard Kenneth Parrot will pay a combined total of \$160,000 to three women whom Parrot sexually abused, according to the terms of a December, 2005 settlement agreement.

One of the victims, Melissa Henderson, says the sexual abuse started after Parrot made friends with her at the Mount Pleasant Correctional Facility in early 2003. The abuse included forcing her to perform oral sex on him, she claimed in her 42 U.S.C. § 1983 lawsuit (*Henderson v. Parrot*, USDC SD IA, Case No. 4:04-cv-40495). Whenever she refused his advances, Henderson says, Parrot would discipline her. As a result she lost privileges and was placed in segregation. The other victims suffered similarly. Yolanda Davis lost exercise privileges when she refused to show Parrot her breasts. Henderson and Shantelle Mundell-Fry were repeatedly groped.

The abuse continued until Parrot masturbated in front of Henderson's cell. She collected some of the ejaculate on a tissue and turned it over to prison investigators. In 2003 Parrot avoided a prison sentence by pleading guilty to two counts of sexual misconduct with a prisoner. He completed his probation in November, 2005.

Prison officials were the first to settle with Henderson, Davis, and Mundell-Fry. The settlement included \$50,000 for

Mundell-Fry, \$25,000 for Henderson, and \$5,000 for Davis. Following the agreement, the U.S. District Court for the Southern District of Iowa ordered Parrot to pay matching amounts.

Prison officials say plans are currently underway to stem the abuse. With \$1 million in grant money provided under the Prison Rape Elimination Act, the State plans to provide training for guards and prisoners, including instruction on the proper collection of evidence in a rape investigation. Officials also plan to install a sexual abuse hotline--unmonitored by guards--that prisoners can use to report sexual abuse or talk to sex abuse counselors.

Two more cases involving sexual abuse by a Mount Pleasant guard are pending, and others are working their way through the prison grievance process, said Jeffery Lipman, attorney for all five women. Lipman said the cases reflect prison officials' failure to send a clear message to guards about how the growing population of female prisoners should be treated. "I think these three cases that we've had have been a wake-up call," Lipman said. "It's going to take some time to figure out how seriously they take it." As of October 2005, women accounted for 768 of Iowa's 8,525 prisoners. ■

Additional sources: wqad.com, des-moinesregister.com

District of Columbia Jail Pays \$14 Million For Over-Detentions and Strip Searches

by Bob Williams

While denying a pattern and practice of over-detentions and strip searches, the District of Columbia (the District) has agreed to pay \$12 million to settle a class-action lawsuit plus an additional \$2 million in additional construction funds. The \$14 million includes over \$4 million in attorney fees, \$5 million to build a new Inmate Processing Center (IPC), \$200,000 each to six named plaintiffs, and the balance to nearly 4,000 class members and administration fees.

Marcus Bynum, Kim Nabinette, Leroy Thomas, Dianne Johnson, Gloria Scarborough, and Julian Ford were at various times either detained in the D.C. Jail beyond their release date, or illegally strip searched and re-booked into the jail after court-ordered release, or both. On behalf of themselves and all others similarly situated they filed a 42 U.S.C. § 1983 class action suit against the District claiming the District violated their Fourth, Fifth, and Eighth Amendment rights in detaining them beyond their release dates and violated their Fourth and Fifth Amendment rights for the blanket strip searches. The class members were found to be held from one day to 21 months beyond their release dates.

For many years prior to 2001, the District practiced routinely strip searching and rebooking prisoners returning from court, even when charges were dismissed or they were otherwise ordered released. The prisoners would then remain locked up for hours, even days or weeks until finally released. Between 2000 and 2001 the District developed this practice into a formal policy. The claim is that this practice/policy was necessary to ensure no one was freed by mistake. Conversely, it must not be a mistake to rob someone of their freedom for days, weeks, even months.

After a judge ordered his immediate release, Joseph Heard, a deaf-mute man, was held for 669 days or nearly 21 months. The Department of Corrections (DOC) director, Odie Washington, said responsibility for this mishap rested "solely on the Department of Corrections" yet nothing was done to correct the problem. Dwight Blue was held nearly seven months beyond his release date and Leroy Thomas nearly four months. Franklin Tyree was

arrested on two misdemeanor warrants. Two days later the warrants were quashed and he was ordered released. Five months later the jail finally released Tyree. The examples number in the many thousands and can reach as high as high as 20,000 according to the *Washington Post*.

The blame has been placed on the IPC, its outdated and mix-matched equipment, including incompatible Macintosh and non-Macintosh computers, and its incompetent staff, usually inept workers transferred to the IPC as a last resort before termination—the dregs of the system. This is no surprise, however, as the deficient conditions and recommendations for improvements were detailed in a 1976 study. And again in 1985. And again in 1986, 1989, and 1997. All recommendations were ignored.

A 1999 report by Corrections Trustee John Clark was prepared for the United States Attorney General which documented a "long pattern of systemic problems dealing with case management, classification and records office management" resulting in a system that was "overwhelmed and in distress and suffering from years of prolonged inattention from top management." The report noted the many previous studies and that the recommendations were "not seriously implemented."

Independent consultant John Shaw prepared a Report and Recommendation in 2000 for federal judge Royce Lamberth (also the judge in this action). It reiterated all the previous findings and concluded the IPC records office "is in a shambles. Records are strewn everywhere. There seems to be no accountability for record or file management." The report also noted the office is staffed with unperforming employees "dumped" there because of problems elsewhere. Despite these studies and reports, DOC director Odie Washington and former Warden Patricia Britton continued with business as usual.

In reaching a settlement, the District has agreed to pay \$3 million from the \$12 million court settlement to a reversion fund plus an additional \$2 million to build a modern "state of the art" IPC. This reversion fund will also be spent on new protocols and systems to prevent over

detention and strip searches of releasees without cause. While sounding optimistic, the settlement also calls for the "existing staff and computer equipment to be relocated to the IPC."

Each of the six named plaintiffs will receive \$200,000 while a point system will be applied to the nearly 4,000 class members. A \$50 minimum is guaranteed each member with a cap based on each member's portion of the remaining fund after administrative expenses. These expenses will be between \$200,000 and \$400,000 leaving \$3.3 to \$3.5 million for class disbursement with an average of approximately \$2,700 per class member. Class Administrator Rosenthal and Company will make a second round of payments to class members of any funds not received by class members during the first class payment round. Any funds still not disbursed will revert to the reversion fund.

Three class members opted out of the settlement and two objected but then withdrew their objections. This is a very low opt-out and objection ratio. No one may opt-out of the injunctive relief for which the reversion fund was created.

A combined \$4,090,552.26 was awarded in attorneys fees to William Claiborne, Washington, D.C.; Lynn Cunningham, Professor of Clinical Law, The George Washington University School of Law, Dubois, Wyoming; and Barrett S. Litt of Litt, Estuar, Harrison, Miller & Kitson, LLP, Los Angeles, California. See: *Bynum v. District of Columbia*, Case No. 1:02-CV-00956-RCL (2006). ■

Freeing The Innocent

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By Michael and Becky Pardue

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Nebraska's County Jails Neglect Mentally Disabled

by Gary Hunter

Nebraska's American Civil Liberties Union (ACLU) has revealed major problems in the state's county jails. Prisoners with physical handicaps, chronic illnesses and mental disabilities receive little or no healthcare in a state where 1-in-33 citizens are arrested each year.

According to ACLU investigators mentally impaired prisoners suffer most. Nebraska exceeds the national average for incarceration of the mentally ill with a figure of 17.5% compared to 16.3% nationally. Yet the state's mentally ill patients have less access to services than any other disabled prisoners.

The study showed that most county jails lack any type of on-site health professionals. Consequently, most mentally ill county prisoners receive no treatment. Of those that are treated only 16% receive counseling -- a fact that is sometimes fatal.

Robert Patona was prescribed medication to control his anxiety disorder. When he was arrested and placed in Sarpy County Correctional Center jailers ignored his requests and refused to give him his medicine. On July 15, 2002 Patona hung himself in the jail.

Another man with a history of mental illness spent four weeks in a small northeastern Nebraska county jail without his psychotropic medication. Both the man and his wife alerted jail staff of the prisoner's need but nothing was done. The man soon began to experience visual and auditory hallucinations. Only after ACLU intervention was the man sent to a facility that could provide proper care.

The Nebraska ACLU has also had to assist prisoners in obtaining such basic needs as interpreters, heart medication and HIV tests.

One prisoner was doubly victimized when she was sexually assaulted in Nebraska's York penitentiary then was denied her anxiety medication when she went to the county jail to testify against her attacker. County jail officials claimed it was standard policy to deny new prisoners medication. This policy prevented prosecution of her attacker until the victim could be re-stabilized when her anxiety attacks reappeared. The prosecutor had to make special arrangements with

the jail so that the victim could continue her medication during future court appearances. Again, ACLU intervention was required.

Five reasons have been identified by the ACLU for the gross inadequacies of Nebraska's jails. Insufficient funding, discontinued Medicaid, jail standards do not address mental health issues, inadequate jail facilities and inadequate oversight of county jail standards.

Although prisoners are entitled to continue receiving medication prescribed prior to their incarceration they seldom get it. Costs for some meds are prohibitive and simply not within the budgets of small county jails. Families are not allowed to supply the drugs for fear that they might try to sneak in contraband. Most small county jails have no medical staff and would thus have to pay all the costs and medical fees incurred with taking prisoners to a hospital.

Medicaid assistance is also discontinued when a person is incarcerated. Consequently, the full cost of medical maintenance falls to the county jail. Some local health providers work with local jails to defray costs. Others do not. The Nebraska ACLU suggests that a balanced standard be implemented to equally accommodate all county jails. They also point out that discontinuation of Medicaid immediately upon incarceration results in a higher recidivism rate for affected prisoners.

The ACLU also points out that Title 81 of the Nebraska Rules and Regulations governing jail standards say nothing about how jails should address mental health issues. They suggest that this is a primary concern to be addressed by the Nebraska legislature. The Jail Standards Board has submitted several proposals on medical issues without success. Medical standards for the state have remained unchanged for over a decade.

Closure of regional health centers in 2004 has resulted in an inordinate incarceration of mentally ill citizens. Again the smaller counties are hardest hit because they lack community-based services. Even most Nebraska hospitals do not have psychiatric wards. Consequently, mentally ill citizens are jailed; their care disrupted, and then they are released from jail with no discharge planning. This is a cycle doomed to failure.

Neither do any state-wide standards exist for handling complaints. Prisoners with problems are ignored for weeks and even months at a time. Neither is any satisfactory appeal process in place. Most of those in need have never even heard of the Jail Standards Board. Even so, the board has little power and limited ability to help. For those in need of immediate help there is literally no solution. ■

Source: *BARRED FROM HOPE: A Study of Healthcare in Nebraska's County Jails* ACLU Nebraska

Los Angeles County Pays \$110,000 for Wrongful Jail Death

Los Angeles County settled a lawsuit for the wrongful death of Julius Gray in the North County Correctional Facility on November 21, 1998. Gray, jailed for corporal injury on a spouse or cohabitant, died from a ruptured aneurysm, according to the homicide investigation and coroner's report. But Gray's family's forensic pathologist came to a different conclusion: while Gray did die from the aneurysm, the aneurysm was due to a micro-fracture of the neck, caused in turn by blunt force trauma.

During the course of the ensuing litigation, Gray's 12-year-old nephew and

13-year-old niece, who had visited their uncle on the day of his death, testified that they saw Gray being hit and choked by a Sheriff's Deputy, a fact never told to the homicide investigators. Nonetheless, the County's experts remained resolute that there was no fracture.

Projecting a possible \$1.3 million verdict if a jury believed Gray's pathologist and the two child witnesses, the County -- having already expended \$100,360 in defense fees fighting the case, agreed to settle out for \$110,000 in April, 2006. See: *Gray v. County of Los Angeles*, USDC SD CA, Case Nos. CV 99-7149 CBM (RCX); CV 99-11315 CBM (RCX). ■

Mumia Abu-Jamal Honored in Paris, France

by Gary Hunter

Prison Legal News columnist Mumia Abu-Jamal was recently honored by the citizens of Paris, France who named a street in his honor.

The controversial Philadelphia figure has the dual distinction of being a hero in one country and a villain in another.

Convicted of the fatal shooting of a Philadelphia policeman in 1982, Abu-Jamal has spent over a quarter century on death row in Pennsylvania prisons.

Abu-Jamal was an outspoken journalist and a former Black Panther party member when policeman Daniel Faulkner was killed in a shootout. His constant

criticism of Philadelphia police made Abu-Jamal a polarizing local figure. Convicted on the testimony of two prostitutes and a drunken cab driver, Abu-Jamal has always maintained his innocence.

"In France, they see him as a towering figure," said activist Suzanne Ross. Rue Mumia Abu-Jamal is found in the civil rights district of the suburb of St. Denis.

Maureen Faulkner, widow of the slain policeman called the honor "unnerving" and "insulting to the police officers of Philadelphia."

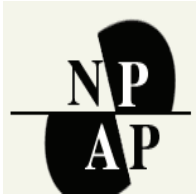
"It's deplorable," said long-time policeman Richard Costello. "They've made

him some type of hero."

The Paris ceremony centered on a variety of U.S. civil rights deficiencies including its practice of the death penalty, and the 1985 Philadelphia police bombing of the MOVE headquarters which killed over a dozen black Americans and destroyed an entire city block.

Abu-Jamal is now memorialized in St. Denis along with other notable civil rights figures such as Nelson Mandela. He is also a quarterly columnist for *Prison Legal News*. ■

Source: *Philadelphia Inquirer*



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- **Inmate Damages Claims for Denial of Medical Care:** will include liability for jail suicide, and suing for deliberate indifference in medical care. Speakers include: **Sonia Mercado and Sam Paz**, Culver City, CA, from the Law Office of Samuel Paz. Commentator: **Tim Hoffman**, Amarillo, TX, partner at Hoffman, Sheffield, Sauseda & Hoffman
- **Class Action Litigation on Behalf of Prisoners and Detainees :** Case examples include claims for skin infections, over detention, misidentification driven wrongful detention, and unconstitutional strip searches: **Barry Litt**, Los Angeles, CA of Litt, Estuar, Harrison, Miller, & Kitson, LLP
- **Techniques to Win Maximum Damages in Police Misconduct cases:** strategies for maximizing chances of success in civil rights cases, shaping the case presented to the jury, witness preparation, cross-examination tactics and playing "defense" as well as offense. Speaker: **Jon Loevy**, Chicago, IL of Loevy & Loevy
- **Less Lethal Force:** the evaluation of claims and defendants, ascertaining reasonableness of force, handling qualified immunity and product liability claims. Speakers include: **Rachel Lederman**, San Francisco, CA, National Lawyers Guild attorney, and **Mark Silverstein**, CO, Legal Director of the American Civil Liberties Union of Colorado
- **Preventing, Monitoring and Litigating Government Sponsored Constitutional Violations:** Strategies to counter government plans which would violate the constitutional rights of demonstrators. Speakers: **Carol Sobel** Los Angeles, CA of The Law Offices of Carol A. Sobel, **Mara Verheyden-Hilliard**, Washington, D.C. ,The Partnership for Civil Justice, and **Jonathan Moore**, New York, NY of Moore and Goodman LLP

Washington Liable for Negligent Parolee Supervision; Bad Jury Instruction Vacates \$33 Million Verdict; Settles for \$6.5 Million

In a 6-3 decision, the Washington Supreme Court reaffirmed its earlier holdings that the state may be held liable for negligent supervision of offenders. However, the court vacated a \$22.4 million verdict, which had ballooned with interest to \$33 million, because the trial court gave a faulty jury instruction.

Vernon Stewart was on community supervision for assault and car theft. The 1995 assault was his first adult felony but he had numerous juvenile offenses and a long history of mental illness.

Stewart was assigned Community Corrections Officer (CCO) Catherine Lo. From the beginning, Stewart was completely non-compliant with his supervision obligations. However, Lo wrote him up for only three of an estimated 100 supervision violations. She also failed to obtain, review or notify the courts of Stewart's mental health history.

On May 9, 1997, Stewart's supervision was transferred to a different CCO. Despite knowing Stewart was non-compliant, the new CCO never met Stewart or obtained his medical records.

On August 8, 1997 Stewart stole a Suburban, drove 70 mph on city streets, ran red lights and ultimately rammed a vehicle by Paula Joyce, killing her. Stewart was under the influence of marijuana at the time of collision.

Joyce's family brought suit against Stewart and the State. The trial court rejected the State's motion to dismiss which argued that it owed no duty to Joyce. At trial, Joyce's attorney, Jack Connelly, argued that Stewart could have been in jail at the time of the collision if Lo had done her job. A jury found the State liable and awarded Joyce \$22,400,000; the largest civil verdict ever levied against the State [*PLN*, May 2001, p.1]. The Washington Court of Appeals affirmed *Joyce v. DOC*, 116 Wn. App. 569, 75 P.3d548 (2003) and the Washington Supreme Court granted review. *Joyce v. DOC*, 150 Wn.2d 1032, 84 P.3d 1229 (2004)[*PLN*, June 2004, p.18].

The Court rejected the State's attempt "to drastically narrow [it's] duty of reasonable care as a matter of law." It noted that is had "answered all of the questions raised by the State about its duty before." See: e.g., *Taggart v. State*, 118 Wn.2d195, 822 P.2d 243 (1982). Therefore,

"the trial court did not err in denying the Department's motion to dismiss as a matter of law."

The Court agreed with Defendant, however, that the trial court gave an erroneous jury instruction which suggested that a policy directive required CCOs to report all violations. Policy directives do not, however, have the force of law. Therefore, it could be offered only as "evidence of the standard of care" and not as "negligence per se." The Court concluded that "[r]eading the instructions as a whole, the State was not meaningfully allowed to argue its theory of the case because the jury was misdirected." The decision vacates

the damage award and remands the case for a new trial. See: *Joyce v. Department of Corrections*, 155 Wn.2d 306; 119 P.3d 825 (WA 2005).

On December 15, 2005, the state of Washington agreed to pay the Joyce family \$6.5 million dollars to settle the underlying lawsuit. It is the largest settlement paid by the state of Washington for a single death in its history. Of the settlement, \$6,450,000 will come from insurance companies the remaining \$50,000 was paid by the state of Washington. ■

Additional Sources: *The Seattle Times*, *The News Tribune*

Massachusetts Prisoners Battle MRSA, Untreated Hepatitis C

by Michael Rigby

Kerry M. Castello is infected with hepatitis C, a disease that is slowly destroying his liver. But because Massachusetts prison officials are short on funds, he can't get the treatment he desperately needs.

Castello, 41, was first diagnosed with hepatitis C by prison doctors in 2001. In 2003 doctors placed him on a waiting list for treatment after blood tests found abnormally high levels of a liver enzyme and a biopsy revealed, liver inflammation. He was still waiting in February 2006 when he filed his pro se lawsuit against the Massachusetts Department of Corrections (MDOC). He was later placed on a treatment list.

Castello is just one of thousands of Massachusetts prisoners whose lives are threatened by hepatitis C and another potentially fatal infection, Methicillin Resistant Staphylococcus Aureus, or MRSA.

Currently 1,472 Massachusetts prisoners are known to be infected with the hepatitis C virus, though the actual number is probably much higher. Health officials believe about 30% of the state's 10,000 prisoners may be infected.

Yet only 150 prisoners are on the waiting list to receive treatment, and even fewer are getting it. As of December 27, 2005, only 62 prisoners were receiving the recommended combination of interferon injections and ribavarin capsules.

The reason is cost. The price tag for the standard 48 weeks of treatment with the two drugs is \$18,000 to \$25,000. In 2005 about \$1 million was budgeted for hepatitis C treatment. But it's not enough. By the state's own admission, the number of prisoners who get treated is determined by how much money is available.

"While there are many patients with hepatitis C currently awaiting treatment ... due, to the Massachusetts Department of Corrections' finite resources, combination therapy is offered first to inmates with the greatest medical need," a state brief said.

Michelle R. Burrows, a Portland attorney who represented Oregon prisoners with hepatitis C said the Supreme Court has held that cost cannot be considered when deciding who gets treatment. "Prisoners are vulnerable and they do not have any choices," Burrows said. "The standard has to be: 'What would a person get in the community? What if you went to your doctor and he says, 'You need treatment but I'm putting you on a waiting list'?"

Because hepatitis C is spread primarily through the blood, prisoners--many of whom have histories of IV drug use--are five times more likely to be infected than the general population. Years of living in close quarters with infected individuals may also increase the risk, as does receiving tattoos with unsterile equipment.

Hepatitis C is known as the "silent

epidemic" because it progresses over 10 to 30 years, often with no initial symptoms. But, if left untreated, the disease can lead to cirrhosis, liver failure, liver cancer, and death. Males, people infected with HIV, and heavy drinkers are at an increased risk for serious complications.

The combination therapy is effective in about half the patients who complete the treatment regimen. But many discontinue treatment due to side effects, which can include depression, suicide, headaches, irritability, and sleeplessness. A newer version of the interferon, known as pegylated interferon, may reduce side effects and increase effectiveness.

Prisoners are also at risk in the state's county jails, which hold about 14,000 prisoners. These prisoners are rarely tested and even fewer receive treatment. The Norfolk County House of Corrections, for instance, tests prisoners only if they show symptoms of possible infection or come to jail already taking medication for the disease, said David Falcone, a spokesman for the Norfolk sheriff's department.

At the Hamden County Correctional Center, where jail officials reportedly encourage testing for those who show elevated levels of a particular liver enzyme, about 200 of the jail's 2,000 prisoners have been diagnosed with hepatitis C, said the jail's medical director, Dr. Thomas Lincoln. But like other jails, Hamden County treats only a tiny fraction of those with the disease--just 2 were receiving treatment in December 2005. The jail does, however,

have doctors and nurses from community health centers spend time at the jail, said Lincoln. When the prisoners are released, they're referred to the center for follow-up care, he said.

Like other penal facilities across the nation, Massachusetts prisons are facing another epidemic--Methicillin Resistant Staphylococcus Aureus, a particularly virulent strain of staph bacteria [See *PLN*, September 2005]. As the name implies, MRSA is resistant to most antibiotics, including penicillin and methicillin. It can lead to pneumonia and various infections. It is sometimes fatal. MRSA can even lead to a painful and potentially deadly form of flesh-eating bacteria, according to Dr. Alfred DeMaria, director of communicable disease control at the state Department of Public Health.

Prisons and jails are particularly susceptible to MRSA outbreaks because the bacteria is transmitted through skin contact, contaminated items, poor hygiene, and institutional living conditions. In 2005 the MDOC dealt with a serious outbreak of MRSA. From January 1, 2005, to December 1, 2005, prison health officials treated 68 prisoners infected with the bacteria.

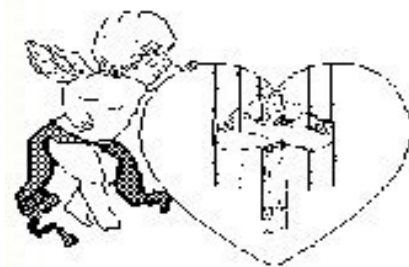
MRSA can generally be treated using a variety of antibiotics, said DeMaria. But he stressed the importance of using antibiotics appropriately. Whenever an infection is treated with an antibiotic, he explained, there is a risk the bacteria will mutate and become resistant to the antibiotic. "It's pure Darwinian natural

selection," he said. All 68 prisoners were treated for the infection.

The prisoners infected with hepatitis C haven't been so lucky. In his lawsuit, filed on February 7, 2005, Castello claimed the MDOC's failure to treat his infection constitutes cruel and unusual punishment. Castello says he suffers from joint pain and fatigue and is facing permanent liver damage. The court dismissed the lawsuit on February 1, 2006, finding the DOC employees had not shown deliberate indifference to Castello's medical needs. Castello has appealed. ■

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Texas Jail Suicide Suit Settles For \$300,000

In December 2005 Nueces County, Texas, agreed to pay \$300,000 to settle with a woman whose husband committed suicide in the county's jail.

In 1995, while imprisoned in the Nueces County Jail in Corpus Christi, Texas, Jose Orlando Sanchez-Ortiz committed suicide. His wife, Maria Sanchez-Ortiz, subsequently filed suit in state court pursuant to 42 U.S.C. § 1983 and the Texas Tort Claims Act.

In her lawsuit Ms. Sanchez-Ortiz claimed she warned jailers that her husband was suicidal, though she provided no supporting documentation. Other evidence showed, however, that the jail was understaffed and that many jailers failed to conduct cell checks as required by the Texas Jail Standards. The evidence further indicated that Ortiz-Sanchez was allowed

to cover the windows in his cell with paper before committing suicide.

During the discovery process evidence also surfaced that Sanchez-Ortiz may have been married previously. Because no documents were found showing he had ever been divorced from his first wife, Nueces County settled with her prior to settling with Maria Sanchez-Ortiz.

Ms. Sanchez-Ortiz was represented by Christopher J. Gale of the San Antonio firm Gale, Wilson & Sanchez. Randall G. Hines, also of San Antonio, was retained as an expert on jail suicide prevention procedures. See: *Sanchez-Ortiz v. Nueces County*, 214th District Court of Nueces County, Case No. 97-3590-F. ■

Source: *Williford Information Corporation*

Supreme Court: Lethal Injection Procedure May Be Challenged Via § 1983

by John E. Dannenberg

A unanimous U.S. Supreme Court held that a condemned prisoner's challenge to the procedure used in lethal injection may be brought in 42 U.S.C. § 1983 and need not be brought in habeas corpus. The Court distinguished a challenge to the lawfulness of a sentence or confinement, which necessarily implicates habeas corpus, and a constitutional challenge to the procedure used in carrying out a sentence, which is a proper complaint under § 1983. This ruling does not address the merits of whether the common three-drug lethal injection protocol is per se unconstitutional or not.

Clarence Hill, a condemned Florida prisoner, filed a § 1983 complaint in U.S. District Court (D. Fla.) seeking to enjoin Florida's lethal injection procedure as cruel and unusual punishment under the Eighth Amendment. The district court and the Eleventh Circuit construed the action as a petition for writ of habeas corpus and ordered it dismissed as an unauthorized second and successive petition. The sole question accepted by the Supreme Court on certiorari was whether the proper forum for challenging the execution procedure should be habeas corpus or § 1983.

When Hill was condemned in 1983, Florida used electrocution. After flames shot out of prisoners' heads during executions, the electric chair was deemed cruel and unusual punishment. In 2000, Florida retired "Old Sparky" and instituted "lethal injection" with details unspecified. Now Hill claims that the three-drug regimen leaves prisoners insufficiently sedated before the heart-stopping dose is administered, consigning them to excruciating pain for ten or more minutes.

In 2004, the Supreme Court dealt with whether a challenge to lethal injection must proceed in habeas corpus. See: *Nelson v. Campbell*, 541 U.S. 637. Nelson sought alternative procedures to inject him because his veins were compromised. Since his specific complaint did not challenge a lawfully required outcome, § 1983 was available to him.

The Supreme Court reasoned similarly in *Hill* that if successful, Hill would not necessarily prevent Florida from executing him by "lethal injection" -- the command of the controlling statute. The Court noted

that *Hill* concerned the injection sequence while *Nelson* concerned a surgical procedure, but considered this a distinction without a difference. However, to prevent endless piecemeal litigation intended to merely forestall eventual execution, the Court fashioned a "practical consideration" rule: if one challenges the procedure as unconstitutional, one must also come to the table with an acceptable alternative that alleviates the complained-of problem. Anything less would have the effect of delaying or modifying the sentence, and could only be brought in habeas corpus.

A significant factor attaching to the use of § 1983 is that that statute does not entitle the complainant to an order for a stay of execution "as a matter of course."

The Court noted that both the state and the victims have an important interest in timely enforcement of a sentence (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). Nonetheless, the Court stated that any stay would be available only as an equitable remedy, which at the least requires the complainant to make a showing of a "significant possibility of success on the merits." It further noted that "last-minute" maneuvers, including repetitive and piecemeal litigation, are disfavored and may not be bootstrapped to become the basis for a stay.

The Court reversed and remanded to the Eleventh Circuit for proceedings consistent with its opinion. See: *Hill v. McDonough*, 126 S. Ct. 2096 (2006). Hill was executed in September 2006. ■

Virginia's General Assembly Sells Out Prisoners' Families for Phone Money

by Gary Hunter

Virginia's General Assembly reneged on their agreement with a prisoner advocate group to substantially reduce phone rates between prisoners and their families.

Virginia's Citizens United for the Rehabilitation of Errants (CURE) had lobbied for years to have a state-approved prepaid phone system for prisoners calling their families. The newly acquired service took effect on February 1, 2005, and promised as much as a two-thirds savings over current rates. The result was not even close.

Under the original phone service a 15-minute, interstate call cost \$9.20. The same call is now \$8.40, a savings of less than 10 percent.

It's not that cheaper rates are not available. That same \$8.40 call from a Virginia state prison costs only \$3.45 from a Virginia federal prison.

"They're sticking it to us again," said CURE Director Jean Auldrige. "The General Assembly doesn't want to give up the money."

The money Ms. Auldrige refers to is the 40 percent commission MCI pays the state for the prisoner phone contract. Annual revenue for state coffers in 2005 was \$7 million, an average of \$225 per prisoner.

MCI and Verizon also made almost \$2 million in political campaign contributions to Virginia legislators in 2005.

MCI's prison phone rates were declared uncompetitive, in 2001, by the State Corporations Commission (SCC) a watchdog over state utilities. The SCC ordered MCI to lower its rates. The State's General Assembly responded by stripping the SCC of its authority over government phone contracts before the commission could implement its order. And for good measure, the Virginia supreme court, in an unpublished decision, held the SCC lacked authority to issue its order in the first place.

"It just seems so wrong to me," said Auldrige. "It seems that families of prisoners are just not considered in our state. They are taxpayers like everybody else. They're not lower class. They're not people who should be picked on like this." Auldrige also points out that regular contact with family encourages rehabilitation and enhances effective reentry of a prisoner into society.

Virginia's General Assembly is simply another example of the prison-for-profit trend plaguing this country. ■

Source: *The Virginia-Pilot*

Beaten Texas Prisoner Who Was Denied Safekeeping Awarded \$87,500

by Michael Rigby

On March 20, 2006, a federal jury awarded \$87,500 to a Texas prisoner who was beaten by gang members after his request for transfer to protective custody was denied.

While imprisoned at the McConnell Unit in southeast Texas on March 10, 2003, Robert Clark, 23, formally requested removal from the general population. Clark had recently outed himself as a homosexual and renounced his membership in the Bloods gang. In addition to being threatened by other gang members, Clark

feared that as a known homosexual he would be forced to pay for protection.

On March 15, McConnell prison officials recommended to the State Classification Committee (SCC)--the ultimate decision makers in such matters--that Clark's transfer request be approved. But Kelly Strong, a member of the SCC, determined the threat to Clark's safety was insufficient to warrant placement in protective custody.

On April 18 Clark was attacked by two Bloods and two Crips. The assault

left him with a fractured right thumb, a mild concussion, and various cuts and bruises.

Clark sued, pro se, under 42 U.S.C. § 1983 claiming that Strong was deliberately indifferent to his safety needs. His claim survived summary judgment and the U.S. District Court for the Southern district of Texas appointed him an attorney. At trial Clark's counsel argued that Strong was aware of the risks to his safety and chose to ignore them. His treating physician, Maximiliano Herrera, M.D., of Beeville, opined that Clark's thumb, which was surgically repaired with a metal plate and six screws, would likely result in continued pain and disability.

After deliberating for 5 hours, a jury found Strong's decision to be unreasonable and awarded Clark \$87,500 in damages. Clark was represented by John T. Flood of the Flood & Flood law firm in Corpus Christi. Judge B. Janice Ellington presided. See: *Clark v. Strong*, USDC SD TX, Case No. C-04-006. ■

Maywood, Illinois Jail Settles Failure to Protect Suit For \$750,000

The Village of Maywood, Illinois, paid \$750,000 to settle with a former Maywood prisoner who was severely beaten by his cellmate at the village jail, according to a January 19, 2006, settlement agreement.

George Caithamer, 22, was arrested by Maywood police in June 2004 for a traffic violation. He was taken to the village jail and placed in a holding cell with Marcus Hrobowski, a mentally ill man with a known propensity for violence.

According to Caithamer's complaint, Hrobowski beat him for at least 20 minutes as he screamed and waved to the security camera for help. As a result of the beating Caithamer was taken to a local hospital and treated for a concussion and other injuries. The surveillance video revealed that Caithamer was hit more than 60 times.

Hrobowski was charged with aggravated battery after the beating, but he was later found not guilty by reason of insanity. He now lives at a mental health facility, said Amanda Yarusso, Caithamer's attorney.

Caithamer sued the Village of Maywood and a number of Village police officers in their individual capacities. The suit, filed in the U.S. District Court for the Northern District of Illinois, Eastern Division, alleged claims under 42 U.S.C. § 1983 and state law. Caithamer specifically claimed the officers failed to protect him and that the Village's inadequate customs, policies, and practices constituted deliberate indifference to his Fourteenth Amendment due process rights.

Attorney fees were included in the \$750,000 settlement. Caithamer's attorney, Amanda Yarusso, is affiliated with The Law Offices Of Blake Horwitz in Chicago. See: *Caithamer v. Collier*, USDC ND IL, Case No. 04-C-5859. ■

Additional source: *cbs2chicago.com*

Source: *VerdictSearch Texas*

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Michigan Prisoner's Deliberate Indifference Claim Nets \$73,906 In Fees

On October 20, 2005, the U.S. District Court for the Western District of Michigan, Southern Division, awarded \$73,906 in attorney's fees to a plaintiff who prevailed on his claim of deliberate indifference against a Kalamazoo deputy. The Court additionally held that attorney fee caps outlined under the Prison Litigation Reform Act (PLRA) were inapplicable.

For two days in May 2000 Tyjmas Blackmore languished in the Kalamazoo, Michigan, county jail before a jail nurse diagnosed him with "classic signs of appendicitis." Blackmore had begun complaining of severe abdominal pain an hour after he was arrested. The deputies' only response, however, was to give him antacids. After the nurse's diagnosis Blackmore was transferred to a hospital where he underwent a successful appendectomy.

In May 2002 Blackmore filed suit in federal district court pursuant to 42 U.S.C. § 1983. He named the County, the sheriff, and 23 deputies as defendants. Blackmore specifically claimed deliberate indifference to his serious medical needs and a failure on the County's part to adequately train its jailers.

The district court granted summary judgment to the defendants and Blackmore appealed. In *Blackmore v. Kalamazoo County*, 390 F.3d 890 (6th Cir. 2004), the Sixth Circuit reversed the district court and held that verifying medical evidence was not required in cases where a plaintiff's illness or injury was so obvious that even a layperson would recognize the need for a doctor [see *PLN*, June 2005, p. 39]. A jury subsequently awarded Blackmore compensatory damages of \$50,000 against Deputy Jason Pardee.

Following the jury's verdict, Blackmore moved for attorney's fees pursuant to 42 U.S.C. § 1988 in the amount of \$129,611. The figure included fees of \$120,436 for the law firm of Plunkett & Cooney, and \$9,175 for Bendure & Thomas.

The district court granted the motion in part and denied it in part. Initially the Court noted that the fee caps outlined in 42 U.S.C. § 1997e (d)(3) were inapplicable since the language of the PLRA, which applies to prisoner lawsuits, "clearly" refers to those currently imprisoned, rather than previous imprisonment.

The Court next eliminated portions of the bill it deemed "duplicative, unnecessary, excessive, or inadequately documented." Then, considering each attorney's experience and the number of hours worked on the case, the Court arrived at a "lodestar" amount of \$92,382. (A lodestar is defined as the number of hours reasonably expended multiplied by a reasonable hourly rate.)

Continuing, the district court noted

that Blackmore had not prevailed on his failure to train claim against the County and the Sheriff, "which were based on different facts and legal theories and are severable from his deliberate indifference claim against the officers." Thus, the court reasoned that Blackmore's failure on this claim merited a 20% downward departure from the lodestar figure, resulting in an actual award of \$73,906 in attorney's fees. See: *Blackmore v. Misner*, 2005 U.S. Dist. LEXIS 25882. ■

WA Youth Detention Officer Awarded \$603,500; Remitted Damages Reinstated

The Washington Supreme Court held that the Court of Appeals improperly reduced a plaintiff's non-economic-damage award from \$260,000 to \$25,000.

From 1979 to 1991, Ralph Bunch worked as a prison guard at the Washington State reformatory in Monroe. In 1991 he transferred to the Department of Youth Services as a juvenile detention guard. His performance there was praised and he received good reviews but "management ... thought of [Bunch] as a problem because he spoke out against things that he felt were wrong."

"In 1995 and ... 1998 Bunch testified against the county in employment discrimination trials and later noticed increased disciplinary action by the management." Bunch, an African-American, was increasingly punished harshly for minor transgressions that others were never disciplined for. There was "racial discrimination at the department, including disparate discipline for violations."

In 1999 Bunch sued the department for employment discrimination under Washington's antidiscrimination law. The department terminated Bunch's employment in April 2001.

As *PLN* previously reported, a jury found the county discriminated and retaliated against Bunch, and awarded him \$3,500 in lost past wages and fringe benefits, \$340,000 in lost future wages, and \$260,000 in non-economic damages. The court also awarded Bunch attorney fees of \$166,754.50 and costs of \$10,126. The trial court then denied the county's motion for a reduction of the non-economic

damages or for a new trial.

The Washington Court of Appeals reversed the trial court's denial of remittitur and reduced the non-economic damages from \$260,000 to \$25,000, finding that "the evidence was insufficient to support the award, it was motivated by passion and prejudice, and it shocked the court's conscience." See: *Bunch v. King County Dept. of Youth Services*, 119 Wash.App. 1034 (Wa.App.Div. 1 2003). It "allowed Bunch the option of choosing a new trial on damages alone."

The Supreme Court denied the County's petition for review but granted Bunch's cross-petition. The Court first discussed the applicable standard of review, holding "that a trial court order remitting a jury's award of damages is reviewed de novo since it substitutes the court's finding on a question of fact. Trial court orders denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent."

Applying such standard, the Court concluded that "the Court of Appeals was not justified to reduce the non-economic damages from \$260,000 to \$25,000 -- less than a tenth of the original amount ... The jury's award of non-economic damages is within the range of the evidence presented, is not 'flagrantly outrageous and extravagant,' nor was it motivated by passion and prejudice. The award of the jury should stand unmodified." Thus, the state Supreme Court reinstated the \$260,000 non-economic damage award. See: *Bunch v. King County Dep't of Youth Services*, 155 Wash.2d 165, 116 P.3d 381 (Wash. 2005). ■

\$1.35 Million Settlement for Wrongful Death of Illinois Prisoner

On March 17, 2005, Cook County, Illinois, agreed to pay \$1.35 million to the surviving son of a woman who died in a county jail after she was denied medical attention.

Marilyn Bones, 37, was arrested on August 14, 2000, and eventually taken to the Cermak Health Services facility, which is operated by the Cook County Department of Corrections. At 1 a.m. on August 16, just after she was placed in a cell, Bones began complaining of stomach pain and diarrhea. She was given Kayopectate at around 4 a.m., but her symptoms persisted.

At 7 a.m. Bones called a guard and pleaded for medical attention. The guard refused, however, because she was lying on the cell floor. The guard told her he'd summon help when she got up. Roughly two hours later Bones was still lying on the floor when a nurse checked on her. She was rushed to the jail's hospital, but

it was too late. She was pronounced dead on arrival.

It was later determined that Bones had suffered an ectopic pregnancy which caused a blood vessel to rupture. Approximately 1.5 liters of blood had leaked into her stomach, causing her death.

The plaintiff--guardian of Bones's 9-year-old son, Charles Reed--sued Cook County claiming it was negligent in Bones's medical treatment. The plaintiff overcame the state's Tort Immunity Act by successfully arguing the guard effectively denied Bones medical care, which constituted willful and wanton misconduct.

The County agreed to settle for \$1.35 million prior to trial. The plaintiff was represented by David L. Buffen of the Chicago law firm Rittenberg & Buffen, Ltd. See: *Reed v. Cook County*, Cook County Circuit Court, Case No. 00-L-10733. ■

Source: *VerdictSearch Illinois Reporter*

New York Prisoner Paid \$1.25 Million for Untreated Glaucoma

On October 4, 2005, prisoner Abraham Mitchell settled his claim against the State of New York for \$1,250,000. Mitchell had claimed in his lawsuit, filed in the Albany Court of Claims, that the New York Department of Correctional Services was responsible for his near total vision loss because they failed to treat his glaucoma for five years.

Mitchell, 29, was examined by an optometrist on January 4, 1995, while imprisoned at the Mid-Orange Correctional Facility. The doctor found that Mitchell had above normal intraocular pressure in both eyes and that it was deforming his optic nerves. He diagnosed Mitchell with glaucoma and determined that further evaluation was necessary.

Mitchell was not seen again until January 1, 2000. By that time permanent damage had already been done. Mitchell now suffers from a total loss of vision in his right eye and 90% vision loss in his left. He is legally blind.

Mitchell sued the State of New York claiming the prison's medical staff ignored his repeated requests for a follow-up examination and further treatment. He also contended they were aware of his deteriorating vision yet took no corrective

action. Mitchell's expert optometrist, Dr. Stanley Berke of Lynbrook, New York, opined that timely treatment would have prevented nearly all of his vision loss.

The case settled several hours before the start of trial for \$1.25 million, which included all costs and fees. Mitchell was represented by Anthony C. Ofodile of Brooklyn-based Ofodile & Associates, P.C. See: *Mitchell v. The State of New York*, Albany Court of Claims, Case No. 103000. ■

Source: *Verdict Search New York*

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California Parole Board Squelches Life Prisoner Writs on Procedural Grounds

The California Court of Appeal, Sixth District (San Jose), granted the California Board of Prison Terms' (BPT) petition for writ of mandate to prohibit a Santa Clara County superior court from appending an order from one unrelated life prisoner's writ petition as support for the court granting an order to show cause in another petitioner's case. The appellate court also chided the lower court for issuing the order to show cause based upon grounds not expressly or implicitly raised in the original habeas petition or supported by factual allegations therein.

The Court of Appeal consolidated four virtually identical jailhouse-lawyer-spawned habeas corpus petitions for which

Superior Court Judge James Emerson had granted orders to show cause, whereby the order included compelling the BPT to disclose prior parole rulings in non-related cases in a quest to determine if the BPT's 98% parole denial rate was based upon a statistically improbable blanket rejection policy. The judge apparently thought such discovery was appropriate, but the appellate court found that because no petitioner had requested such discovery and the order to show cause was inherently defective, the superior court had acted in excess of its powers in ordering discovery sua sponte.

The proper procedure, the appellate court held, was first to have a properly

framed claim for habeas relief. Thereupon, the appellate court continued, when a properly-grounded order to show cause has issued and jurisdiction has been conferred, "the superior court has the power to order discovery when requested by a party.... On those rare occasions where no party has requested discovery and the superior court believes that discovery is necessary to ensure a full and fair hearing and a determination of the cause, the court has the discretion to compel the necessary discovery." The prisoners may yet amend their habeas petitions to conform with the proper procedures. See: *Board of Prison Terms v. Superior Court*, 130 Cal.App.4th 1212, 31 Cal.Rptr.3d 70 (Cal. App. 6 Dist., 2005). ■

Florida Gain Time Revocation Clarified

Florida's First of District Court of Appeal has held that a prisoner serving a split sentence where one of the crimes occurred before the effective date of a statute authorizing forfeiture of gain-time upon revocation of probation prohibits imposing a sanction.

Before the Court was a petition for writ of certiorari seeking a review of an order denying Florida prisoner William Larimore's petition for writ of habeas corpus. Larimore pled guilty in two separate cases to two offenses of lewd, lascivious, or indecent acts on a child under the age of 16 years. The first offense was committed in 1997, in the second in 1990. There was a different victim in each case.

Pursuant to a plea agreement, Larimore received 15 years prison on the 1987 charge and five years probation on the 1990 charge. After accumulating 7.75 years of gain time in serving 7.25 years, Larimore was released to serve his probation sentence. Upon violating his probation, Larimore was sentenced to five years prison on the 1990 offense.

The Florida Department of Correction then applied § 944.28(1), Florida Statutes (1984) to Larimore, revoking all gain time earned during the incarceration portion of his initial sentence. That statute permits the forfeiture of gain time earned on the incarcerated of portion of a split sentence, when determining the amount of credit to be served upon revocation of probation.

The First Circuit concluded that sent to one of Larimore's crimes occurred before the October 1, 1989, amendment to § 944.28, no forfeiture could occur.

However, because this precluded the trial court from imposing a sanction, the Court certified a question to the Florida Supreme Court, asking if this result is correct. See: *Larimore v. Florida Department of Corrections*, 910 So.2d 847 (Fla. 1st DCA 2004).

Subsequent to the First Circuit's decision, the Florida Supreme Court denied review of the case. As a result, the trial court's order was denied with directions to immediately release Larimore. See: *Florida Department of Corrections v. Larimore*, 905 So.2d 125 (Fla. 2005). ■

L.A. County Pays \$300,000 for Wrongful Death of Psychiatric Jail Prisoner

Los Angeles County settled with the estate of a deceased prisoner who died in the County Jail from inadequate care for his known psychiatric needs.

Darran Craig, 31, was arrested on January 13, 2004. On January 14, intake medical screening established that he had a history of mental illness, and he was placed on the psychiatric evaluation line. On February 25, he was placed in a single cell after a psychologist so ordered, with 15 minute observation checks. Later that morning, on a regular 10:30 a.m. check, Craig was unresponsive to questions by staff; the reasons why were never ascertained. At pill-call at 12:10 p.m., staff found Craig

non-responsive on his right side between the toilet and bunk. Assuming he was asleep or just not wanting to respond, staff assumed Craig needed no help. In a 12:45 p.m. security check, Craig was found dead on the floor. The autopsy revealed that Craig suffocated from a chunk of saran wrap in his airway -- probably from a lunch sandwich. Either Craig committed suicide or accidentally choked on the wrap.

County officials concluded that their care of Craig fell below the standard of care owed him, and settled in March 2006 for \$300,000 to avoid an estimated trial liability of \$705,000. See: *Craig v. County of Los Angeles*, U.S.D.C. (S.D. Cal.), Case No. CV 05-01711 ER. ■

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See page 45 for more information.

No Qualified Immunity for Arkansas Detainee's Miscarriage

The Eighth Circuit Court of Appeals affirmed a lower court's denial of qualified immunity to jail officials who denied medical care to a female detainee, causing a miscarriage of her 4-5 month old fetus.

Talisa Pool was convicted of manslaughter and sentenced to 10 years in prison. She was booked in to the Sebastian County Detention Center (SCDC) on May 8, 2001, "pending transfer to the Arkansas Department of Corrections".

Pool was not visibly pregnant but informed jailers that she was and asked to see a nurse because she was passing blood clots. Pool also asked to be taken to an emergency room and to be given Tylenol and sanitary pads. A nurse told Pool she just needed bed rest.

Pool continued to suffer severe abdominal cramps and bleeding for several days. Other prisoners showed jail staff some of the blood blots but Pool received no medical attention.

On May 11, 2001, Pool was transported to Benton County. By the time she had arrived, she bled through her clothing. She was seen by a nurse and sent back to SCDC an hour later.

Back at SCDC, Pool was placed in an isolation cell but still received no medical attention. On May 13, 2001, Pool miscarried a 4-5 month old, 4-5 inch long fetus.

Pool filed suit, alleging that jail officials were deliberately indifferent to her serious medical needs. A deputy submitted an affidavit, asserting that two days before the miscarriage, her "supervisor

told her to quit being an inmate-lover; to toughen up and to 'not let these people get to you.' The supervisor also commented: 'F[***] her [Pool], she's going to prison and doesn't need a baby anyway.'" The deputy said she was told "not to do anything for Pool and that Pool just wanted attention".

The district court rejected defendants' motion for summary judgment on the deliberate indifference claim, concluding that defendants were not entitled to qualified immunity.

Defendants filed an interlocutory appeal, arguing that "they are entitled to qualified immunity because: (1) Pool offered no proof that they proximately caused any compensatory damages; (2) Pool suffered no physical injury; (3) they complied with the standard of medical care in the community in treating Pool; and (4) Pool cannot prove that she was suffering from a serious medical need that created an excessive risk to her health or safety or that Appellants actually knew of an excessive risk."

The Eighth Circuit determined that it lacked jurisdiction to address the first three arguments on interlocutory appeal. It had jurisdiction to review the final argument, however, "because it requires" the court "to resolve an 'abstract issue of law' relating to qualified immunity."

On the merits, however, Defendants' "argument fails because it ignores facts in the record and relies on an incorrect understanding of the legal standard governing this case". The court could not "say that as a matter of law". Defendants "were not deliberately indifferent in responding to Pool's miscarriage". See: *Pool v. Sebastian County*, 418 F.3d 934 (8th Cir. 2005).

Former Head New York Islamic Prison Chaplain Pleads Guilty in Gun Case

Until he retired in 2000, Imam Warith Deen Umar, 61, made \$67,919 a year as the head Islamic chaplain for the New York state prison system. On June 7, 2006, Umar pleaded guilty in Manhattan federal district court to illegally possessing a Winchester shotgun, a .22-caliber Ruger rifle and four shotgun shells in his Bronx apartment. The weapons were illegal for Umar to possess because he had been convicted of felony possession of a dangerous weapon on May 13, 1971.

Umar told federal judge Robert Patterson that he notified prison officials when he purchased the weapons in 1983. The judge is scheduled to sentence Umar to up to 10 years in prison at his sentencing.

Umar is best known for a February 2003 *Wall Street Journal* article in which he was quoted as saying "even Muslims who say they are against terrorism secretly admire and applaud" the 9-11 hijackers. Umar now says that what he meant was that some Muslims view the hijackers as martyrs, not that he personally agreed with that viewpoint. Umar has since called the 9-11 attacks "a terrible thing to happen," saying he felt saddened for the victims.

The police went to the Bronx apartment building Umar owns after he called them following a dispute with one of his tenants. The police also searched his

Glenmont, New York, house pursuant to a search warrant that said they were seeking notes, memos, correspondence and periodicals that had references to "holy war," "jihad" and/or acts of violence against Jews, U.S. military personnel, gays, lesbians or "infidels."

"I feel like they are persecuting me because I'm Muslim and I'm black and I speak out and because I was the Muslim chaplain in the state prison system for 25 years," said Umar.

PLN has provided extensive coverage of the persecution of Muslim prison chaplains. [*PLN*, July 2004, pp. 8-10 and Sept. 2003, pp. 20-21.]

Sources: *New York Post*, *Associated Press*, www.wcax.com.

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New York Disciplinary Hearings Office – Must Interview Witnesses

The Appellate Division of the New York Supreme Court held that a prison disciplinary Hearings Officer erred in refusing to personally interview potential witnesses. The court ordered expungement of all references to the disciplinary proceedings and restoration of lost good time.

New York prisoner Robert Hill was ordered to provide a urine sample. However, he was issued a misconduct report alleging that he “had not produced a urine sample, but had dribbled water from his mouth into the specimen cup.”

At his disciplinary hearing, Hill requested to present testimony of two prisoners who had agreed to testify. A guard was sent to get the prisoners, but returned without them, claiming both had refused to testify and gave no reason for

their refusals.

The Hearings Officer informed Hill that he could not compel the witnesses to testify and the hearing proceeded. Hill objected to the Hearings Officer’s failure to personally communicate with the witnesses “to verify that they were refusing to testify or to ascertain their reasons for refusing.” The Hearings Officer concluded that he had conducted a sufficient inquiry and found Hill guilty of the charged misconduct.

Hill filed an action to annul the termination, pursuant to CPLR article 78, challenging the Hearings Officer’s refusal to personally interview his requested witnesses. The Supreme Court granted Hill’s application and prison officials appealed.

The Appellate Division noted that

prisoners have a conditional constitutional right to call witnesses to testify. Additionally, when a prisoner “previously agreed to testify, but later refuses to do so without giving a reason,” the court has “consistently held that the hearings officer is required to personally ascertain the reason for the ... unwillingness to testify”. As such, the court held that “the Hearings Officer was obliged to personally interview the potential witnesses to try to determine what caused them to change their minds. Petitioner’s right to call witnesses was not adequately protected ... because the Hearings Officer lacked the opportunity to judge the authenticity of the witnesses’ refusals.” See: *Hill v. Selsky*, 19AD.3d64, 795 NYS.2d 794 (NY SCT. App. Div. 3rd Dept. 2005). ■

New York’s “Son of Sam” Law Constitutional, Damages Seized

The New York Supreme Court, Appellate Division, has held that the state’s Son of Sam law, which allows a victim to seek restitution from crime perpetrators, is constitutional.

Ibn Kenyatta was convicted of attempted murder and criminal possession of a weapon after he scuffled with Salvatore Cifone, an officer supervising the 149th Street IRT subway station in the Bronx in 1979. After he gained possession of Cifone’s service revolver, Kenyatta shot Cifone six times, preventing Cifone from returning to work as a police officer.

In January 2001, while still serving his 15 year to life sentence, Kenyatta received a settlement for a medical malpractice claim against the New York State Department of Correctional Services and prison medical personnel. For the misdiagnosis of his kidney failure, Kenyatta received a lump sum of \$133,500 into a supplemental needs trust account and \$500,000 into his prisoner account.

The New York State Crime Victims Board notified Cifone of the settlement. He brought an action to recover damages, under the “Son of Sam” law, arising from the 1974 shooting. Kenyatta moved to dismiss, asserting the “Son of Sam” law violated the ex post facto clause and the contract clause of the United States Constitution. The New York Supreme Court denied the motion.

In rejecting Kenyatta’s ex post facto claim, the Appellate Division held the

“Son of Sam” law is not a penal law but rather is civil in nature. Its intent is to provide “aid, care, and support” for crime victims, not to punish convicted felons. After examining all relevant factors, the appeals court held the statute was not punitive in effect.

The appellate court further held that the “Son of Sam” law does not operate upon the contract to settle Kenyatta’s medical malpractice suit, but only against the property that resulted from settling that suit. As such, the law does not im-

pair performance of the contract, but rather only allows Cifone to recover if he proves his right to damages for the 1974 shooting.

Accordingly, the Supreme Court’s order denying Kenyatta’s motion to dismiss was affirmed. It should be noted that damages from federal actions cannot be seized under the supremacy clause of the US constitution, see: *Hankins v. Finnell*, 964 F.2d 853 (8th Cir.1992). See: *Cifone v. Kenyatta*, 27 A.D.3d 143, 807 N.Y.S.2d 114 (N.Y.A.D. 2 Dept. 2005). ■

WA Courts Cannot Extend Supervision Period for Sex Offenses Committed Before 1996

In 1994, Jamie Wallin pled guilty to sex offenses in Washington state, committed between July 2, 1988 and January 8, 1990. He remained free on supervision until March of 1996, when he violated his probation and received a 51 month prison sentence. He was released on April 29, 1998 with 1 year of supervision. After another probation violation on March 22, 1999, his period of supervision was extended to 10 years, pursuant to RCW § 9.94A 120(10)(c). In March of 2003, a neighbor complained to police that Wallin was taking photos of her teenage niece. Believing a reasonable suspicion that Wallin violated his supervision existed, community corrections officers searched his home without a war-

rant. Evidence then discovered resulted in Wallin’s being convicted of new sex offenses. He appealed.

On appeal, Division 1 of the state Court of Appeals found that § 9.94A.120(10)(c) allowed courts to extend the period of supervision for sex offenses committed after 1996 only. Since Wallin’s were committed before 1996, his supervision was improperly extended and should have expired in 1999. Thus, he could not have been on supervision in 2003 when the warrantless search was done, and that search, then, violated art. 1 § 7 of the Washington Constitution. Wallin’s convictions were therefore vacated. See: *Washington v. Wallin*, 125 Wn. App. 648, 105 P.3d 1037 (2005). ■

Florida's Felon Disenfranchisement Law Upheld

by David M. Reutter

The Eleventh Circuit Court of Appeals, sitting en banc, has held that Florida's felon disenfranchisement law does not violate the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act. Before the Court was the appeal filed on behalf of all Florida citizens who have been convicted of a felony and have completed all terms of their incarceration, probation, and parole, but who are barred from voting under the Florida Constitution's disenfranchisement law. That appeal came after a Florida federal district court granted summary judgment for the state.

The plaintiffs alleged that racial animus motivated adoption of the disenfranchisement law in 1868, and that an animus remains legally operative today, notwithstanding the fact that Florida altered and reenacted the provision in 1968.

The Eleventh Circuit, turning to the Equal Protection claim, said that a state's decision to permanently disenfranchise convicted felons does not, in itself, constitute an Equal Protection violation. The plaintiffs were required to plead facts to show that Florida's current disenfranchisement law *intentionally* discriminates on the basis of race.

The Court held the plaintiffs failed to make such a showing. Throughout history, criminal disenfranchisement provisions have existed as a punitive device. When the Fourteenth Amendment was ratified, twenty-nine of the thirty-six states had some form of criminal disenfranchisement law.

Florida first enacted such laws in its 1836 and 1845 Constitutions. Because the right to vote for African-Americans did not exist at that time, [Florida was a slave state] they could not have been the target of the laws, making those Constitutions laws non-racial.

The Court said that while some provisions of Florida's 1868 Constitution were motivated by racial bigotry, such discrimination does not "establish that racial animus motivated the criminal disenfranchisement provision, particularly given Florida's long-standing tradition of criminal disenfranchisement." The plaintiff's reference to racist remarks made by a white delegate to the 1868 Constitutional Convention about keeping blacks from taking over the state was rejected

by the full Court as unconvincing. Those remarks caused a three-judge panel of the Court to reverse. See: *Johnson v. Governors State of Florida*, 353 F.3d 1287 (11th Cir. 2003); vacated 377 F.3d 1163.

The en banc Eleventh Circuit, moreover found that in 1968 Florida narrowed the class of persons who could be disenfranchised and re-enfranchised some persons who previously were disenfranchised. At that time, a committee considered and rejected an amendment to limit disenfranchisement to those still in prison. Because the law was substantially altered and reenacted in 1968 in the absence of any evidence of racial bias, there is no Equal Protection violation.

The Court then turned to the Voting Rights Act (VRA) claim. The VRA was enacted to stop states from enacting subtle ways of denying racial minorities the right to vote while under the VRA a plaintiff can establish a violation without proving discriminatory intent, the VRA does not prohibit all voting restrictions that may have a disproportionate effect.

The Fourteenth Amendment provides states the discretion to deny the vote to convicted felons. Interpreting the VRA to prohibit Florida that discretion, as the plaintiffs contend it does, raises serious constitutional problems because such an interpretation allows a congressional statute to override the text of the Constitution. The Court said it cannot construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing the understanding. Moreover, Congressional reports show that neither house of Congress intended to include felon

disenfranchisement within the statute's scope.

The Court, therefore, affirmed the district court's grant of summary judgment to Florida. See: *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

To date, nationally no felon has won a VRA claim. In Florida, the only solution left is a political one. Republican Ron Reagan has ordered his House Ethics and Elections Committee to study the voting ban and report back. "I'm becoming an advocate [of restoring rights to felons]." Reagan said. "But there were, I think, seven different bills filed, which one is right?"

Advocates promised to keep pushing for a legislative bill to put on the ballot to change Florida's Constitutional ban, said Reginald Mitchell, with People for the American Way: "This is not a sprint. It's a marathon, and we're not going away." 🐾

Additional Sources: *Miami Herald*; *Law Com.*

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News in Brief:

California: On August 12, 2006, Tony Padilla, 44, a prisoner at the Federal Correctional Complex in Victorville died in a local hospital after an "altercation" with another prisoner.

Colorado: On September 6, 2006, a federal court in Denver sentenced John Reynolds, 53, to an additional 16 months in prison for escaping from the Federal Prison Camp in Florence on March 14, 1999. Reynolds was then a fugitive for 7 years before being captured in Mexico. Reynolds had entered the federal prison system in 1998 to serve a seven year sentence for making false statements to a financial institution and money laundering.

El Salvador: On September 6, 2006, officials at the maximum security prison in Zacatecoluca discovered cell phones concealed in the rectal cavities of four prisoners. Nine cell phone chips and a charger were also discovered in various anuses. The cell phones were discovered as part of an investigation into organized crime inside the nation's prisons.

Florida: On September 11, 2006, Kathleen Hill, 33, a former guard at the Charlotte county jail, pleaded guilty to manslaughter charges stemming from shooting and killing her forest ranger husband Shawn Hill, 32, in 2004. Kathleen claimed that Shawn had abused her which is why she killed him. Shawn's family dispute that account and note she was fired from her jail job for having "inappropriate relations" with a prisoner.

Florida: On September 7, 2006, federal immigration officials arrested and detained 15 people who were using false identification papers to do roofing work on the Federal Detention Center in South Miami-Dade. The workers had been employed to do roofing work on the federal jail. 13 were illegal aliens from Mexico, two were from Guatemala.

Georgia: By August 10, 2006, at least 10 prisoners in this former Soviet Republic had died of heat related causes as temperatures reached record highs of 113 degrees Fahrenheit. Prison officials said prisoners had plenty of water and fans.

Georgia: On August 22, 2006, Timothy Jones, 28, a state prisoner who was brought to the Jackson county courthouse to face additional charges, grabbed a pistol from jail deputy Kimsey Gray and shot Gray three times with it after his arraignment while being returned to the jail. Gray

is expected to recover. Jones then took the keys to the van and attempted to flee the secure area of the courthouse parking garage when he crashed into a chain link fence. Jones got about 100 yards before he was shot to death by deputies. A preliminary investigation indicates that Gray did not follow jail policy and left his gun in the van and not in a secure lockbox in the courthouse.

Georgia: On August 9, 2006, Jimmy Butler, 30, a Dekalb county jail guard, pleaded guilty to smuggling marijuana and other contraband to jail prisoners. He was sentenced to six months in jail and five years probation for bribery, drug possession, contraband charges and violating his oath of office. Adriane Mitchell, 40, who pleaded guilty to giving Butler the drugs and contraband to smuggle into the jail, was sentenced to 30 days in jail and 3 years probation after pleading guilty to bribery, smuggling and drug charges.

Kansas: Toby Young, 48, the prison volunteer who ran the Safe Harbor Prison Dog Program at the Lansing Correctional Facility until she helped smuggle convicted murderer John Mannard, 27, out of the prison in a crate, was sentenced to 21 months in state prison for her role in the February 12, 2006, escape. When police captured the duo on February 24, Mannard was armed with two pistols. Federal prosecutors have charged Mannard with being a felon in possession of a firearm and charged Young on August 17, 2006 with supplying a firearm to a felon and a fugitive.

Minnesota: As of August 19, 2006, at least 18 prisoners at the Federal Prison Camp in Duluth had contracted Methicillin Resistant Staphylococcus Auereus (MRSA), a highly contagious and sometimes fatal skin disease, since June, 2006. The Bureau of Prisons has responded with an education campaign urging prisoners to wash their hands. In a prison environment crowding and poor laundry conditions lead to the spread of MRSA.

Minnesota: On August 11, 2006, Carl Moyle, 28, a motorist who was arrested and jailed for not having proof of his vehicle insurance with him when stopped by police was beaten to death in the Sherburne county jail with a handicap rail by prisoner Bruce Christenson. The insurance papers were in Moyle's home and his brother brought the documents to the police department that same day but

was told it was too late and to return the next day. Christenson was a state prisoner serving a sentence for aggravated assault who was sent to the Sherburne county jail because he had been charged with assaulting a prisoner at the St. Cloud State Prison with a weapon earlier in the year. Sherburne county sheriff Bruce Anderson said his staff were unaware of these facts and if they had been Christenson would not have been in general population at the time he allegedly beat Moyle to death. The more obvious question is why was Moyle jailed for not having insurance papers with him.

Missouri: On September 12, 2006, Daniel Bunton, 35, shot and killed Stacey Davis, 31, then shot and killed himself at the Chillicothe Correctional Center which is the state's prison for women. Both had been employed as guards at the prison for less than a month and both were undergoing divorces though they lived together. Bunton was apparently upset that Davis would not speak to him. Missouri prison guards are not required to be searched or go through metal detectors before entering prisons. Missouri does not allow firearms within the secure perimeter of its facilities.

New Jersey: On September 11, 2006, police arrested Sean Chinsoon, 31, a guard at the Monmouth county jail on charges of drunk driving and leading police on an 80 MPH chase in his Hummer.

New Mexico: On August 9, 2006, s Cibola county grand jury indicted Enrique Garcia, 50, the former commander of the New Mexico Women's Correctional Facility in Grants for two charges of sexual penetration while in a position of authority over prisoners. He is accused of sexually assaulting an unidentified 25 year old female prisoner serving a life sentence for murder.

New York: On August 22, 2006, Katrina Bolden, 39, a guard at the Rikers Island jail, was arrested and charged with assault for beating a 41 year old woman and her 12 year old son in a Manhattan apartment complex.

Oklahoma: On August 20, 2006, Creek County superior court judge Donald Thompson, 59, was sentenced to 4 years in prison after being convicted of four felony counts of indecent exposure for using a penis pump to masturbate in court while presiding over criminal trials, including death penalty cases. Thompson

denied masturbating during court proceedings but investigators later recovered his semen on his judicial robes, and carpet and chair behind the bench. Thompson was also fined \$40,000.00

Pennsylvania: On August 23, 2006, Tina Martinez, 42, a drug and alcohol counselor employed by private prison company Civigenics at Greensburg State Correctional Institute was charged with sexually assaulting a 29 year old male prisoner at the facility by fondling him and engaging in oral sex. When confronted by guards both parties acknowledged having had sex together.

Tennessee: On September 8, 2006, Don Dunaway, the director of the Tennessee Department of Corrections internal affairs division and Joe Vernon, one of his special agents, were both fired for using state computers to pornographic and racist e mails and messages to each other. Ironically, their duties included investigating inappropriate workplace behavior. They were investigated after officials received an anonymous tip alerting them to the malfeasance.

Texas: On August 20, 2006, Colleen Jordan, 44, a former employee of the Arkansas Department of Corrections who had been fired in 1999 and then was employed by private prison company Civigenics at the time of her arrest, was sentenced to three years probation after pleading guilty in federal court to conspiring to file false tax claims against the federal government. She was a jail guard at the Civigenics run Bi-State Justice Building in Texarkana and with co-defendant Janice Koontz, another jail

employee; they stole prisoners' names and social security numbers and used them to file false income tax returns whereby the pair then pocketed the illegal refunds. The two defrauded the federal government of around \$50,000 in this manner.

Utah: On March 22, 2006, Dr. Bruce Guernsey, a psychiatrist who treated imprisoned sex offenders, pleaded guilty to Possession and Receipt of Child Pornography. He was released to await sentencing and subsequently disappeared before his July, 2006, sentencing. Guernsey was then found dead of suicide in a Dominican Republic jail on June 10 after FBI agents and local authorities arrested him in a Santo Domingo hotel room the day before.

Utah: On September 1, 2006, William Appawora, 37, and Larry Jensen, 38, employees of the Cornell Community Corrections Center in Salt Lake City, a work release center run by the private prison company Cornell on behalf of the federal government, were indicted on charges of tampering with the urine test results of prisoners by altering the records.

Virginia: On August 20, 2006, William Morva, 24, a prisoner at the Montgomery County jail was taken to the Montgomery County Regional Hospital for treatment to a sprained ankle and wrist. At the hospital Morva overpowered jail guard Eric Sutphin and took his pistol from him shooting and killing Sutphin and shooting and killing Derrick McFarland, 26, an unarmed hospital security guard who tried to help Sutphin. Morva then escaped from the hospital.

He was recaptured on August 22, 2006, in the woods near Virginia Tech University in Blacksburg. Morva had been awaiting trial on the attempted robbery of a convenience store when he escaped. Morva was recaptured without incident, ending a two day manhunt.

Washington: In July, 2006, state Supreme Court justice Tom Chambers, 62, crashed the motorcycle he was riding after hitting a patch of gravel and his friend and passenger, Carrie Brown, 54, required emergency room treatment for a broken collarbone and other injuries. State law requires that all accidents involving death or injury be reported to police within four days which Chambers did not do. Chambers, who is seeking reelection this year, said he did not know he was required to report a single vehicle accident and accused political opponents of spreading the story.

Wisconsin: On September 18, 2006, Christine Roberge, 39, a guard at the Oakhill Correctional Facility was sentenced to two years probation after pleading guilty to sexually assaulting a male prisoner at the facility. Another prison guard, Heather Bartosch is expected to plead guilty to sexually assaulting the same prisoner. ■

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Successor Judge Needs Compelling Reason to Reopen Prior Judge's Ruling

The Seventh Circuit Court of Appeals has held that a successor judge did not have record support to reopen another judge's decision that a prisoner's suit was not barred for failure to exhaust administrative remedies.

This action was filed by prisoner David Brengettcy, who alleged he was subjected to excessive force by guard William Horton while awaiting trial at Illinois' Cook County Department of Corrections (CCDOC). Brengettcy attended a Bible study on August 21, 2000, in the mess hall on CCDOC's first floor. When he left the meeting and headed up the stairs to the second floor, Brengettcy recalled he had forgotten to mail a letter when he reached the second-floor landing. He went back down the stairs, mailed his letter, encountered a guard without incident, and returned to the second floor.

Upon observing his return, Horton asked Brengettcy why he had gone back downstairs, and began cursing him. Brengettcy silenced himself, looked Horton in the eye, and was then struck by Horton, who proceeded to continue beating him. To stop the attack, Brengettcy punched Horton several times. Other guards called for assistance. When reinforcements arrived, Brengettcy claimed he was repeatedly kicked and beaten. The beating continued after he was handcuffed, and "he was taken to the stairwell where someone kicked him down the stairs." He

regained consciousness that evening in the hospital. Medical reports indicate he experienced pain in his throat, shoulder, wrist, back and legs, received sutures in his bottom lip, and had chipped front teeth.

On August 23, 2000, Brengettcy filed a grievance with CCDOC, alleging Horton used excessive force against him. In October, after he had received no response, a guard told him that sometimes grievances get torn up. On November 27, 2000 he filed another grievance. After receiving no response, he filed his complaint in federal court.

The defendants filed motions to dismiss, claiming failure to exhaust administrative remedies and arguing the suit was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). Judge Bucklo denied both motions. For administrative reasons, the case was transferred to Judge St. Eve. The defendants moved for summary judgment, raising the same issues included in the motion to dismiss.

The Seventh Circuit said it had to decide if new evidence from a deposition "gave the second court [judge] a compelling reason to reopen the previously decided question." The Seventh Circuit held the summary judgment papers "did not present enough new material to justify overturning Judge Bucklo's evaluation of the two defenses." The deposition provided by Horton misled the court to believe that the only grievance Brengettcy filed was on November 27, but his verified complaint also alleged the August 23 grievance.

Additionally, *Heck* did not bar the action. Although Brengettcy was convicted of aggravated battery on a peace officer for punching Horton, his claim of excessive force after he hit Horton (while he was handcuffed) was not undermined by the conviction. Accordingly, the district court's grant of summary judgment in Horton's favor was reversed. See: *Brengettcy v. Horton*, 423 F.3d 674 (7th Cir. 2005). ■

Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 915 15th St. N.W., 7th Floor, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. FAMM-gram, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rul

ings, administrative developments and news about the Florida DOC. \$10 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 1511, Christmas, Florida 32709.

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.

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PHS Redux: Sued In A Dozen States, Contract Losses, Stock Plummets, Business Continues

by John E. Dannenberg

Prison Health Services (PHS), a subsidiary of America Service Group, Inc. (ASG), continues to face lawsuits and lose contracts for its deplorable record of prisoner health care gaffes in a dozen states. The old maxim "Physician, heal thyself" might be good advice for ASG, whose stock has tanked by over 55% from March 2005 to October 2006, based largely on negative publicity from PHS. Even more disturbing is that PHS is the nation's largest for-profit provider of prisoner health care, with 110 contracts in 37 states, meaning that its low-budget "solution" to prisoners' health needs has

become bad medicine for an increasing number of our nation's prisoners. This report is an update to *PLN's* six earlier reports since 2002 on PHS's sordid performance (see, e.g., *PLN*, May 2005, p.34 and Aug. 2005, p.1).

Alabama

Alabama's Department of Corrections (ADOC) has been the target of major federal-court ordered health care reform at the Tutwiler, Limestone and Donaldson prisons, and continues to be troubled turf for PHS. On March 6, 2005, 53-year-old insulin-dependent diabetic Teresa Morris died of what PHS called "natural causes" at the Tutwiler Prison for Women. Visibly unnatural, however, was Morris' condition at the time of her death: her legs were so badly swollen that her shackles dug into them. Morris' family filed suit, claiming that PHS inexplicably took Morris off her insulin shots, a predictably fatal move. "I can't say whether or not she was given insulin," said PHS Vice-President Ben Purser, adding, "it was an expected death." Although Morris's death certificate listed diabetes, cirrhosis and Hepatitis-C as causes of death, she was not being treated by PHS for the latter two diseases. Morris was reportedly seen by PHS staff every three months, but not by a doctor. She was last visited by her mother just after Morris died. Her mother kissed Morris' swollen, shackled, still-warm body in the hospital, and held her hand.

PHS replaced prior medical care contractor Naphcare in November 2003,

whose health care services had been a disaster. ADOC officials characterize PHS's services as "better," but court monitor Dr. Joseph Bick reported that ADOC was far from compliant and suffered from severe shortages of doctors and nurses. PHS's own Montgomery-based medical director was pressed into service at Limestone, where he was reportedly their sole HIV doctor.

There have been six deaths at Tutwiler since PHS took over. Renowned prison health care expert and court monitor Dr. Michael Puisis audited Tutwiler and found mistakes in 19 of 22 prisoner charts he reviewed. Dr. Puisis recommended to the court that based on the chart reviews, PHS employee Dr. Samuel Englehardt, a retired obstetrician and the primary care physician at Tutwiler "should not be providing general internal medicine care to the patients." Dr. Puisis's comments came on the heels of his investigation into three prisoner deaths, at least two of which were laid to "no effective physician monitoring of patients." The state and PHS tried to keep Dr. Puisis' reports confidential, but the prisoners' class attorney, the Southern Center for Human Rights, fought for disclosure and accountability.

In May 2005, ADOC put its foot down. It annulled \$1.2 million in payments on PHS's \$143 million, three-year contract because the company had not provided enough doctors and nurses from May 2004 to February 2005. Whether PHS still made a profit from short staffing its facilities is not known. ADOC is also conducting an audit of PHS's staffing

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PHS Redux (cont.)

records to determine how much money ADOC should be reimbursed for billed vacant medical positions. But PHS is only losing money; prisoners are losing their right to adequate health care and their lives.

Accusations flew alleging interference with prisoners' access to attorneys during a federal suit against PHS's non-performance at ADOC's Hamilton Aged and Infirm Correctional Facility. There, 33-year-old prisoner Terry Miller, a habitual drunk driver who was severely injured in a car wreck, suffered from a hole in his stomach (a fistula, caused by bile eating through skin grafts) that exposed his intestines. For over a year at Hamilton, his only medical treatment was gauze to sop up the caustic drainage that was consuming his surrounding skin. Later treatment, ADOC spokesman Brian Corbett said, cost the state \$500,000. Miller was reportedly seen by PHS 28 times and a chronic care clinic six times. But in his four years in ADOC, Miller never received the admittedly risky and complex surgery needed to correct the fistula. He wheeled himself out of the prison gates on June 2, 2005 with, by then, three fistulas, a ten-day supply of gauze pads and \$10 from the state. Miller is a plaintiff in a class action lawsuit filed by the Southern Center for Human Rights alleging inadequate care at the Hamilton prison. The suit, which did not name PHS as a defendant, resulted in a partial consent agreement in March 2006. See: *Aris v. Campbell*, USDC ND AL, Case No. 1:05-cv-00396-PWG.

A fresh brouhaha arose in February 2006 when Nurse Brandon Kinard resigned from PHS to become a state employee (ADOC regional clinic manager) charged with monitoring PHS's performance under its contract with the state. Attorney Rhonda Brownstein of the Southern Poverty Law Center opined that this smacked of a conflict of interest. Kinard had worked for PHS at the Hamilton facility as director of nursing and in administration, making patient health care decisions. After several weeks of employment with the state Kinard stated he would resign and go back to work for PHS, but then rescinded his resignation. Under Alabama law, state employees cannot immediately accept employment at companies they audited or regulated.

Kinard's supervisor, Associate Com-

missioner Ruth Naglich, was also formerly employed with PHS; she was vice president of sales and marketing for the company. "I don't know if it violates any state laws. But effective monitoring of a private company by the state Department of Corrections needs to be done by people who are independent of the medical company and independent of the DOC..." stated Southern Center for Human Rights attorney Joshua Lipman. And given PHS's record, such independent monitoring is necessary. In addition to withholding \$1.2 million in payments to PHS due to contract violations in 2005, Alabama also withheld \$580,000 as a performance penalty.

Florida

PHS, which contracts with a large number of Florida counties, has experienced an above-average amount of bad publicity and adverse incidents in the Sunshine State.

On March 4, 2004, Kimberly Ann Grey, after complaining to PHS medical staff and jail workers that she was in pain, gave birth to a son over a toilet at the Hillsborough County Jail. Although the mother and her newborn were belatedly taken by ambulance to a hospital after nurses initially refused to call 911, the infant died enroute. Suit was filed in December 2004 against PHS and jail personnel, alleging grossly inadequate medical care. The umbilical cord had been wrapped around the baby's neck and PHS nurses were untrained with resuscitation and newborn care; they also initially refused to believe that Grey was in labor and dismissed her complaints of pain as "mood swings." PHS fired one nurse practitioner and reprimanded two nurses over the incident. Grey's family's lawyer asked the federal court for "nationwide discovery" of PHS's records, but the court denied the motion as overbroad, notwithstanding a similar event reported in PHS's past. However, the court said it would entertain such a motion later if warranted. The case is ongoing. See: *Lister v. Prison Health Services, Inc.*, USDC MD FL, Case No. 8:04-cv-02663-RAL-TGW.

Two former Hillsborough County Jail prisoners have also accused PHS of shoddy medical care. Sean Norbury was 19 years old and had a fractured hand when he was incarcerated in Oct. 2003. According to a lawsuit filed in Circuit Court on Oct. 26, 2005, he requested treatment but instead was ridiculed by

PHS Redux (cont.)

PHS nurses. Despite swelling, bruising and complaints of pain, Norbury received no medical care and never saw a doctor; an X-ray was ordered but never taken. In a separate lawsuit filed one day earlier, Aretha Jackson claimed that PHS failed to provide treatment resulting in her going blind. Jackson, who was HIV-positive and suffered from deteriorating vision, was held at the jail from August 16, 2004 until June 1, 2005. She accused PHS employees of ignoring a doctor's follow-up order and alleged they were untrained, unfamiliar or indifferent to her medical needs and did not have proper treatment procedures or policies for HIV-positive prisoners. See: *Jackson v. Prison Health Services, Inc.*, USDC MD FL, Case No. 8:05-cv-02157-SDM-TBM.

PHS is also being sued by the widow of 47-year-old Patrick Bilello, who suffered his third and fatal heart attack at the Palm Beach County jail on October 24, 2003. Dr. Edgar Escobar, PHS's jail doctor at the time, admitted that he had overlooked critical lab results showing low blood oxygen that required Bilello's immediate hospitalization four days earlier. Instead, he ordered that Bilello, who was also HIV-positive, receive Tums for indigestion and gave him an extra blanket. Escobar's malpractice history included two deaths and five lawsuits; he was later fired by PHS. A Circuit Court judge ruled in September 2005 that Bilello's widow, Roseanne Scarola-Bilello, could seek punitive damages against the doctor and PHS. Since the death, and after numerous other complaints, the sheriff, also a defendant in the lawsuit, dumped PHS as the jail's medical provider.

Attorney Gary Susser, who represents Roseanne Scarola-Bilello, said, "A jury ... will want to send a message to the corporate parent of PHS that profits should not rule over the sanctity of human life." After being terminated by PHS, Dr. Escobar was employed as a practicing physician at Johnson Medical Center in Hollywood. It was not until October 6, 2006 that he was finally disciplined by the Florida Board of Medicine in connection with Bilello's death, and only then after a personal plea from Bilello's widow. Escobar was fined \$10,000 (the maximum allowable under state law), ordered to complete 200 hours of community service, and required to pay \$5,000 for the cost of the investiga-

tion. His medical license was suspended until he passes a competency exam. Board member Dr. Elisabeth Tucker termed Escobar's actions in the Bilello case "terribly egregious."

Mrs. Bilello's lawsuit against PHS and Dr. Escobar settled on August 15, 2006 under confidential terms. However, according to closed medical malpractice claim records maintained by the Florida Office of Insurance Regulation, the suit settled for \$475,000 against Escobar. The settlement with PHS was undisclosed. See: *Roseanne Scarola-Bilello v. Prison Health Services* Palm Beach Co. Circuit Court, Case No. 50-2004-CA-009140.

One year previously, Dr. Escobar had settled an unrelated malpractice suit involving another prisoner at the Palm Beach County jail when he was employed with EMSA Correctional Care, Inc., a sister subsidiary of America Service Group. Stafford Wilder, who was serving a one-year jail sentence, complained of blurred vision in April 2002. Dr. Escobar and other medical staff took no action; eight months later Wilder had lost 90% of his vision due to untreated glaucoma. The malpractice suit against Escobar and EMSA reportedly settled in October 2005 for over \$500,000, with \$287,500 being paid by Escobar's malpractice insurer. See: *Wilder v. EMSA Correctional Care* Palm Beach Co. Circuit Court, Case No. 50-2003-CA-011473xxmmaa.

On February 22, 2005, Milton Oakes committed suicide at the Marion County Jail, one month after PHS staffers stopped giving him antidepressant medication. He was ignored when he began banging his head on the wall of his jail cell. Sheriff Ed Dean admitted that PHS did not provide the medical care he expected at the facility.

Orestes Rendon began his 90-day jail sentence at the Sarasota County Jail in good health but finished it on November 14, 2005 in intensive care, unable to eat, speak or walk. Rendon had been on a work crew and a falling branch containing a hornet's nest resulted in his receiving more than a dozen stings. He filed forms for immediate health care as he went into shock, but it took six days for PHS to get him to a doctor, who put Rendon in the hospital. PHS nurses had only given him Tylenol, even though he complained of losing his eyesight.

Also in 2005, PHS contracted to provide health care at the Volusia County Jail; the company promised to save the county

\$2.2 million over a four-year period. However, in the first year of the contract the county was asked to pay an additional \$1 million to cover PHS's medical services. More disturbing, according to County Chairman Frank Bruno, were allegations regarding the company's health care. "My main concern is doctors taking away prescriptions, especially for non-convicted people going through court cases," said Bruno. While medical expenses at the jail have increased, the cost for psychotropic drugs declined sharply after PHS took over, dropping over 70% from the expenses charged by the previous health care provider.

According to *The News-Journal*, a local newspaper, defense attorneys have noted that their clients are being deprived of medication, which hampers their ability to assist in their criminal cases; the county's Public Defender and Chief Circuit Judge were concerned enough to call for a meeting with PHS officials to discuss the issue. Dr. David Hager, PHS's director of mental health services for Volusia County, has stated his approach to mental health treatment is often to discontinue all medication so he can observe the prisoner's symptoms, stating that less is more in terms of psychotropic drugs. PHS spokesperson Martha Harbin, however, said the company would never "withhold care to hold down costs."

On June 5, 2003, former Sarasota Jail prisoner Gerrese Daniels was paralyzed after being thrown head-first into a concrete wall by a guard. Two PHS nurses accused him of "faking it," and he was dragged to a bus and transported to the Central Florida Reception Center without receiving any medical care. When he arrived and his injuries were discovered, he was airlifted to a hospital. Daniels subsequently sued PHS for two severed vertebrae and near-complete paralysis. The guard, Matthew O'Kon, was acquitted on a charge of intentionally slamming Daniels into the wall and then stepping on his neck. The case is pending. See: *Daniels v. America Service Group, Inc.*, USDC MD FL, Case No. 8:05-cv-01392-JSM-TBM.

Manatee County prisoner Tony Myrick, 41, died in 2004 in the jail's infirmary after having four epileptic seizures over two days. PHS nurses allegedly did not provide adequate treatment. The company fired two nurses and its medical director as a result.

Two other PHS nurses were fired following a bizarre incident at the Charlotte

County Jail in March 2006. Prisoner William Parbus, a diabetic serving a 15-day sentence, required an insulin shot. PHS nurse Karen Helmick, upon learning the infirmary was out of insulin, said "she just did not feel like driving and getting it." Instead she broke open a sharps container used to dispose of medical and biohazard waste, and retrieved a vial of expired insulin. Sheryl Staples, another PHS nurse, then injected Parbus with the outdated drug. "Unfortunately, it happened," admitted PHS health service administrator Linda Antuono.

In an unusual claim against the company, on August 21, 2006, Kevin Coleman filed suit against PHS claiming that grossly inadequate medical care at the Palm Beach County Jail caused him to admit to a crime he didn't commit. In July and August 2004, PHS staff reportedly misdiagnosed Coleman's abdominal pain, telling him it was gas when it was in fact diverticulitis, an inflammation of small pouches in the colon. Coleman lost 30 lbs. and eventually required emergency surgery. Convicted of first-degree murder in 1992, Coleman was being held at the jail pending a new trial after it was learned a detective had suppressed evidence in his case. He reluctantly pled no contest to a lesser charge in September 2004 in exchange for his freedom so he could obtain competent medical treatment. According to Coleman's lawsuit, he took "a plea agreement whereby he admitted to a crime he did not commit in order to be immediately released from [PHS's inadequate] care."

On September 15, 2006, the estate of Herman B. Tucker, 24, who committed suicide at the Marion County Jail, filed suit against the sheriff, jail officials and PHS employees. Tucker, who was on suicide watch at the time he killed himself in September 2002, was allegedly drugged by PHS medical staff in order to subdue him; he was injected seven times with "cocktails" that included Ativan, Haldol and Benadryl. He received no mental health treatment. Tucker's estate is seeking compensatory damages for his funeral and burial expenses, and for the pain and suffering of his parents. See: *McGough v. Marion County*, USDC MD FL, Case No. 5:06-cv-00364-WTH-GRJ.

Despite PHS's dubious track record at county facilities, in January 2006 the Florida Department of Corrections (FDOC) hired PHS under a ten-year contract to care for 14,000 prisoners in 13

southeast Florida prisons. PHS's almost \$800 million bid for the contract was \$80 million less than that of its nearest rival, Wexford Health Sources, FDOC's prior health care contractor since 2001. Although FDOC had wanted to select the winner on factors other than cost, the state legislature ordered the department to reopen the contract and hire the lowest bidder. Governor Jeb Bush touted the deal, but state Senator Frederica Wilson said, "It all seems very suspect," adding, "I fear we can only expect greater disappointment." Competitor Wexford Health Sources was "really surprised [PHS] ... bid as low as they did," calling the FDOC contract "one of the most risky contracts that any prison health company could enter into" because of the disproportionately high rate of Hepatitis-C, HIV, diabetes and hypertension in the FDOC prison population.

Such concerns proved correct when less than nine months into the contract, on August 21, 2006, PHS announced it was abruptly calling it quits, stating it had underestimated the cost of treating prisoners who required off-site hospitalization. "This is what I was warning about," remarked state Senator Dave Aronberg, who had expressed misgivings about the PHS contract before it was finalized. Sen. Aronberg and Sen. Walter Campbell demanded to know why the company had not been fined or assessed liquidated damages for the contract cancellation. PHS acknowledged that it may be subject to fines, but said that was the "cost of doing business"; the company also complained that state officials had provided incorrect information during the bidding process. An audit of PHS's performance during the short-lived contract is on-going, and the company may submit another (presumably more realistic) bid when the FDOC's health care contract is re-bid in October 2006. Unless it wins the re-bid contract, PHS will stop providing services at FDOC facilities as of November 20, 2006.

Prior to canceling its contract with the state, PHS officials had approached FDOC Secretary James McDonough and tried to renegotiate for better terms, including moving some medically-needy prisoners to other facilities not serviced by the company. This is apparently standard operating procedure for PHS, which has renegotiated contracts after claiming it was losing money in Philadelphia and Maine in June 2002, in Kansas in October 2003 (unsuccessfully), in Wyoming

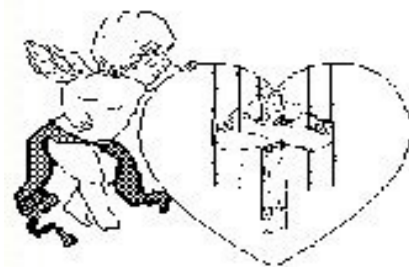
in 2005, and in Vermont in mid-2006. McDonough declined to cut PHS any slack, however, saying, "The answer was a polite no – there was nothing I would be doing for them."

Georgia

The October 17, 2005 death of 43-year-old Harriett Washington in the Gwinnett County Jail continues to dog PHS. Washington, who suffered from leukemia, died on the floor as her two cellmates watched. The cellmates, parole violators Kim Holmes and Carla Dotson,

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can't get the images of Harriet's death out of their minds, saying, "She screamed in pain and was convulsing before dying." Their repeated pleas to PHS medical staff to get help for Washington were allegedly ignored for two days. When a nurse came in on the last day, she refused to look at the list of symptoms Holmes and Dotson had kept. At 2:10 a.m. the next morning Washington began vomiting continuously, but despite the cellmates' repeated screams for help, none came for 34 minutes. By then it was too late – Washington had "exhaled a loud breath and her eyes were open and fixated."

On November 8, 2005, Holmes and Dotson wrote a detailed exposé to the medical unit supervisor and the Sheriff's Department internal affairs unit. "We fulfilled all of our legal responsibilities to ensure she received the proper medical care," replied Department spokesperson Stacey Kelley. PHS declined to comment. Sheriff Conway's report was released in January 2006, clearing his deputies of any culpability. The report concluded that although Washington would have died even if she had been taken to an outside hospital, the appropriateness of her treatment would not have been in question. Nurses alleged that they responded within three minutes of Washington's screams for help (there are no doctors present on weekends at the Gwinnett jail). The emergency oxygen cart they brought was missing its tubing. One of the nurses, Brian Woodward, had also been accused of taking narcotics from the jail's medical unit. He resigned after admitting he "messed up by failing to document Washington's treatment." It was learned that the PHS nurses had violated protocol by not keep-

ing notes of care that was provided. They did, however, hastily jot some down after Washington died on their watch.

Sheriff Conway, beset by Washington's death, was considering firing the company. Two other lawsuits naming PHS were filed in Gwinnett County in 2005, including a federal suit involving the September 2003 death of prisoner Ray Charles Austin, who was forcibly injected with an anti-psychotic drug by PHS medical staff despite a doctor's order in Austin's file directing that he not be given injections. Austin became combative, was Tasered and then strapped in a restraint chair, where he received no medical treatment and later died. The lawsuit is pending. See: *Lewis v. Prison Health Services, Inc.*, USDC ND GA, Case No. 1:05-cv-02434-TWT.

Regardless, on October 5, 2006, Gwinnett County renewed its contract with PHS to the tune of \$6.1 million. According to Sheriff's Dept. Major Jim Hogan, a member of the committee that considered bids for the health care contract, the lawsuits against PHS were taken into consideration but "it seemed that most of the companies we considered had similar situations somewhere around the country in some site that they provided service." Which simply seems to indicate that PHS is just as bad as many of its competitors. Seven companies bid on the contract; PHS was not the lowest bidder, but according to Hogan was selected – ironically – because of its experience, references and financial stability. The Gwinnett County chapter of the NAACP objected to the contract renewal due to three deaths at the jail under the company's watch.

Maryland

In May 2005, PHS learned that it had lost its bid to continue providing medical services at most Maryland prisons and Baltimore's jails, a total population of 20,000 prisoners. The winning bidder for the estimated \$100 million annual contract was St. Louis-based Correctional Medical Services (CMS), whose track record is reminiscent of PHS's. PHS had signed a \$270 million five-year contract with Maryland in 2000. But because the contract was based on a flat-fee model, it became a loss-leader for PHS over time, resulting in \$13 million in red ink on \$55 million in billings in the last year alone. Sally Dworak-Fisher, an attorney for Baltimore's prisoner-advocate Public

Justice Center, criticized Maryland for pitting a contractor's loss against prisoners' health needs.

The Baltimore grand jury routinely reviewed jail health care performance and determined that there had been a "poor job" at medical care in the past five years (i.e., under PHS's reign) because of a flawed and under-funded contract. The result, the grand jury found, was that pressure on PHS's management to economize on operations "made it more and more difficult for offenders to receive prescription medications, hospital procedures or laboratory tests." PHS President Trey Hartman called this charge "blatantly false."

Under the new contracts, Maryland expects its annual prisoner health care costs to rise from \$68 million to \$110 million. The Public Justice Center and the ACLU have a long-standing lawsuit to improve medical services in Baltimore jails, and are skeptical that the new CMS contract will remedy their complaints.

New York

In May 2005, New York's state Department of Education, which regulates the practice of medicine, began an investigation into the terms of the five-month-old \$300 million prisoner health care contract the state had signed with PHS. New York law requires that for-profit medical care companies be owned and controlled by doctors in order to prevent business considerations from influencing medical decisions. PHS insisted that doctors are in charge of medical decisions through its doctor-run subsidiary, PHS Medical Services P.C., which directs health care at the Rikers Island jail. However, that corporation is run by Dr. Trevor Parks, who is a regional medical director for PHS. Education Department investigators called this arrangement a sham.

Illegal contract concerns notwithstanding, a scant one month later the New York Department of Health and Mental Hygiene reported that in the first quarter of 2005, PHS failed 12 of 39 performance standards for treating prisoners at Rikers Island and Lower Manhattan jails. As a result, New York City withheld \$55,000 in payments, its largest penalty against PHS for poor performance since 2001. Health Department official Paul Vallone criticized the department's decision to let PHS develop its own plan to remedy deficiencies. "It's like a judge allowing a criminal to determine his sentence," he

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In 2003, York County prisoner Michael Herman, 19, who had a history of mental illness, was court-ordered not to be placed in general population because of his vulnerability. In January 2004, Herman was assaulted and put in a solitary-confinement cell pending a hearing. He was not watched for an "extended period of time," during which he tried twice to commit suicide, once unsuccessfully with his shoelaces and once successfully with his bed sheets. Herman's family filed a wrongful death suit against prison officials and PHS for not providing Herman with appropriate medical care and treatment for his mental illness.

In December 2005, the very process by which New York health officials evaluate PHS's performance came under attack as "slapdash, subjective and lenient." The state comptroller audited the Health Department's reviews of PHS's performance. One complaint was that PHS was allowed to preview audit-selected files to "fix" them just before the auditors gave them the once-over. When a mentally ill prisoner died in the prison ward at NYU Downtown Hospital, a PHS doctor and mental health workers went through the prisoners' medical files, "doctoring" the records where they had failed to doctor the patient. In another incident, a PHS doctor used correction fluid (which is unlawful) to change the date he had reviewed a prisoner's abnormal lab test result, to make it appear the review was done within the requisite 24 hours. At Rikers Island the rule that intake prisoners are to be given a physical examination within four hours of admission is repeatedly violated but dismissively overlooked by auditors, thus nullifying the important public health purpose of timely initial exams. One auditor said the only way she could keep a physician's assistant from altering selected prisoner medical charts was to get to work first, at 5:30 a.m. Since the tightening up of such "previews," PHS has received 22 failing grades, for which the company was penalized \$107,000, a drop in the proverbial bucket.

In an ominous sign of the audit tension, Dr. Bruce David, assistant commissioner with the Department of Health and Mental Hygiene, who monitored PHS as part of his \$165,514 per year job, quit and took a position as mental health director for Nassau County. Dr. David's "too-lenient" grading of PHS was one criticism of the comptroller's audit of the

Department's review process.

In January 2006, New York City health officials withheld \$71,000 in payments to PHS for failure to meet standards in 10 of 39 audit areas in the final quarter of 2005. Six of the areas, including untimely administration of medication to mental health and HIV+ prisoners, had been failed for three consecutive quarters. Also in January 2006, the Deputy Commissioner for New York City's jail health care program quit after only seven months on the job. Dr. Arthur Gualtieri left for "undisclosed personal reasons," but it was alleged that his resignation was due to his perception that prisoner health services (under PHS) suffered from a lack of leadership.

Tennessee

PHS isn't getting any breaks in its home state of Tennessee. The company is being sued by Memphis lawyer Archie Sanders III for the January 19, 2005 death of Davidson County Metro Jail prisoner Ricky Douglas, who was diabetic. Douglas died in his cell, on his stomach, with his tongue sticking out between his teeth, after PHS personnel allegedly made "critical errors" in his treatment (e.g., failing to

respond to his requests for medication). Because of slipshod medical records, PHS nurses allegedly "failed Ricky Douglas and did not provide him with anything close to medical care," according to the lawsuit. Sheriff Daron Hall said he had reviewed PHS's report and said, "No, it's not a concern." Yet he did order PHS to give their nurses additional training, which company officials said they were too busy to do.

Apparently it was also "not a concern" eight days before Douglas' death, when Metro Jail prisoner Paul Burton, 40, died after lapsing into a diabetic coma. PHS allegedly had failed to give him enough diabetic medicine, according to Nashville attorney David Raybin. In January 2005, PHS official Phil Burser told the *Tennessean*, "The personnel at the Davidson County Jail provided timely, effective and appropriate care."

Yet when prisoner Glen Lee checked into Nashville's Metro Jail in November 2005, he walked in unassisted. Three months later, after PHS allegedly denied him needed treatment, he was in a diabetic coma in the hospital for three weeks. Lee claimed that PHS not only didn't give him his insulin, they gave him an inappropri-

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ate diet. When his blood sugar hit 520 he went into shock. The American Diabetes Association is in touch with attorneys representing Burton and Douglas' families, in furthering the association's mission to ensure that diabetics receive proper care. Attorney Raybin may take Lee's case as well. One can only ask Sheriff Hall if three diabetic treatment failures in three months, two fatal, out of a jail population of 690, are "not a concern."

PHS was also named in a federal suit involving the August 14, 2005 death of James Patrick McCullar at the Metro Jail. McCullar, who committed suicide using his boot laces, was allegedly not adequately screened by a PHS nurse at intake; the nurse requested a mental health referral that McCullar never received. The suit is pending. See: *McCullar v. Prison Health Services, Inc.*, USDC MD TN, Case No. 3:06-cv-00786.

PHS's five-year contract with Metro went up for rebidding on June 30, 2005. Apparently medical care was now a concern to someone, because the Metro Jail dumped PHS and hired Correct Care Solutions of Nashville to replace the problem-plagued company.

South Carolina

PHS drove prisoner Antonio Richburg to suicide in May 2005 at the Richland County Jail. After going seven days without his medication, he wrote to his wife, "I need you to call down here and get on them for me." He hanged himself the next day.

Richburg's attorney said he had been mentally ill, and that "physician and court orders were not being followed." PHS spokesperson Stephany Snowden stated that PHS staff "are not professionally trained in the area of mental health." PHS has been named in six lawsuits in Richland County since 2003, three of which involved "questionable" prisoner deaths.

A rare coroner's inquest was convened, and Richland County Coroner Gary Watts looked into having criminal charges brought against PHS as a result of Richburg's death. A coroner's jury found that Richburg died "due to a lack of standard care by providers." Testimony revealed there were no jail records of diagnosed paranoid-schizophrenic Richburg receiving anti-psychotic or anti-depres-

sant medications in the seven days prior to his suicide, even though a probate court had ordered jail staff to follow a treatment plan developed by Just Care, Inc., a private company that provided mental health care to prisoners. Attorney Richard Harpootlian, who handled two earlier jail suicide cases that settled for over \$600,000, reportedly had arranged a partial settlement of \$500,000 for Richburg's widow, Tiffany. No criminal charges were filed in Richburg's death.

In September 2005, based upon the coroner's jury ruling, the Richland County Council unanimously terminated PHS due to the three prisoner deaths. Council Member Val Hutchinson called PHS's performance "unacceptable and inhumane." In March 2006, Richland County was negotiating a \$2.7 million annual contract with Correct Care Solutions, Inc. to replace PHS's \$1.9 million contract. PHS was given six months to pull out and its last day was March 17, 2006. Correct Care will provide 28 full-time medical staff, almost double the 15 staff members under PHS, to service the jail's 1,000 prisoners. In addition, the county will maintain its own nurse and an administrator at the jail. During PHS's tenure starting July 2001, the county paid \$7.5 million for medical and mental health care services.

Wyoming

The Wyoming Department of Corrections (WDOC) apparently wasn't convinced by Mike Rigby's report panning PHS in the May 2005 issue of *PLN*. Citing *PLN*'s article for PHS having received "some bad press", WDOC spokesperson Anne Cybulski-Sandlian said, "so have all of the private medical providers." In addition to hiring PHS for a \$10.5 million annual contract in May 2005 (effective July 1, 2005), WDOC employs Consultants in Correctional Care to visit WDOC every quarter and audit prison facilities based on health care and contractual standards. PHS replaced Correctional Medical Services, Inc., which in turn had replaced Wexford. Linda Burt of the Wyoming ACLU reported that the number of health care complaints remained unchanged under all three providers, and noted that both Wexford and PHS had been sued.

In October 2005, auditors reported that WDOC prisoners were continuing to receive "constitutionally adequate health care," notwithstanding complaints of delayed treatment due to the transition to PHS and the integration of its

record-keeping system with that of its predecessor. The report found, however, that 36% of incoming prisoners were not screened within the required 24-hour period. Also, in a sampling of seven hypertensive patients, a majority did not have adequate control of their high blood pressure. Subsequent quarterly audits in Feb. and July 2006 found that PHS's services had improved significantly. The company entered into a renegotiated \$14.2 million contract with WDOC in July 2006, a 35% increase over the initial contract amount. PHS claimed that it had lost \$600,000 in a single quarter under the first contract.

Parenthetically, two former PHS nurses alleged they were fired or forced to quit because they complained about inadequate staffing and training by the company. Karran Bedwell and Debra Long said standards of care declined after PHS took over. According to Long, an LPN, prisoners who signed up for sick call were seen within 48 hours only 20% of the time and medications were not dispensed in a timely manner. Bedwell raised concerns about training for new medical staff, stating, "One of the poorest things about [PHS] is when they hire someone they don't even orient them but put them right on the floor," adding, "That is really scary for someone who's never been in a prison before."

Lawsuits, Settlements and Jury Awards

PHS has been named in 788 federal lawsuits over the past five years, in addition to an unknown number of complaints filed in state courts. The company, however, considers such litigation a cost of doing business. "Inmates are one of the most litigious groups in society, and the vast majority of the suits that are filed against PHS are dismissed as baseless," said PHS spokesperson Martha Harbin. In cases where claims of gross medical neglect, malpractice and deliberate indifference filed by injured prisoners or their survivors are not "baseless," the company often settles under confidential terms. In addition to the lawsuits mentioned above, other recent cases involving PHS and other ASG subsidiaries include the following:

In December 2005, PHS settled a federal lawsuit in Ohio in which the company was accused of negligence. Booker Mitchell, 72, was pepper-sprayed and suffered a head injury during his arrest. Despite complaining about a severe

headache, fatigue and vision problems, PHS nurses at the Mahoning County Jail told him to rinse his eyes with water and did not contact a doctor. Mitchell, who had a history of high blood pressure, got progressively worse, was diagnosed with a cerebral hemorrhage after his family took him to a hospital, lapsed into a coma and died six months later. The case against the Youngstown police department, the sheriff's office and PHS settled for \$450,000. See: *Pennington v. City of Youngstown*, USDC ND OH, Case No. 4:02-cv-01343-PCE.

In New Jersey, Michael DiFelice, formerly incarcerated at the Gloucester County Jail, filed a Superior Court lawsuit in August 2006 against the county and PHS, the jail's medical provider. DiFelice claims he contracted a drug-resistant staph infection (MRSA) while held at the jail, and upon release infected his domestic partner. Similar lawsuits have been filed by over a dozen other former prisoners and jail guards.

On July 15, 2005 a federal jury in Albany, New York awarded \$782,988 to former prisoner Byron Lake, which included \$632,988 in punitive damages against EMSA Correctional Care, a subsidiary of ASG. The jury found that an EMSA employee had failed to properly treat Lake's undiagnosed heart attack when he was held at the Schenectady County Jail. Following the verdict the district court vacated the punitive damages and awarded \$138,336 in attorney fees and \$5,438.55 in costs to Lake. The case has been appealed to the Second Circuit. See: *Lake v. Schoharie County*, USDC ND NY, Case No. 9:01-cv-01284-DEW-DEP.

Patricia Ann Farrell, serving a five-month sentence at the Collier County Jail in Florida, filed a lawsuit on September 5, 2006 asking a federal judge to force the sheriff's office to let her leave the facility so she could undergo hip-replacement surgery for osteoarthritis, a painful degenerative disease. PHS, which provides medical care at the jail, gave her Tylenol instead of her prescription pain medication, and a PHS nurse reportedly told Farrell that her hip condition was not "life threatening." See: *Farrell v. Hunter*, USDC MD FL, Case No. 2:06-cv-00454-UA-SPC.

In August 2005, PHS agreed to pay \$350,000 to settle a lawsuit filed by the family of Ruth Hubbs, a 39-year-old prisoner who died at the Leon County Jail in Florida on May 16, 2003. An autopsy

indicated she had an excessive amount of Doxepin (an antidepressant) in her system, but was unable to determine if PHS staff had given her an overdose. According to the suit, PHS had a policy of rarely using a different medication that was safer but more expensive. Guards at the jail reported that PHS medical workers seemed to be unconcerned about Hubbs' condition prior to her death. Under the terms of the settlement PHS did not admit liability. Following another death at the jail in June 2003, PHS replaced some staff members at the facility and made other changes, including implementing a medical-grievance committee and a medical hotline for family members and friends of prisoners. See: *Travison v. Prison Health Services, Inc.*, USDC ND FL, Case No. 4:04-cv-00409-RH-WCS.

Most recently, in October 2006, the family of Robert Nichols, who died at the Chittenden Regional Correctional Facility in South Burlington, Vermont on February 5, 2005, filed suit in Rutland Superior Court, naming the state and PHS as defendants. The lawsuit claims that Nichols, who notified the jail staff he was suffering from heroin withdrawal, did not receive needed treatment. He was not seen by a PHS nurse for almost 16 hours. PHS had entered into a contract to provide medical care in Vermont's prisons shortly before Nichols died; in June 2005, a statewide advocacy group reported that Nichols' death could have been prevented had he received adequate medical care.

Internal Investigation, Stock Slide, Shareholder Suits

In March 2005, within one month of a damning three-part investigative series on PHS published in the *New York Times*, (which was reprinted with permission in the August, 2005 issue of *PLN*) parent company ASG's stock began a long, fairly steady decline with sudden, precipitous drops along the way [the *Times* also did a follow-up article on PHS's care at the Rikers Island Jail on June 10, 2005]. The series documented horrific cases of prisoner suicides, shoddy care to children in custody and prisoners dying after being denied treatment. Michael Catalano, ASG's CEO, called the story "unfair," asserting that it gave "no context, no perspective and completely failed to tell the real story of what it is like to provide health care in a correctional setting." Catalano also said the story had no effect on ASG's business. But with the loss of six contracts in 2005,

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earnings forecasts were lowered and the company's stock dropped accordingly.

In mid-March 2006, ASG shareholders headed for the exits again, taking the stock down 33% after the company announced lower-than-expected revenues. Concurrently, ASG disclosed that following an internal investigation into accounting irregularities at its prison pharmacy subsidiary, Secure Pharmacy Plus, the company would have to restate \$2.1 million in earnings from 2001-2004 and the first six months of 2005, and would refund \$3.6 million in overcharges to clients who weren't properly credited with discounts and rebates for returned pharmaceuticals. As a result of the Secure Pharmacy Plus investigation, Grant Bryson, head of Secure Pharmacy Plus, and PHS president Trey Hartman were fired on December 7 and 9, 2005, respectively.

ASG's stock has fallen from a high of almost \$30 a share in February 2005 to under \$12 in August 2006; it has since rebounded to \$13.62 a share as of October 12, 2006. Stock price does not necessarily correlate with a company's financial or operational health – private prison juggernaut CCA, for example, once traded as a penny stock after a series of management blunders. However, ASG's revenue continues to suffer as well; in August 2006 it was reported that the company's second quarter earnings plunged by 81% compared to the same period the previous year. ASG's net income fell to \$4.37 million for 2005, less than half of its profit in 2004.

Investors have taken notice of the company's less-than-stellar performance. At least four shareholder suits were filed against ASG between April and May, 2006. The lawsuits allege that company officials violated federal securities laws by making false or misleading statements that inflated the value of ASG's stock. Specifically, ASG was accused of failing to disclose that it was not charging its customers pursuant to the company's contracts, failing to properly credit customers with discounts and rebates, and inappropriately using reserve capital – claims primarily related to the company's internal investigation of subsidiary Secure Pharmacy Plus.

Nasdaq, the stock exchange where ASG is traded, has also taken notice.

After two of the company's directors quit in May 2006 following unsuccessful efforts to oust ASG chairman Michael Catalano, the Nasdaq National Market threatened to delist the company due to non-compliance with rules requiring a majority of independent directors. One of the ASG directors who left, Michael Gallagher, stated, "I no longer have confidence or faith in the leadership of the company." New directors were retained in June.

In the for-profit correctional health care industry, ASG (largely through PHS) holds 21% of the market while competitor CMS has 22%. As a result, competition has become intense and the lowest bid often wins the contract. For example, CMS underbid PHS by 10% in Maryland, by 14% in Idaho and by 21% in Indiana. Such contract losses for PHS have a direct impact on its profitability and stock performance.

While there are obviously huge difficulties in the execution of for-profit prison health care services, this writer believes that the underlying problem lies with the "low bidder wins" concept. As medical contractors, sheriffs and state DOCs are learning through lawsuits and court orders, pitting prisoners' health care against corporate profit margins is

inherently incompatible with the Eighth Amendment. Indeed, the health and wellbeing of prisoners are reduced to mere chattel in a bidding process that is based solely or primarily on the financial bottom line. ASG's shareholders may be bleeding due to a decline in the company's stock price, but prisoners are suffering far heavier losses, including their lives in some cases – and such losses are not tax deductible. However, it is not as if government provided medical care in prisons or jails is much better. However, when a prisoner dies of medical neglect due to government action, shareholders are not personally enriching themselves at the cost of human misery. ■

Sources: *Birmingham News*, *Tuscaloosa News*, *Mobile Register*, *Decatur Daily*, *Montgomery Advertiser*, *Tampa Tribune*, *Palm Beach Tribune*, *Palm Beach Post*, *WSEH Channel 2*, *Miami Herald Tribune*, *St. Petersburg Times*, *Orlando Sentinel*, www.gainesville.com, *Atlanta-Journal Constitution*, *Baltimore Sun*, *Baltimore Daily Record*, *New York Times*, *Daily Record*, *Tennessean*, *WVLT-TV*, *The State*, www.myrtlebeachonline.com, *Casper Star-Tribune*, *Business Week*, www.bizjournals.com, www.gwinnettdaily.com, *Naples News*.

Utah House of Refuge a House of Horrors

by Gary Hunter

A Utah "faith based" halfway house for probationers, jail releasees and homeless men, called the House of Refuge, turned out to be a house of horrors for those who lived there.

On February 2, 2006, state licensing officials shut down the church-operated shelter citing it for 13 different state violations. Robert Ferris and Steve Sandlin are pastors of the Central Christian Church in Salt Lake City. They also owned and operated Transmetron, an unlicensed telemarketing company which they ran out of the church basement. Transmetron phone lines were manned by House of Refuge residents, some of whom were paid as little as 28 cents per hour for their labor.

Some of the men living in the House of Refuge were homeless. Others were ordered there by judges or state agencies, including the Department of Corrections.

Joe Rupp was ordered into the pro-

gram by the court. "For the first three and a half weeks I was there, I believe I was making 58-cents an hour," he said.

Resident James Auston said, "My pay? I'm making \$1.28 an hour," working up to 50 hours per week.

House of Refuge residents were forced to sign contracts which stated that all their pay would be donated back to the program. Residents surviving the program for six months would get a "love offering," a partial refund on their "donated" wages. At least one resident, Leo Duran, was kicked out of the program just days before his six months were up.

"When he threw me out, I had to go back on the streets, live with my friends and start over," said Duran.

Auston said Pastor Steve would consistently "...stand up and threaten, 'We'll just put you back in jail, contact your probation officer.' He threatens us with jail all the time."

From the Editor

by Paul Wright

By now subscribers should have received the annual PLN matching grant fundraiser. I hope that those who can afford to make a donation do so. While there are many worthy causes out there I think that PLN is one of the few where your activist dollar will get the biggest bang for the buck.

We will receive up to \$15,000 in a matching grant from a PLN supporter, dollar for dollar, for all donations made between now and January 31, 2007. Please help us receive the entire amount. We will report our progress in the next few issues of *PLN*. Your support, above and beyond the amount PLN receives from subscriptions and advertising is what helps us continue publishing and supports our advocacy on behalf of prisoners around the country.

That advocacy includes events like my attending the National Lawyers Guild convention in Austin, Texas in late October where I gave a presentation on the rights of disabled prisoners and moderated a workshop on the issue of sexual assault of prisoners. I am also the national jailhouse lawyer co-vice president of the NLG. *PLN* columnist Mumia Abu Jamal is the other. One of our goals is not just to inform people about the plight of prisoners in the United States but to get them to do something about it.

You can flip through the pages of this issue of *PLN* or any other and see that we are covering issues and reporting news no one else. If *PLN* stopped publishing tomorrow, where would you get this high quality and quantity of prison and jail related news, regardless of the price. We have not raised *PLN*'s subscription rate in a number of years, despite rising printing and postage costs, while expanding the size of the magazine. If you think an independent penal press is worth supporting, please send a donation to PLN to support our work.

On October 16, 1006, New York criminal defense attorney Lynne Stewart was sentenced to 28 months in federal prison for violating federal prison rules by issuing a press release that her client, a political prisoner from Egypt, did not support a ceasefire in that country. While much attention has been given to the fact that the government blithely violates the attorney client privilege of prisoners it dislikes, the larger issue of why any pris-

oner shouldn't be able to speak directly to the press is ignored. Her prosecution is obviously an attack on the attorneys and advocates who represent political prisoners. The government had sought a sentence of 30 years against Stewart, 67. She is free on bail while appealing her sentence.

A few days before this president Bush signed legislation allowing the torture of military prisoners and giving total immunity from suit to the military and CIA torturers who commit these crimes

against humanity. Abuse and torture are something with which American prisoners are all too familiar. As well as the relative impunity with which these acts are carried out. *PLN* has consistently made the connection between the abuse of prisoners at Guantanamo and Abu Ghraib and what happens in American prisons and jails.

As the holidays approach, I hope you will consider a gift subscription of *PLN* or some of the books we distribute as gifts for your friends and family. Enjoy this issue. ■

Wisconsin Halfway House Overbills BOP; Fired Whistle blower Settles For \$435,000

by John E. Dannenberg

Federal jurors found that Rock Valley Community Programs (RVCP) in Janesville, Wisconsin and its chief executive officer, Irwin McHugh, had submitted false claims for reimbursement to the Federal Bureau of Prisons (BOP). The jury also found that the whistleblower reporting the fraud had been wrongfully terminated thereafter. A settlement was reached totaling \$500,000 for both the fraud and the wrongful termination.

RVCP is a 75-bed halfway house providing drug abuse treatment programs to state and federal offenders and has been paid over \$300,000 annually by BOP. The story broke when RVCP employee Nancy Gilligan-O'Brien refused to sign bogus claims paying for alleged work supervision that she had never performed. Gilligan-O'Brien had been employed by RVCP since 1990, and was their director of outpatient and clinical services. In addition to the billing fraud, Gilligan-O'Brien charged that RVCP didn't have adequate staff to meet Wisconsin certification for residential treatment services, a deficiency validated in June 2006 by U.S.D.C. Judge John Shabaz. In April 2004, she asked for official investigations. One month after Gilligan-O'Brien's whistle blowing, McHugh fired her for being publicly critical of RVCP's programs.

Gilligan-O'Brien sued in a qui tam action accusing RVCP and McHugh of knowingly making false claims in violation of 31 U.S.C. § 3729(a)(1) and (2). She also claimed her firing was in retaliation

for whistle blowing, protected under both 31 U.S.C. § 3730(h) and Wisconsin law. Defendants' motion for summary judgment was denied and the case went to trial to resolve disputed facts. In April 2006, a jury found that RVCP did knowingly present false/fraudulent claims to the BOP; that McHugh also did so; that RVCP used false records to gain fraudulent payment; that McHugh also did so; but that Gilligan O'Brien's conduct was not a "motivating factor" in her termination. Nonetheless, the jury found that she was wrongfully discharged "in violation of an important Wisconsin public policy," a judicial exception to the state's employment at-will doctrine that was carved out by the Wisconsin Supreme Court in *Brockmeyer v. Dun & Bradstreet*, 335 N.W. 2d 834 (Wis. 1983).

It was this last finding that led to a damages settlement for Gilligan-O'Brien. RVCP's insurer, West Bend Mutual Insurance, agreed to pay her \$407,000 to settle her wrongful discharge claim. In addition, West Bend paid \$92,500 to settle the false claims act violation. Of this, 70% went to the U.S. Government and 30% to Gilligan-O'Brien. Gilligan-O'Brien was represented by Janesville attorney Julie Lewis of Nowlan & Mouat, LLP. See: *United States ex rel Nancy Gilligan-O'Brien v. Rock Valley Community Programs, Inc. and Irwin McHugh*, U.S.D.C. (W.D. Wis.), Case No. 04-C-975-S, Memorandum and Order (March 2006) and Special Verdict (April 2006). ■

Other source: *Madison Gazette*.

Florida's Civil Commitment Center Under Funded and Out-of-Control

by David M. Reutter

When first created in 1999, Florida's Civil Commitment Center (FCCC) was hyped as a place to house "sexually violent predators" for protection of the public while providing sex offender treatment after completion of criminal sanctions.

Instead, FCCC has turned into a facility that treats less than one-third of its residents while releasing those who receive no treatment. To date, not one resident has completed the treatment regimen, but over 200 formerly-incarcerated sex offenders have been released from FCCC. A state audit found that FCCC failed to provide a therapeutic atmosphere; drug and alcohol use was routine, sex between staff and residents was not uncommon, pornography was available, and a racially-charged tension existed.

FCCC was created due to a 1998 law commonly referred to as the Jimmy Ryce Act, in memory of a 9-year-old Miami-Dade County boy who was kidnapped at gunpoint, sexually assaulted, murdered and buried inside several large planters by a handyman. The law allows for persons deemed "sexually violent predators" to be confined indefinitely beyond the expiration of their criminal sentence.

Initially, FCCC was located within a former drug treatment center adjacent to Martin Correctional Institution. In June 2000, FCCC resident Steve Whitsett escaped from FCCC when a friend picked him up in the recreation

yard with a helicopter. They crashed the helicopter in a nearby orange grove and were captured in a canal the next day with handguns and over \$10,000 in cash (See: *PLN*, Nov. 2000, p.7). Ironically, a jury subsequently found Whitsett not to meet the criteria for a sexually violent predator.

In 2000, FCCC was moved to a former prison adjacent to DeSoto Correctional Institution in Arcadia. Following its plan to privatize some of its prison operations, the state, effective January 1, 2003, granted a three-year, \$45 million contract to Liberty Behavioral Health Corporation (Liberty) to run FCCC. Liberty was the only bidder for the contract, and from 1998 to mid-2006 Florida taxpayers have spent \$150 million to operate FCCC. Liberty lost the contract in June 2006 and the 545-bed facility is now being operated by the GEO Group (formerly Wackenhut).

Anatomy of Commitment

In 1998 the Florida legislature found "that a small but extremely dangerous number of sexually violent predators exist who do not have a mental disease or defect," and enacted the Jimmy Ryce Act "to provide short-term treatment to individuals with serious mental disorders and then return them to the community."

To accomplish this task, six people review the case files of 2,000 or more prisoners per year to determine if they

should be held under the Ryce Act. Using a prisoner's criminal record, court cases, medical and mental health files, victim statements, police reports and other available information, the reviewers make a subjective decision about which prisoners are "likely" to commit new sex crimes.

"We don't have some magic formula where we plug in information" to reach the decision, said Greg Venz, former FCCC director and now special counsel for Florida's Department of Children & Families (DCF). The qualifications of psychologists who conduct face-to-face interviews with prisoners subject to civil commitment have been questioned. There are no licensing or accreditation requirements.

"My view is that there must be some type of licensing requirement and more specialized training. What Florida has right now is well below the threshold for this highly specialized field," said Natalie Brown, a former Florida evaluator who now screens offenders for programs in Washington and Missouri.

Once an offender is deemed "likely" to re-offend, they are transported to FCCC to await a jury trial to determine if they are a sexually violent predator. The trial to make this determination is legally required to commence within 30 days, but the average wait is now 2½ years. Some offenders have reportedly been awaiting trial for up to seven years. While 825 men

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have been held at FCCC, another 600 who were reviewed were found unqualified for the Ryce Act but later re-offended.

A Therapeutic Atmosphere?

For the most part, transfers of state prisoners to FCCC after they complete their sentences are like any other inter-prison transfer. Upon arrival, the “resident” is confronted with a compound surrounded by razor wire-draped fences and patrolled by armed Department of Corrections guards. The typical dormitory lay-out with central chow-hall and laundry facilities are present, and everyone uses the same recreation yard. FCCC is, after all, a “converted” state prison. The only true conversion, however, is in the legal classification of the person being involuntarily held there.

The atmosphere at FCCC is a stark difference from Florida’s tightly controlled, punitive prison system. Residents wear their own clothes, wear their hair and facial grooming as they please, are allowed to possess cash, and can have packages with TV’s, radios and food sent in.

Drug and alcohol abuse is rampant. Like most prisons, the alcohol is home-made while most drugs are brought in by staff. That picture was clearly spelled out by interviews conducted by DCF Inspector General Auditors of FCCC residents. Of seven residents interviewed, only one refused to inform.

Other residents said that homemade wine, or “buck”, was regularly made in the kitchen using five-gallon oil barrels. One auditor was surprised that FCCC staffers made no effort to conceal the activity despite knowing that an inspection was scheduled.

When DCF officials visited FCCC on June 23, 2005, a drunken fight ensued. The auditors interviewed one of the combatants. “His eyes were bloodshot, he smelled of alcohol, and admitted he was still drunk and could not talk at that time,” the auditor’s report says. “He was badly beaten and sustained a broken nose.” A staff member who witnessed the fight said the two men “had been drinking all night.”

That came as no surprise to investigators. “All residents and staff interviewed admitted ‘everyone’ knows the residents drink and consume homemade alcohol,

called ‘buck’”, reads a February 2005 DCF report. “Two residents during the investigative interview admitted being intoxicated at the time.”

Residents also said you could smell marijuana on the compound all the time. One stated that there was “more weed in this place than I have ever seen in my life.” That resident named Coach Wayne Bythewood as the drug “kingpin” of the staff, saying he brought in drugs and small bottles of liquor to sell to the residents.

Several other residents named staff members who trafficked drugs at FCCC, and said they also smuggled in cell phones. Allegedly, these employees worked with a few select residents to sell drugs – one for the whites, one for the blacks and one for the Hispanics.

The drug trafficking was easily accomplished due to the large amounts of cash on the compound. A resident claimed “there is probably \$10,000 in cash right now” at the facility. Much of it came through the mail by tricking the “mail lady” with a slight of hand, dropping the cash where she could not see it while holding the letter high once opened. Another resident then scoops up the cash. More cash and contraband enters FCCC during family visits.

The greatest mail smuggling job came over the weekend leading up to December 4-5, 2004. That was the weekend when the residents had a cook-in. They smuggled in uncooked chicken, hamburger meat, hot dogs, buns and French fries. After cooking the food in the dorm they sold or gave it away to residents and staff in exchange for cash, tobacco and volunteer labor.

Upon reporting the cook-in to Facility Safety Manager James Staunton, FCCC’s investigator, Ken Dudding, was told to “let it go” in order to avoid a confrontation with residents. That statement coincided with the overall philosophy at FCCC. A staffer told investigators that “as long as the residents were not causing problems,” staff would ignore any inappropriate behavior or rule violations. “We’d rather have them happy than their bad attitude.”

Child pornography has been sent into FCCC through the mail, which has resulted in two residents being indicted on federal charges. Sex between residents and staff is widespread. “Most of the turnover of staff is due to female staff having sex with residents,” says a Liberty memo. That

must keep residents happy, indeed.

Same-Old Same-Old

The willingness of staff to overlook or even cover-up rule violations and crimes worried Dudding, who predicted, “the danger ... will eventually cause the death or serious injury of a staff or resident.” That forecast, made in April 2005, would come true twice in the next eight months. But considering that Dudding had investigated over 100 violent episodes during his two-month stint as FCCC’s investigator, his prediction was hardly prescient.

In October 2004, FCCC resident Daniel E. Donnelly, 38, was in his dorm watching TV while eating a bag of chips. Alfredo Roebuck, 48, then questioned Donnelly about the bag of chips he was owed. When Donnelly refused to “pay up”, Roebuck assaulted him while the lone FCCC staff member present stood by telling Roebuck to stop. Donnelly, who was described as a “frail resident on a lot of medication,” died the next day of head injuries. Donnelly was a rare case; he had committed himself to FCCC after completing his probationary criminal sentence.

Then in December 2004, a basketball rolled into resident George Williams’ flower garden outside his dorm. When Jorge Delgado, 38, went to get the ball, he deliberately “trampled [Williams’] flowers”. An argument and fight ensued. On his way to get a rock to defend himself, Delgado saw “an ice pick ... on the ground.” He then stabbed Williams seven times.

That incident was not the first stabbing Delgado had been involved in at FCCC. In June 2004 he had stabbed another resident 12 times. He avoided criminal charges because staff ordered him to clean up the blood and crime scene.

“It’s the same-old same-old, nothing’s changed. In fact, it’s getting worse,” said Dudding. “My point is, this [Delgado] is a guy that goes around stabbing people – and he can find a knife lying around anywhere.”

Sit-In Protest

By November 2004, a small group of FCCC’s residents was disgusted with the lack of sex offender treatment and medical care, as well as the poor food in the chow hall. They reported worms in their food. They also complained that sewage backed up in the toilets and drains around the facility. Rather than admit FCCC was an old, deteriorating prison in need

of repairs, administrators used the old swan song of prison officials, claiming the residents were flushing blankets and sheets down the commodes.

Resident Jody Colzin experienced poor medical care after he received a broken jaw in a fight. His jaw was wired into place. "The wires broke and popped into his lip," said Nancy Morois, president of Family and Friends of Committed Victims, an advocacy group for FCCC residents. "He asked to be taken to the emergency room." Instead, a Liberty staff supervisor told him, "'You're not going nowhere.' He took old, rusty pliers and cut the wires himself," said Morois.

Other complaints include one resident being given heart medication that would have conflicted with his prescription for his high blood pressure. Despite arguing it was the wrong medication, an FCCC nurse ordered him to take it anyway. Another resident complained of shortness of breath, but nothing was done until he passed out in the kitchen. A subsequent examination at DeSoto Memorial Hospital discovered a loose electrode on the resident's pacemaker.

The culmination of these problems caused 30 residents to begin a sit-in. They moved all of their property and bedding into the recreation yard and refused to go into the dorms. The peaceful protest came to a crashing halt 89 days later.

On February 9, 2005, FCCC was raided by over 300 guards from the Florida Department of Corrections (FDOC). The raid was hyped by officials as necessary to enforce orders from the state Fire Marshall, who required FCCC to comply with the same regulations as state prisons because of the lockdown atmosphere. That could change if FCCC removed the locks on doors inside the dorms, which FCCC officials refused to do.

The Fire Marshall ordered all plugs in resident cells to be covered and the extension cords that were strung throughout the dorms removed. Some residents confronted the guards with broom sticks; the guards then used chemical agents and physical force to regain control.

Residents claim the guards took educational and religious materials, clothes, family pictures and TV's without providing property inventory slips. Some residents were simply told to throw their property in the trash. "My personal possessions are the only difference between making this a clinical setting and a punitive setting and a prison," said resident

Mark Ritchie, chairman of FCCC's residents' commission. The raid also netted eight gallons of buck. It further gained FDOC a \$2 million payment from DCF to bring in the guards to conduct the raid.

Cover Up

After two months on the job as FCCC's investigator, Dudding resigned and filed a whistleblower complaint, which spurred an audit of FCCC. Nearly all of Dudding's allegations were found to be true.

One of his claims was that staff would cover up critical incidents to make it appear they never happened. The primary perpetrators were FCCC Facility Safety Director Tiffany Lane and Facility Safety Manager James Staunton.

The audit "demonstrated how Ms. Lane either failed to document, or destroyed, documents she felt were unfavorable toward her or certain staff members, including her own mother, whom she supervised," wrote investigator Kelly Summers. In fact, Lane hired and supervised not only her mother, but a sister, two cousins, another relative and two high school friends.

In June 2003, a resident climbed on top of the roof of the mailroom. Lane had several opportunities to stop him but made no effort, according to staff witnesses. Lane and her best friend from high school, Michelle Allen, viewed the security tapes of the incident. Afterwards, the tapes could not be located by administrative staff.

In April 2004, another resident climbed onto the roof of a building. This time, Lane's mother made no attempt to stop the resident, who was supposed to be on 1:1 status, which is constant supervision in the resident's cell. Staunton had failed to promptly enforce a doctor's 1:1 status order, providing the resident – who had threatened to burn a female staff member – time to climb onto the roof. Once on the roof, Lane, Staunton and other "security" staff confronted the resident, who

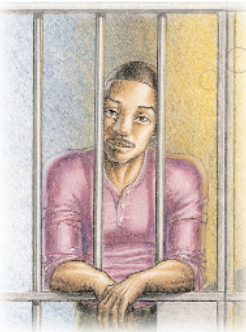
warned them to back off or he would jump.

Staff members rushed the resident anyway, and he jumped. When Dudding went to retrieve the videotape of the incident, Lane told him to "get with her later." Five days later he was given the tapes, which had been erased. Staunton justified the decision to rush the resident because he was supposedly trying to eat a nail and set himself on fire. Somehow, a video from a handheld camcorder survived. It showed the resident doing nothing other than attempting to light a cigarette. Auditors also uncovered Staunton's alteration of times on incident reports. Lane failed to even write a report for 49 days, and only did so because investigators ordered her to.

Finally, the audit revealed how staffers who complained of misconduct or mismanagement by Lane or members of her clique were given demotions and suspensions, or were terminated. Lane's conduct finally caught up to her on August 20, 2004, when she was fired after she tried to move residents "without sufficient resources to accomplish the move." Her

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termination letter said the move resulted in “a hostile and rebellious environment ... which took over 20 hours to diffuse.”

They’ve Thrown Away the Key

Since its inception, not one resident has completed the treatment protocol at FCCC. In February 2006, FCCC held about 520 residents. From its inception in 1999, 825 men have been placed at FCCC to await civil commitment jury trials. Of the 300 men released during that time, only five were set free through plea agreements with prosecutors while the remainder were found to not be a danger to the public.

What about the current 520 residents? Most have no realistic hope for release. The blame lies in the lack of “short-term treatment” envisioned in the Ryce Act’s preamble. The fault lies with legislators. What must not be forgotten is that the Florida legislature intended for FCCC “to provide short-term treatment” of “sexually violent predators” and then “return them to the community.” While that certainly sounds like a worthy goal, in reality the legislature has failed to provide the financial backing needed to accomplish the goals of the Jimmy Ryce Act. But it also ignores why, if that is the stated goal, sex offender treatment is not being provided within the Department of Corrections before sex offenders are released.

In its first year, DCF estimated it would cost \$27 million annually to operate FCCC. The legislature provided \$17 million. Each subsequent year DCF requested more funding, seeking an additional \$8.6 million in 2002 to “meet the public safety goal of the Jimmy Ryce Act.” Legislators responded with silence. In 2003, DCF sought a \$1 million increase because “the need for new funding to operate the facility in a safe manner has become quite critical.” Once again, the legislature ignored the request.

It was only after the February 2005 raid of FCCC that the legislature responded with a \$2.6 million allotment. That was only \$600,000 more than the cost of the raid, however, so funding to improve operations at FCCC was minimally affected. Florida spends less than half as much at FCCC as it does at other state mental health facilities.

Further, the “short-term treatment”

at FCCC is so short that few even receive it. In its contract with Liberty, DCF stipulated that funds were provided to treat only 150 residents. Hence, the other 370 have nothing to do but wait for additional funding. And wait, and wait.

The minimal treatment that is provided is inadequate. “It’s common for group sessions not to be held because of staff training, staff turnover, or because it’s too hot in the classroom,” said Dean Cauley, a former FCCC Mental Health Counselor.

The treatment regimen is supposed to consist of four stages: (1) reception and custody; (2) introduction to treatment-assessment and evaluation; (3) intermediate phases one through four; and (4) community treatment. These are no alternatives to the program. The fourth phase does not exist, which spawned a class-action lawsuit challenging the failure to provide treatment. See: *PLN*, Nov. 2004, p.35. Other Florida mental health facilities are required to provide “adequate care,” but in February 2001, DCF exempted FCCC from complying with that rule.

Many FCCC residents are opting to not participate in treatment on the advice of their attorneys or of their own accord. “A lot of guys that stay in treatment have been there for four or five years. For what? There ain’t no guarantee they’re going to get out,” said resident Johnny Frazier.

Resident Doug Carlin, 50, learned just that in August 2005. Carlin is the first “graduate” of FCCC. Three psychologists testified he had gone as far as possible in his treatment and was ready to be released to continue with outpatient sex offender care. Duval County Chief Judge Donald Moran disagreed, stating, “while ... Douglas W. Carlin has indeed made commendable progress, the evidence is clear that secure confinement continues to be necessary as he continues with his treatment program.” The judge’s order means Carlin will continue to be indefinitely civilly committed for the 1983 rape of a Jacksonville woman.

Medical and Mental Health Care Lacking, Too

Beyond the lack of meaningful sex offender treatment, medical and mental health care at FCCC has continued to be substandard. Resident Ernest Contrillo, 52, had to have his left arm amputated in 2005 due to a gangrene infection that resulted after he repeatedly mutilated him-

self. He then spent ten days in an outside hospital because FCCC staff failed to keep him on antibiotics. According to a June 19, 2006 article in the *Miami Herald*, a four-month review of internal records, reports and court cases revealed a startling level of medical incompetence. Drugs were reportedly dispensed without doctors’ approval. One resident languished in the infirmary for days; mold grew in the urine in his unemptied bedpan. Nurses were threatened and intimidated by residents who demanded medications. “The medical care is a mess because they don’t want to spend the money on proper care,” said Beverly Babb, a former FCCC nurse who quit in 2004.

The *Herald* found that healthcare at FCCC was compromised by inadequate record keeping, failure to provide basic checkups, delays in treatment, improper use of solitary confinement for mentally ill residents, and misuse (or no use) of certain medications. Only three of 23 residents’ medical records that were examined met state standards. Lacking additional money from the state, Liberty diverted funds from its already underfunded sex offender treatment program – its core mission – to pay for mental health care. Residents with serious mental illnesses, including Joseph Myers, 32, who has a history of suicide attempts and hearing voices, have received minimal treatment consisting of monthly visits from a contract psychiatrist. “This is an asylum-era institution that has no place in this century,” said Douglas Shadle, a psychiatrist who quit his position at FCCC because of conditions at the facility.

The Future of Civil Commitment in Florida

The landscape for FCCC has no real hope of changing anytime soon. “But, like, I mean, this is a group of people that are the sickest of the sick,” said Florida Governor Jeb Bush. “They are truly perverted and not curable. These are grotesque crimes. They should just be put away ... imprisoned forever. That would solve this problem.” As Bush proposed only a paltry \$58,000 increase in FCCC’s 2006-07 budget, he’s doing his part to ensure that residents are confined indefinitely without needed treatment. Which has been the pattern nationally since Washington started its civil commitment program in 1990.

The U.S. Supreme Court, in *Kansas*

v. *Hendricks* (1997), upheld civil commitment of sex offenders provided the intent is to provide treatment – not impose punishment. Treatment and eventual release, however, is not what the state, or politicians, want.

“It is political suicide for a legislator to suggest that some of those laws don’t work and they’re a waste of public money,” said John Q. Lafond, editor of the book *Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy*.

Critics have pointed out that FCCC residents may choose to avoid treatment without punitive repercussions due to a loophole in the Ryce Act. The whole act is cited as being ineffectual. “It’s, in effect, the legislature practicing medicine or practicing psychology without a license,” said Dr. Fred Berlin, a psychologist and psychiatrist who founded the sexual disorders clinic at John Hopkins University in Baltimore.

Those same critics question why treatment for sex offenders is not available in prison, a place where treatment can be required in the face of disciplinary action. For two decades, Florida pioneered treating sexual offenders in prison with what was known as the Mentally Disordered Sex Offender Program. When the program was running, prisoners received 20 to 30 hours a week of intensive therapy. The program was cut to save taxpayers \$7.3 million a year after adjusting for inflation – or less than a third of what it now costs to treat offenders beyond their prison sentences at FCCC.

Even FCCC doctors see legal problems with civil commitment. “I think it’s a constitutional issue,” said Dr. Douglas Shandle, a Punta Gorda psychiatrist familiar with FCCC. “You have people in a civil facility without the full range of psychiatric services, and without them, they can’t get out.”

With the political strength of today’s prison industrial complex, one can not help but wonder when the government will start extending civil commitment to other “violent offenders” who have completed their sentences.

“They have essentially locked them up and thrown away the key,” said Alice K. Nelson, an attorney in the Gainesville Office of Southern Legal Counsel. Which is apparently the whole point behind civil commitment; just ask Gov. Bush and the Florida legislature.

Civil Commitment Update

During the 2006 spring session, state lawmakers proposed to speed up civil commitment trials by limiting continuances to one lasting 120 days. They also hope to earmark more money to provide additional prosecutors and public defenders to handle such trials. The state, further, plans to create a database of mental-health doctors specializing in sexual offenders to testify at trials. No money, however, was allotted to improve the sex offender treatment program at FCCC. DCF’s secretary, Lucy Hadi, said the program is properly funded. “In terms of priorities, this would not be one that would ask for additional funding,” she testified at a Florida House hearing.

A major change took place at FCCC in June 2006 when it was announced that Liberty was being booted by the state in favor of another private operator. Boca Raton-based GEO Group, formerly Wackenhut, and its subsidiary GEO Care, Inc., will run the facility from July 2, 2006 to January 2007 for \$7.7 million. DCF later entered into a long-term contract with the company to operate FCCC until 2012. That contract includes the construction by GEO of a \$60 million, 660-bed civil commitment treatment facility within the next two years (Liberty filed suit after the state initially requested bids to build and operate a new facility, alleging bid-rigging; the suit has since been resolved). GEO says it will design a new treatment program that is “outcome-based” rather than time-based; the company has agreed to retain 182 former Liberty employees on an interim basis. Upon losing its contract to run FCCC, Liberty lashed out, claiming it was made into a scapegoat due to failures by the state. Liberty Vice president Sue Nayda stated that DCF had “abdicated its responsibilities to establish formal, fundamental administrative rules, regulations or standards to govern the program” at FCCC, and said the problems at the facility were due to “a legacy of [DCF’s] own poor decisions.”

Regardless of whether Liberty or the state is more at fault for the deplorable situation at FCCC, the fact remains that hundreds of offenders are languishing at the civil commitment facility for sex crimes they might commit in the future, without even minimal sex offender, medical or mental health treatment, under substandard conditions. “Anytime offenders are put in the position where they can pretend to have the moral high ground, then we have done

something very stupid,” said Don Ryce, the father of Jimmy Ryce, whose 1995 abduction and murder led to the Jimmy Ryce Act and, by extension, the establishment of FCCC. ■

Sources: Florida Department of Children & Families, Inspector General Investigation 2004-0043, available at: <http://www.dcf.state.fl.us/admin/lgl/publications/investigations/2004-0043.pdf>. Miami Herald, News Press, Sun Herald, St. Petersburg Times, Florida Times-Union, Associated Press, News Journal, Talkleft.com.

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California Guard Murdered By Prisoner; Investigative Reports Blame Gross Staff Incompetence

by Marvin Mentor

A prison guard at the California Institution for Men (CIM) at Chino was stabbed to death in the Sycamore Hall housing unit on January 10, 2005 by an East Coast Crips gang-affiliated prisoner who had just begun a 75-year-to-life “three-strikes” enhanced sentence for the attempted murder of a Los Angeles peace officer. This was the first murder of a guard by a state prisoner in California in twenty years. All 33 California prisons (and many county jails) were locked down for one day; Governor Schwarzenegger ordered Capitol flags lowered to half mast.

Guard Manuel A. Gonzalez, Jr., 43, died from three stab wounds to his chest and abdomen that were allegedly inflicted by Jon Blaylock, 35. Using a prison-made weapon, Blaylock was allegedly assisted by fellow prisoners Keith White and Henry Riley when he attacked Gonzalez from behind. Gonzalez was not wearing a protective vest because CIM had received only 352 of its order for 900 of the \$500 vests; none were issued pending receipt of the balance. However, it is uncertain whether a vest would have saved Gonzalez’s life. Blaylock is now fighting for his own life: San Bernardino Co. District Attorney Michael Ramos is seeking the death penalty for Gonzalez’s murder.

Four Inquiry Boards Convened

Four formal inquiry boards were convened to investigate the killing. Separate reports were issued by the San Bernardino County Sheriff, the California Office of Inspector General [a legislative watchdog agency for prisons], the California Department of Corrections and Rehabilitation (CDCR), and by a national panel of experts appointed by former Corrections Secretary Roderick Hickman. The latter panel was chaired by New York DOC Commissioner Glenn S. Goord.

One area of inquiry raised by officials with California’s prison guards union (CCPOA) was why none of the protective vests were issued until the entire purchase order had been filled. CIM Warden Lori DiCarlo indicated it was a fairness issue raised by the union itself, i.e., who should be favored if only some staff could be outfitted with vests?

A second concern lay with the fact that Blaylock was a maximum-security (Level IV) prisoner who was being held at a Level III Reception Center until his custody placement was resolved. Blaylock claimed to have enemies at Corcoran State Prison where he was initially slated to go, and begged off his earlier transfer. He reportedly had medical and mental conditions (including suicide attempts) that required special placement. Blaylock was hoping to go to the California Medical Facility, a Level III prison. Meanwhile he remained at CIM for seven months, where his security restrictions were lower than the maximum security level expected for someone with his criminal history and known assaultive behavior.

Guards Are Safe – Prisoners Are Not

CCPOA President Mike Jiminez blamed Gonzalez’s slaying on a “prisoner-coddling” culture allegedly instilled by former CDCR Secretary Hickman that compromised the workplace safety of guards. Indeed, on May 6, 2006, Michael Watson, a mentally unstable prisoner at New Folsom (Sacramento) facility who was unhappy over losing his job in the kitchen, took guard Sheila Mitchell hostage for 10 hours using a prison-made knife (the incident ended peacefully through negotiations). But statistically, California guards have suffered far fewer workplace homicides than have other classes of workers. With one murder in 20 years, the CDCR’s average annual workplace homicide rate computes to about 0.25 deaths per year per 100,000 guards. This compares favorably with taxicab drivers (26.9 homicides per 100,000 drivers/yr.), detectives (5.0) and justice/public-order workers (3.4). The average rate for CDCR guards is 1/3 that for workers in all professions (0.7), according to the National Institute for Occupational Safety and Health’s 1995 report, No. 93-109.

To be sure, prisoners have a much greater “on the job” homicide risk. For example, 50 prisoners were shot to death by CDCR guards from 1986 to 2004, some of which were reported as staged “bloodsport” fights. Only one of those

shootings involved an escape. Other prisoners have died after altercations with guards, including being pepper sprayed. And according to findings of fact in *Plata v. Schwarzenegger*, a class action lawsuit over health care in CDCR facilities, on average, a California prisoner needlessly dies every six to seven days due to grossly deficient medical treatment [See: *PLN*, Mar. 2006, pp.1-9].

No guards did any time for these killings. No special commissions were convened. The respective governors at the time didn’t concern themselves with dozens of prisoners’ deaths. But when New Folsom (Level IV) prisoner Mathew Ormsby stripped a protective vest off a guard in March 2004 in an attempted stabbing that only resulted in “minor injuries,” he was sentenced to 89-years-to-life. On November 30, 2004, a guard at New Folsom fatally shot prisoner Wade Shiflett in the back while Shiflett was stabbing another prisoner on “B” yard. And on August 27, 2004, California Men’s Colony prisoner Anthony Brown stopped breathing two hours after being pepper-sprayed by a guard he had elbowed.

However, one thing is certain. The results of the investigations into Gonzalez’s murder will be closely watched by his surviving family members. Their attorneys, John A. Ferrone and Michael Peacock, have already filed suit against CIM officials and CDCR, alleging misconduct in failing to provide adequate safety for Gonzalez. During a post-murder search of Sycamore Hall, officials discovered 35 “stabbing and slashing instruments,” some rusted with age and secreted in toilets and traps. Within days after Gonzalez’s death, the 352 protective vests held in the CIM warehouse were quietly issued. They had been in storage for over 4 months.

Reports Reveal Failed Leadership

Two initial investigative reports on Gonzalez’s January 10, 2005 murder, which revealed failed leadership, resulted in CIM Warden Lori DiCarlo and two guards being placed on administrative leave by then-CDCR Secretary Hickman. Further disciplinary actions are expected.

Hickman's initial findings uncovered serious management deficiencies. First, the alleged killer, Jon Blaylock, was not placed in proper high level custody during his seven months at Chino. Blaylock's history of assaulting staff and others, while known to the prison's classification committee, was essentially ignored in their four reviews. Blaylock, in and out of prison since 1990 and recently re-incarcerated for the attempted murder of a Los Angeles peace officer, had a classification score of 376 points (only 52 points are needed to require maximum security [Level IV] placement). With documented mental health problems, Blaylock had over twenty citations for violence to staff and other prisoners, including possession and use of weapons.

Nonetheless he was placed in the general population, which put him in daily open contact with staff and prisoners. He stabbed a prisoner on July 31, 2004, but was returned to the general population on September 22 of that year.

CIM staff did not tighten security after a riot and series of stabbings between December 6, 2004 and January 9, 2005. In response to a December 28 stabbing, Blaylock, a reputed "shot caller" for black prisoners, told guards that prisoners blamed staff for permitting the attack and wanted to "get" the responsible guards. No warden-level review of this threat was ever conducted.

Further, the murdered guard, Manuel Gonzalez, routinely let Blaylock out of his cell to move on the tier unsupervised. On the day he was killed, Gonzalez violated procedures by releasing Blaylock from his cell while leaving the grill gate and front door open. That was when Blaylock attacked him. Such violations during Gonzalez's second watch period were reportedly common.

The Inspector General Sums Things Up

A March 16, 2005 report by the State Inspector General revealed lax inventory controls that permitted prisoners easy access to tools with which to manufacture weapons. Daily Tool Inventory Records were obviously falsified as having been checked off during a 20-day period when the tools had earlier been seized as evidence. Check-boxes on Tool Inventory forms were suspiciously signed by the same pen, appearing to have been done after-the-fact by one person. Facility disrepair and poor building maintenance

provided prisoners with a ready supply of raw materials for making weapons. The IG's inspection found "unsecured tools in a five gallon bucket, unsecured lockers containing welding rods and propane cylinders, and numerous unsecured bins containing non-inventoried replacement parts kept on hand for electrical and plumbing repairs." Broken windows permitted prisoners to pass contraband from cell to cell. Required daily cell searches were not performed.

The IG report noted that Blaylock was inappropriately housed in the general population and that Gonzalez and other guards regularly violated security protocols by letting such violent prisoners run loose. Following Gonzalez's murder, the prison's clinic was found to be ill-prepared to handle emergency medical needs, with key supplies such as defibrillators, oxygen and airway relief equipment kept in different locked closets in separate rooms. Indeed, the prison's emergency response was characterized as "disorganized" and "pandemonium," so much so that the crime scene was contaminated and destroyed, resulting in the loss of important forensic evidence linking the victim and assailant. Staff were described as "traumatized" and "inadequately prepared by academy and institutional training." Elementary chain-of-custody procedures were not followed; evidence bags were not secured. Even blood evidence from Blaylocks' hands was neither examined nor preserved. Incredibly, no incident log was ever made. Additionally it was noted that prison officials had failed to adequately address Blaylock's known mental health needs.

The March 2005 Board of Corrections report, augmented by input from New York DOC Commissioner Glenn S. Goord, concluded unremarkably that CIM was overcrowded, that vests should have been distributed earlier, and that Blaylock should have been put in administrative segregation when he was processed in.

More to the point, all of the above reports generally labeled CIM as being in "complete

disarray" and sorely in need of immediate new leadership. Secretary Hickman ordered a thorough review of the remaining 32 California prisons and eight youth facilities. Under increasing pressure, he subsequently resigned on February 26, 2006. 📰

Sources: *Sacramento Bee*, *Los Angeles Times*, *Associated Press*, *Workers Comp Insider*, *Voters for Corrections Reform*, *Office of the Inspector General*, *Special Review Into The Death of Correctional Officer Manuel Gonzalez, Jr.*, March 16, 2005.



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South Carolina Prison Industries Program Implements Some Audit Recommendations

by Michael Rigby

The South Carolina Department of Corrections (SCDC) has implemented 5 of 13 recommendations made in an October 2003 report that criticized its Prison Industries Program (PIP), according to a May 2006 follow-up report. In its original report the South Carolina General Assembly's Legislative Audit Council (LAC) chided the SCDC for generally poor oversight of the PIP and practices that provided collaborating companies a potentially unfair advantage in the marketplace. [See *PLN*, February 2005, for more on the 2003 report].

The PIP employs more than 1,900 prisoners, mostly through arrangements with private companies. The SCDC supplies the prisoners and the buildings, and the companies use the subsidized labor to manufacture their products. The companies then compensate the SCDC, which in turn pays the prisoner's hourly wages of between 35 cents and \$6.50 per hour.

One area of concern addressed in the 2003 report was the PIP's failure to collect appropriate victim restitution from prisoner wages. The report advised the SCDC to review sentencing records to ensure that these deductions are properly made. During the follow-up review auditors found that in 2005 the SCDC had documented victim restitution deductions--apparently enough of an improvement to consider the recommendation implemented.

Billing was another problem area. The original audit noted that the SCDC sometimes saved companies money by either not billing them or under billing them for prisoner labor. In the update, no instances of improper billing were uncovered, the auditors said.

Along with providing sweet billing arrangements, the SCDC was also paying up to half of the prisoners' training wages for months at a time. Even the U.S. Justice Department took notice of this practice and, in a May 2003 letter, chastised the SCDC for providing these companies with a benefit unavailable to other companies in the community. During the follow-up review the SCDC stated that the practice had been discontinued and that the companies "currently pay the entire amount of inmate training wages."

The 2003 report also observed that

the SCDC had not consulted with the Employment Security Commission (ESC) when establishing the training period for prisoner workers. In February 2006, however, auditors found the SCDC and the ESC had agreed that the web-based national Occupational Information Network would be an appropriate instrument to evaluate training criteria.

Finally, the original report recommended establishing "goals and performance measures ... that accurately reflect the degree to which the [PIP] is assisting the department in meeting its mission" and to report this information. (The "mission," ostensibly, is to provide prisoners with educational and vocational training, engage them in productive work, and prepare them for re-entry into their communities.) In the update auditors

reported that the SCDC published performance measures in its fiscal year 2004-5 annual accountability report, though no specifics were given. The follow-up also noted that the SCDC has "published broad goals that pertain to its mission."

Despite the progress, the SCDC has yet to take action on the other recommendations, including working with the ESC to ensure that low-paid prisoners do not leech jobs from the community; listing perks given to private companies, such as nominal rent and discounted utilities; subjecting contracts to use prisoner labor to a bidding process; and ensuring that all required deductions--including child support--are made from prisoner wages. Both the original report and the follow-up can be viewed online at www.state.sc.us/sclac. ■

California County Jail Settles Overdue Prisoner Hospital Bills For \$1.5 Million

by John E. Dannenberg

Settling a long-simmering dispute in billing rates for medical treatment of jail prisoners, San Diego County has agreed to pay \$1.5 million to multiple hospitals for bills dating back over three years. The health care providers had sued the county in 2004 to recover unpaid bills incurred by its Sheriff's Department. The agreement does not cover some emergency room doctors who have sued separately.

State law requires sheriffs to pay for medical care for their jail prisoners. To this end, the San Diego County Sheriff contracted to pay specified rates for prisoner care, but in 2003 unilaterally notified the hospitals that he would now only pay a lesser scale. The hospitals responded by submitting "full-billed charges," which the sheriff proceeded to underpay. The "full-billed charges" came to \$5 million. The settlement now calls for the county to pay \$1,457,717 to the involved hospitals, on top of the \$700,000 paid earlier.

The agreement permits the county to appeal one remaining question, namely whether the sheriff is responsible for medical costs of "pre-arraignment detainees." The San Diego Superior Court ruled in

October 2005 that the county is so obligated. [Note: Reversal of this holding would have the anomalous result of insulating the sheriff from liability for injuries wrought upon a detainee during his arrest -- a distasteful prospect in stark tension with the presumption of innocence.] Billings for such detainees in the last two years approach \$4 million. The county has agreed that if it loses its appeal, it will pay 55% of these full-billed charges.

Separately, a dispute with Tri-City hospital emergency room doctors for unpaid prisoner bills is set for trial in August, 2006. They filed a second suit on April 18, 2006 for bills from a different time frame.

A new law on health care provider reimbursements by county sheriffs was enacted October 4, 2005 (Senate Bill 159) and provides, inter alia, that hospitals providing emergency medical care, but who do not have a contract with the sheriff, may charge only "a rate equal to 110% of the hospital's actual costs." San Diego's sheriff currently has only one contracted provider, the University of California Medical Center. ■

Source: *North County Times*.

Illinois Cook County Jail Embroiled in Shootings, Scandals and Escapes

by Gary Hunter

Shootings, stabbings, suicides, a death and multiple escapes have turned the Cook County Jail in Chicago on its proverbial ear over the past year, in addition to misconduct by guards, a change in the jail's leadership and a lawsuit alleging brutal beatings.

Guns in Jails

On February 1, 2006, prisoners Lorenzo Evans, Terry Martin and Gregory Sherman each sustained bullet wounds from a .32-caliber revolver that had been smuggled into Cook County's Division 11 maximum security jail.

Randi White, 21, was arrested after investigators unraveled her part in the gun-smuggling scheme. Prosecutor Brian Holmes described a scenario where, on January 26, 2006, White visited Sherman, her boyfriend's brother, at the jail. During that visit White allegedly "unscrewed the visiting cage mouthpiece ... and proceeded to hand the revolver to Mr. Sherman."

Sheriff's Dept. spokeswoman Sally Daly offered a different explanation. "We believe they unscrewed a plate where the phone was on the wall and passed the contraband through the opening," she said.

White was originally arrested and held on \$500,000 bond. On June 2, 2006 she pleaded guilty and was sentenced to 3 years in prison. Evans and Martin likewise accepted guilty pleas and received 3-year sentences for their part in the scheme.

White's boyfriend, Isiah Sherman, and another man, neither of whom were placed at the scene of the gun smuggling, each received 2-year suspended sentences.

None of the gunshot injuries sustained by the prisoners was serious. Authorities suspect that the three men were plotting to file a lawsuit against the jail after shooting themselves.

In an unrelated incident, a guard was implicated in smuggling a weapon into the jail. Former Cook County guard Kenyatta Sanders was sentenced to 15 years in prison on February 21, 2006. She was convicted on a variety of charges including attempting to smuggle a loaded revolver and cell phone to prisoner Daniel Jimerson.

Sanders never admitted to a relationship between herself and Jimerson or to smuggling the gun, but an investigation turned up letters she had written to her incarcerated lover.

"I want you inside and out, but I need your help ... I have never been in love with a man in the system," wrote Sanders. Another excerpt stated, "Nobody can love you like me because [our] love is not a result of sex, money or material things, but is from two people connecting from the soul. We are soulmates until death do us part."

On January 20, 2003, Sanders had wriggled through a 9-inch opening to avoid a metal detector, but was confronted by other jail staff when she tried to gain unauthorized entry to a tier where Jimerson was housed. A search turned up the gun, a cell phone and a knife with a 4-inch serrated blade.

Earlier this year a gun was smuggled into another Illinois county jail, too, although by different means. Victoria Lundy managed to smuggle a .25 caliber pistol into the Ross County Jail on January 29, 2006. The gun was discovered after it accidentally discharged inside a holding cell.

Lundy was originally questioned about an incident of shots being fired, then was arrested for driving without a license. Another woman in the cell with Lundy said Lundy had gone to the bathroom several times before the gun went off.

A close inspection of the weapon revealed an "off white colored liquid substance on the gun with red specks [that] appeared to be consistent with vaginal

fluid."

Lundy later admitted to the original shooting. Her charges include improperly discharging a weapon, illegal conveyance of a weapon and carrying a [very well] concealed weapon.

Escapes and security failures

Cook County jail prisoner Randy Rencher escaped from the facility on June 27, 2005. Rencher faced a variety of charges and is suspected of at least two bank robberies that occurred after his escape. Both banks were robbed by a man wearing a jail guard's uniform. Of major concern was a statement allegedly made by Rencher that he had bribed a guard to help him escape. Rencher, who later turned himself in on November 2, 2005, was the first prisoner to escape from Cook County Jail in a decade. But he wasn't the last.

The Division 11 maximum security jail was embarrassed again on February 10, 2006 when Warren C. Mathis made a clean getaway in a truck carrying dirty

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"At some point, it is believed Mathis slipped away from the officer who was supervising the work detail and hid in a truck that was picking up inmate laundry," said Sheriff Michael F. Sheahan's press office. Mathis was facing three armed robbery charges when he arranged his unauthorized early release. He was captured a day later.

On February 11, 2006, six prisoners overpowered a guard in their escape from the Cook County jail, Division 10.

The well-planned ruse was based on intimate knowledge of jail routines and security weaknesses. Using homemade knives, Eric Bernard, David Earnest, Tyrone Everhart, Arnold Joyner, Michael McIntosh and Francisco Romero subdued guard Darin Gater after a seventh prisoner, Patrell Doss, first blinded Gater with a hot-water concoction.

"We had planned and plotted it for more than seven to eight months," Earnest told an NBC5 reporter after he was captured. "It was disinfectant and soap in his eyes. By the time he could see, when he opened his eyes, he had about three knives and two inmates standing in front of him."

The escape began when Gater arrived on duty alone. Staffing shortages resulted in only Gater being assigned to what is normally a two-guard position. At some point Gater unlocked Doss and escorted him to the showers. That's when Doss dashed Gater with the soapy water, blinding him long enough for the other prisoners to arrive.

Gater was handcuffed and Doss donned the guard's uniform and took his keys. Using a fire as a diversion, Doss was able to secure the other prisoners' escape but was himself trapped in the process. The remaining six managed to get outside the building, where they scaled a barbed-wire fence and ran away.

Joyner, Earnest and Everhart were captured the next day without incident. Bernard, McIntosh and Romero were caught on Feb. 13 after a home invasion and a standoff with over three dozen police.

Outside accomplices Michelle Reyes, Jose Romero and Anna Romero were charged with aiding in the escape of McIntosh and Romero after they spent the day driving the fugitives around the city.

Each was given a \$200,000 bond.

The case took a bizarre twist when Gater admitted under interrogation that he was part of the escape plot. Prosecutors say the guard confessed to giving the prisoners his keys and uniform and then handcuffing himself. Gater's alleged motive was to embarrass outgoing Sheriff Michael Sheahan and to help his former supervisor, Richard Remus, a candidate for Sheriff, get elected.

Gater did not deny making the comments but his attorney, Tommy Brewer, said his client was coerced. "Anything to stop the questioning," said Brewer. "They denied him sleep, [he was] not allowed to eat, they wouldn't let him make phone calls." Brewer claimed that Gater was being made into a "fall guy."

Sheriff Sheahan disagreed, stating, "It's [Gater's] words that he's talked about the political motivation and he talked about what went down and he admitted everything that he did." Gater was charged on February 14, 2006 and posted a \$500,000 bond.

Other security lapses were discovered in connection with the escape. Cook County jail Sgt. Ivan Hernandez was told by his supervisor, Capt. Michael Wright, that a prisoner had a knife and was planning to escape but no cell search was ever conducted.

That tip came at about 3:30 p.m. on the day of the escape. Hernandez and Wright consistently tried to shift the blame to each other. Hernandez said he was waiting on Wright to call back and authorize the cell search. Wright stated that no authorization was required and that Hernandez should have searched the cell on his own authority.

Jail monitor Charles Fasano faulted both men. He noted that Sgt. Hernandez should have performed the search. But he also said of Capt. Wright, "You'd want to call back and say what did you find? Did you find a knife?"

Hernandez and five other guards were eventually suspended. Four of those guards have alleged that they also were held and questioned for over 24 hours without an attorney. All of the guards and supervisors agreed that the jail was short-staffed that night. One guard even admitted to being told about a knife but insisted that no one had said anything about an escape plot.

When asked if any guards helped them escape, Earnest said, "No. Not at all. Everything we needed was there. We

had seen it." It was like a "walk in the park," he added.

One week after the mass escape from the jail, on Friday, February 17, 2006, Cook County prisoner Lawanda Warren, 40, walked out of a hospital where she was being treated after the guard watching her went to answer a phone.

Warren was being held on drug charges. Police tracked her down through her family members, who eventually convinced her to surrender. Cook County Sheriff Sheahan took Warren back into custody himself.

Beatings, Deaths and Suicides

Cook County jail guards are currently locked in a court battle against prisoners over an earlier riot that broke out in the jail in July 2000; also, two former guards are pursuing a separate lawsuit claiming they faced retaliation and were forced to resign after refusing to cover-up what happened during the 2000 incident.

Nathson Fields described how he and other prisoners were attacked by out-of-control guards who were intent on making a point during the 2000 beatings. Nathson said of one of the Cook County guards, "... he looked down at me." "He told me that, 'You no celebrity. You no role model.' He said I was going back to Death Row."

Fields had served 11 years on death row for a gang-related murder but was granted a new trial when his judge, Thomas Maloney, was convicted on bribery charges. Fields credited jail guard Cortez Brown with shielding him from other guards who were trying to beat him. "I was convinced I was about to die," said Fields.

But in separate testimony, Brown denied that he ever helped Fields. He said it was another prisoner he was helping that day.

More recently, on March 12, 2006, a fight in the Division 10 jail left four prisoners and one guard injured. In a melee that involved 14 prisoners, two were stabbed and two others suffered head injuries. Three had to be hospitalized with serious but non-life threatening wounds. The guard was injured when he tried to break up the fight; witnesses say the incident began over the TV.

Another altercation occurred on April 15, 2006 when a prisoner allegedly tried to hit a guard. Jail officials claimed that Demetrius Thomas refused an order to go to a recreation area after being searched,

and attempted to assault a sergeant. Four other prisoners and three guards joined in the ensuing scuffle; four prisoners were subsequently taken to outside hospitals.

A week later, on April 22, 2006, a third fight broke out which resulted in seven prisoners being hospitalized – five with stab wounds, including Jeffery Iniguez, who suffered serious injuries to the back of his head. Iniguez died four days later after being removed from life support at Mt. Sinai Hospital. His was the first stabbing death at the Cook County jail since Nov. 2004.

In an attempt to regain control over violence at the facility, on May 14, 2006, Sheriff Sheahan announced the appointment of Salvador “Tony” Godinez as the jail’s new director. Godinez, formerly a warden at the Stateville Correctional Center in Joliet, assumed the \$125,000 per year position in mid-June. Apparently, however, the county didn’t get its money’s worth.

On August 16, 2006, prisoner Maeceo Dickey, 39, attacked guard William Baker, punching him and repeatedly slamming his head against the floor. By the time help arrived, Dickey had already left the area and guards had to search for him. They ordered prisoners to lie down during the search, but claimed that some refused and “had to be forcibly taken down ...,” according to Sheriff Dept. spokesman Bill Cunningham. The prisoners told a different story, however. They said the guards severely beat them in retaliation for the attack on Baker even though they weren’t involved, and they suffered bruises, black eyes, chipped teeth and other injuries as a result.

Thirteen prisoners at the Cook County jail filed suit over the incident on September 12, 2006. “From the way my clients describe it, it was a jail-guard riot,”

stated attorney Richard Dvorak, who is representing the plaintiffs in the lawsuit. “They just started indiscriminately beating people: Kicking, punching, stomping. Several of these injuries occurred while these inmates were in handcuffs.” The suit is pending.

Additionally, two suicides occurred at the jail in July 2006. Prisoner Michael McAndrews, 47, hanged himself with a sheet in his cell on July 27. Another prisoner, Keith Aldridge, 26, had committed suicide in the same manner just days earlier. Jail officials called the timing of the two deaths a coincidence.

Other Incidents Outside the Jail

Some Cook County jail guards have experienced problems outside their place of employment, too.

In an embarrassing fatal incident on February 19, 2005, Cook County guard Arlin McClendon, 36, decided to play a prank on a fellow co-worker. While he was driving, McClendon flashed his lights and honked his horn at a friend’s SUV; then, after the vehicle stopped at a red light, he jumped out and banged on the SUV’s window. Unfortunately his friend’s wife was driving the SUV. McClendon’s friend, who was not named, pulled up in another vehicle and, believing his wife was being carjacked, shot McClendon multiple times. The shooter, another Cook County jail guard, apparently did not recognize McClendon even though they had both worked in the same department for years and were described as “lifelong friends.”

No charges were filed.

Also, on August 27, 2006, police were investigating the shooting of an unnamed off-duty Cook County Sheriff’s Dept. jail guard, who was shot twice in the back at his home. Investigators were unsure whether the shooting was related to his position at the jail. The guard was expected to recover.

Trying to escape the madness at the jail, Cook County guard Michael T. Hogan, 24, was having a leisurely drink at a local bar on April 6, 2006 when Chicago Lawn District officers burst onto the scene. Hogan was arrested after he dropped a small bag of cocaine on the floor and stepped on it in attempt to hide it from the approaching police. He was charged with a felony count of possession of a controlled substance. Hogan, on probationary status as a jail guard, was subject to immediate termination. Apparently some Cook County guards belong in the jail – and not as employees. ■

Sources: *Associated Press, Chicago Sun Times, Chicago Tribune, UPI*

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Colorado Expands Private Prisons While Fining CCA for Understaffing

by Matthew T. Clarke

On June 28, 2006, Colorado assessed \$126,000 in fines against Corrections Corporation of America (CCA) for persistently understaffing two Colorado private prisons. The Colorado Department of Corrections (DOC) also awarded contracts for new private prisons and the expansion of current private prisons to CCA and other private prison companies.

The fines were prompted by a state auditor's report which blasted the private prison companies and recommended fines. [PLN, Apr. 2006, p. 18]. CCA's Kit Carson County Correctional Facility (KCCCF) in Burlington was fined \$103,743 for short shifting 701 times during the ten-week period ending January 10, 2006. This meant that the prison was short about ten employees per day every day spread out among three shifts. The supervisor was missing for five shifts while the assistant supervisor was absent for 44 shifts. In October 2005, the DOC waived \$46,000 in fines for KCCCF because it said it was unfair to strictly enforce a contract that was only a month old at the time.

CCA's Crowley County Correctional Facility (CCCF) in Olney Springs was fined close to \$23,000 for short shifting 157 times during the ten weeks. CCCF had been previously granted a waiver for \$18,000 in fines.

Alison Morgan, the DOC's supervisor of private prisons, said that staffing had improved at the private prisons since the fines were assessed. According to the state auditor, private prisons have a large turnover in staff because the guards are paid only about two-thirds the amount that state prison guards are paid. And have little in the way of benefits. Interestingly, the DOC did not state how much money CCA made by short staffing its facilities. In similar cases around the country, private prison companies have determined they can short staff their facilities, absorb the fines and still make a handsome profit off the difference.

Around the same time it was assessing the fines against CCA, the DOC announced that it was awarding several contracts to build new and expand existing private prisons. The DOC awarded Houston-based Cornell Companies a contract with a potential value of \$16 million annually to build and operate an 832-bed

women's prison in Hudson. This beat a competing bid from GRW Corporation to expand a 282-bed private women's prison it operates in Bush. GRW may have lost the contract due to a scandal involving employees having sex with prisoners at Brush. [PLN, Oct. 2005, pp. 18-20].

The DOC also awarded Boca Raton, Florida-based GEO Group a contract to build and operate a 1,504-bed prison in Alut potentially worth \$28 million a year. CCA was awarded a contract to expand KCCCF and its men's prison in Bent County by 720 beds each.

The expansion projects and new prisons are expected to be completed by the middle of 2008.

Colorado currently pays private prison companies \$51.91 per prisoner per day to incarcerate state prisoners.

According to DOC spokeswoman Katherine Sanguinetti, Colorado's prison population is growing by 100 prisoners per

month and will exceed existing capacity by the end of 2006.

"We are almost out of state beds, and we are desperately in need of places to put these inmates to keep them safe and secure and house them in a humane way," said Sanguinetti. "The private prisons allow us to do that without incurring the construction costs to the state."

Colorado's private prisons have been plagued with short staffing, riots, and guards bringing in drugs and coercing prisoners to have sex with them. [PLN, Jan. 2005, pp. 26-32; Oct. 2005, pp. 18-20; April 2006, p. 18]. What's safe, secure and humane about that? Sentencing reform, releasing lifers held long past their parole dates and similar measures are not within the bounds of political consideration. ■

Sources: *Rocky Mountain News*, *Greenly Tribune*, *Fort Worth Star-Telegram*.

\$1,156,149 Awarded to Former Federal Prisoner for Failure to Diagnose and Treat Throat Cancer

The U.S. District Court for the Eastern District of New York on September 6, 2005, awarded \$1,156,149 to former Bureau of Prisons (BOP) prisoner Hernando Lopez for failure to diagnose and treat throat cancer over a two-year period. The Court held that BOP medical personnel in Pennsylvania were the direct and proximate cause of Lopez's injuries, where such cancer should have been initially diagnosed and treated but for the deliberate indifference and negligence of such medical personnel. The Court reduced Lopez's initial \$6 Million claim, based upon a determination that Lopez would live for another 16 years, that there would be no future reoccurrence of this cancer, and to bring the award in line with other factually similar cases.

In June 2000, Lopez had complained to BOP medical personnel in Loretto, Pennsylvania of nasal and breathing problems, which he attributed to an assault he sustained by another prisoner in 1998 and to a subsequent surgery to correct nasal blockage. BOP medical personnel had prescribed various antibiotics and throat gargles to Lopez for symptoms of sore throat and hoarseness, despite his repeated

requests to be examined by an Ear, Nose and Throat (ENT) specialist which were consistently denied. Lopez's sore throat and hoarseness persisted and worsened as he was moved from Pennsylvania to a BOP transfer facility in Oklahoma in June of 2001, then to Oakdale, Louisiana, approximately three weeks later in July of 2001.

Between July 18, 2001, and October 24, 2001, Lopez was examined by BOP medical personnel in Oakdale, including two physician assistants and two staff physicians, who noted in his medical records a persistent and worsening hoarse voice, sore throat, continuing problems of breathing and voice changes. On September 18, 2001, BOP Staff Physician Blocker wrote in Lopez's medical records "consider ENT evaluation for complain of nasal problems and voice changes," citing reasons therefore "history of nasal septoplasty (surgery for deviated septum) and difficulty breathing." On September 28, 2001, Dr. Joel Alexander examined Lopez at Oakdale and noted his history of nasal congestion and that he suffered from a "possible vocal cord dysfunction." On October 15, 2001, Lopez was examined

by a BOP physician assistant because he was complaining that his throat hurt, and it was noted again that he suffered from a "possible vocal chord dysfunction."

In October of 2001, over 14 months after his initial request to be seen by an ENT specialist, Lopez was examined by Dr. Leslie Warshaw, Jr., a private ENT specialist in Oakdale, Louisiana. When Dr. Warshaw attempted to examine Lopez's throat with a mirror (after determining that a flexible laryngoscope was broken), he was unable to do so because of Lopez's gag reflex.

On December 13, 2001, Lopez had a CT Scan of his sinuses, which was negative. On January 22, 2002, Dr. Warshaw examined Lopez by passing a flexible scope down his nose and observed a lesion on his larynx, which he noted as "possible T1, T2 squamous cell carcinoma of the larynx," "recommending a biopsy to properly diagnose the lesion. During such biopsy on February 6, 2002, Dr. Warshaw discovered a "large mass lesion in the anterior two-thirds of the right rue vocal cord extending into the ventricle ...," which he removed as much as possible with forceps and a carbon dioxide laser to remove remaining visual evidence of

the tumor. Dr. Warshaw's post-operative diagnosis was Squamous Cell Carcinoma (SCCA) of the larynx.

A month after Lopez's March 2002 release, he had a portion of his right voice box removed, with a tube permanently inserted into his throat below his voice box so that he could breathe. Lopez subsequently participated in a regimen of chemotherapy and other procedures, resulting in no further cancer reoccurrence.

Lopez had timely exhausted his administrative remedies while imprisoned and subsequently filed a complaint against BOP personnel under the Federal Tort Claims Act (FTCA) on April 9, 2002, alleging Eighth Amendment *Bivens* claims for failure to diagnose and treat his throat cancer, and deliberate indifference and negligence of BOP medical personnel in such failure to diagnose and treat his cancer in a timely manner. Lopez's complaint was tried before the Court from March 28 through April 16, 2005.

The Court found credible the plaintiff's pathology expert's opinion that Lopez's cancer was present in September through October 2000 while he was in Pennsylvania. This supported Lopez's argument that the BOP medical personnel

were deliberately indifferent and negligent in not properly diagnosing and treating the cancer, which exhibited a gross deviation from the standard of medical care. The Court rejected the defendants' pathology expert as not credible, since the theoretical basis of her opinion was not regularly accepted in the medical community.

The Court ruled that in this case, there was a conflict in the underlying substantive law relating to damages, such that the laws of Pennsylvania, Oklahoma, and Louisiana (where Lopez was located during his symptoms associated with cancer), were significantly different regarding the award of such damages. After a choice of law analysis, the Court reasoned that "Pennsylvania is where Lopez's cancer should have been diagnosed, and if diagnosed, prevented."

The Court's total award of \$1,156,149 was based on \$18,149 in past medical expenses, \$228,000 for future medical expenses, \$400,000 for past pain and suffering, and \$450,000 for future pain and suffering. The Court further ordered a 3.88 percent interest rate until paid plus recovery of Lopez' costs of this action. See: *Lopez v. United States*, USDC ED NY, Case No. 03-Civ-1729. ■



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Record \$3.2 Million Settlement for Wrongfully Imprisoned Massachusetts Man

by Michael Rigby

The City of Boston, Massachusetts, has agreed to pay \$3.2 million to a man who spent 10 ½ years in prison for a rape he did not commit. The March 2006 settlement is believed to be the largest of its kind in state history.

Neil Miller's nightmare began on November 15, 1989, when he was arrested for the brutal rape and robbery of a 19-year-old college student six weeks earlier. Miller was quickly convicted and sentenced to 10-25 years in prison. After his direct appeals were denied Miller contacted the Innocence Project, which successfully petitioned for post-conviction DNA testing of semen found on the victim's body and bed. The test proved Miller could not have been the perpetrator, and on May 10, 2000, he was freed. Following Miller's exoneration, the DNA was checked against a database of convicted sex offenders. The check implicated another man, Larry Taylor, who in 2005 pled guilty to three rapes, including the one for which Miller was convicted.

In a March 9, 2006, statement, Miller's attorneys, Howard Friedman and Innocence Project co-director Peter Neufeld, said testimony in their 2003 lawsuit showed that Boston police manipulated evidence in order to convict Miller. For instance, then-detective Margot Hill (now a deputy superintendent) ignored clearly exculpatory evidence, say the attorneys. What's more, criminologist David Brody—who retired as the crime lab's director after 32 years—lied about the DNA evidence to make it appear more likely that Miller committed the crime.

Miller's attorneys are now calling for a reexamination of every case Brody participated in. "These were not mistakes," Neufeld said. "[Brody] was the head of the laboratory who testified more than 1,000 times who is caught in perjury. You have a duty to question all other cases." By the end of 2005 at least ten convictions in Suffolk County had been overturned, most through DNA testing.

Neufeld and Friedman had intended to argue at trial that the filing of false testimony and affidavits was rampant in the Boston Police Department. They also planned to show that the department's policies and procedures fostered the mis-

conduct. Expert testimony would have been provided by Professor Gary Wells (identification), Dr. Edward Blake (serology), Steve Rothlein (police practices), and Dr. Jerome Rogoff (forensic psychiatry).

The \$3.2 million settlement agreement was reached a week before the trial was set to begin in the U.S. District Court for the District of Massachusetts. Miller was previously awarded \$500,000 in a lawsuit against the state—the maximum under a 2004 Massachusetts law designed to compensate the wrongfully convicted.

Despite the victories, the nightmare continues for Miller. "It's still not over," he said. "There are still other guys who

are sitting up there because of this forensic guy. Until they're cleared, everything isn't fine with me. It's not over." Miller, who has had trouble finding a job since his release, said he plans to give away most of the money. "It'll do some good for a while," he said.

Attorney Neufeld is based in New York with the firm Cochran, Neufeld Scheck, LLP. Friedman, of the Friedman Law Offices, is based in Boston. See: *Miller v. City of Boston*, USDC D MA, Case No. 03-10805-JLT. ■

Additional sources: *Boston Globe*, *eyewitnessnewsstv.com*

Florida County Sued Over Refusing Sex Offender Home Weather Stripping

A Florida sex offender has sued Brevard County for refusing to weatherize his home. The suit alleges the County has enacted a prerequisite that excludes persons with criminal convictions from receiving federal funds to perform energy savings and installation of energy saving measure on low-income homes. That prerequisite is illegal because it is more restrictive than federal law, the suit contends.

Raymond Houston, 45, was convicted in 1994 of lewd and lascivious acts on a child younger than 16. He was sentenced to 4½ years probation, which he successfully completed. "There was a house party. She was underage, and I was stupid," said Houston.

Under the federal Energy Conservation and Production Act (Act), Houston sought to have his doors weather stripped and a hot water heater replaced. Brevard County, who has a contract with Florida's Department of Community Affairs (DCA) to distribute money under the Act, rejected Houston's application because he was an "ineligible applicant" under criteria set by the Brevard county Commission's "Weatherization Policy".

That policy prohibits grant funds to any person convicted of a felony in any state or federal court or if listed as a sexual predator or sexual offender. It also excludes a household if any person living there is a convicted felon.

"We only have so much money to go

around, maybe \$10,000 or \$20,000," said Brevard County Commission Chairman, Ron Pritchard. "The list of applicants far exceeds the amount of money, and I'm not about to use scarce resources on somebody who was convicted of such a heinous crime."

Attorneys for the American Civil Liberties Union (ACLU), who filed the suit on Houston's behalf, say the only criteria under U.S. Department of Energy regulations is based solely upon income. See: 10 C.F.R. § 440.22. Even the DCM advised Brevard County they were violating federal law.

Brevard County officials are not concerned with federal law because there are "so many other deserving people". Pritchard said, "I guess we'll just have to iron this out in court."

The suit seeks declaratory and injunctive relief, requesting the requested repairs be made. It also seeks unspecified damages.

"This is just more posturing by Florida politicians to look tough on crime and on people with past felony convictions," said Howard Simon, Executive Director of the ACLU of Florida. "What does denying funds to low-income people to save on energy costs have to do with fighting crime?" See: *Houston v. Williams*, USDC, Middle District Florida, Case No. 6:06-CV-110-ORL-28KRS. ■

Additional source: *Orlando Sentinel*.

Private Geo Prison in Texas Rocked By Prisoner Abuse, Disturbance and Escape

by Matthew T. Clarke

Recently, the Newton County Correctional Center (NCCC), a private prison in Newton, Texas run by the Boca Raton, Florida-based Geo Group, has experienced several incidents involving the out-of-state Idaho prisoners housed there. These incidents included a non-violent protest involving 85 prisoners, an escape, and the resignation of a deputy warden. Additionally, allegations of prisoner abuse were substantiated; Idaho prisoners have since been removed from the facility.

Idaho incarcerates 449 of its prisoners in out-of-state private prisons. Of those, 30 are incarcerated at a CCA prison in Minnesota and 419 are held at NCCC, one of 53 prisons nationwide operated by Geo Group, formerly known as Wackenhut.

Initially, Idaho's out-of-state transfers were voluntary and had few problems. In October 2005, Idaho transferred 302 prisoner volunteers to Minnesota. However, overcrowding led Minnesota's prison system to exercise its primacy option on the bunk space in that state's private prisons. Thus, 270 of the 302 Idaho prisoners were transferred hundreds of miles away to NCCC in Texas, something they neither volunteered for nor desired.

When they arrived at NCCC, Idaho prisoners discovered hotter temperatures and an austere prison life without many of the luxuries and privileges they were accustomed to. According to Idaho Department of Corrections (IDOC) spokesperson Teresa Jones, these privileges included cable TV and personal televisions, the absence of which she referred to as "cultural differences" between how prisons were run in Idaho and Texas.

Another unaccustomed "cultural difference" was guard brutality. On April 7, 2006, six Idaho prisoners complained of abuse by guards. In a letter to his sister, one prisoner stated that he had been placed in isolation, handcuffed, beaten and pepper sprayed. The complaints resulted in disciplinary actions against three Geo guards –

including one demotion, a suspension and the firing of a supervisor. It also prompted an "already scheduled" visit by IDOC officials to the for-profit prison site.

Another violent incident occurred on

May 30, 2006, when an Idaho prisoner refused to leave his cell and cursed at a deputy warden. The deputy warden then punched him in the face; the prisoner was forced to the ground and pepper sprayed, and his pants were forcibly removed. An IDOC report regarding the incident found that it resulted from a lack of staff training and policy violations. The unidentified deputy warden resigned on June 4.

Less than a week later, on June 10, 2006, eighty-five Idaho prisoners participated in a non-violent protest on the recreation yard by refusing to return to their cells. The protest lasted more than seven hours and was prompted by demands for butter for rolls, more television channels and lower commissary prices, according to prison officials.

Two days later, a pair of Idaho prisoners escaped from NCCC by climbing the fence while guards were distracted by a disturbance elsewhere in the prison. Orlando Gonzalez-Leon, 27, serving up to 50 years for murder, was recaptured about 90 minutes later. The other escapee, Rudolfo Garcia-Lopez, 38, was serving up to 20 years for aggravated assault and attempted kidnapping. He was caught on the morning of June 15, 2006, about 12 miles from the prison.

It was later reported that an armed Geo guard in a watchtower had failed to shoot at the escapees despite having a clear shot. The guard, who was not named, stated, "My timing was slow and I felt highly-ass intimidated." Local law enforcement officials harshly criticized the guard, and Geo, for allowing the escape.

IDOC didn't view these problems as being serious. "There's always a little bit of a settling process" at a new prison, said Jones. Someone apparently reconsidered, however, as IDOC announced in July 2006 that it would move all of its prisoners out of NCCC and place them in two other Texas lock-ups run by Geo, the Bill Clayton Detention Center and the Dickens County Correction Center. IDOC Director Beauclair stated he was dissatisfied with Geo's inability to hire qualified staff at NCCC.

Apparently Wyoming prisoners are equally unhappy with the "cultural differences" of how prisons are run in Texas. A May 28, 2006 disturbance involved 39 of the 301 Wyoming prisoners housed at the Bill Clayton Detention Center; only minor injuries were reported. Wyoming incarcerates 536 of its prisoners in Texas. ■

Sources: *Houston Chronicle*, www.localnews8.com, *Associated Press*, www.billingsgazette.net.

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Prisoner Dies in Custody of Washington Jailers

by Gary Hunter

Eight Spokane County Jail guards were placed on paid administrative leave while investigators probed the death of a prisoner under their care, but they weren't suspended for long. All were back at work within two weeks.

Benites Salmon Sichiro, 39, was booked into the jail on January 27, 2006 for three misdemeanor charges when he was kned twice and shot multiple times with a Taser during three separate altercations with guards.

The fights began about 6:50 a.m. on January 29.

A nurse noticed that Sichiro was going through alcohol withdrawal and wanted him moved to a cell closer to her office. Sichiro was belligerent as guards approached him. Two Taser shots were fired, but the projectiles bounced off books and magazines that Sichiro had stuffed in his jail coveralls. The stun-gun was then placed directly against his body and fired again, but even that did little to slow him down.

"He wasn't feeling the pain," one guard commented.

Guards eventually wrestled Sichiro into another cell and stuffed him under a bunk to allow them time to retreat. But when Sichiro stood on a desk and threatened to hurl himself head-first onto the concrete floor, the nurse then asked that he be placed in a restraint chair to keep him from hurting himself.

Guards used the Taser on Sichiro twice more before they could cuff him.

Sichiro continued to resist and bit one guard on the arm. The guard responded by kneeling Sichiro twice in the torso. Sichiro was then strapped into a restraint chair, lost consciousness and died. Attempts by the nurse to revive him were unsuccessful. An autopsy revealed that his death was caused by internal bleeding due to a lacerated liver.

According to Sheriff Mark K. Sterk, "based on Mr. Sichiro's behavior and the fact that he was fighting with them very, very violently," the amount of force used was appropriate. "The deputy used two knee strikes to distract the inmate long enough for him to get his arm out of Mr. Sichiro's mouth. We know that those knee strikes did occur during that altercation. We don't know that they were

the cause of the injuries that caused his death."

Sheriff Sterk also noted that Sichiro was injured before he was taken into custody. Booking photos show Sichiro with a black eye, bruises, swelling and abrasions to his face, lip and neck. Abrasions were also found around his groin area.

Sichiro's nephew, Katamichay Rudolph, told police that his uncle had been in a fight on January 25, but other than scrapes and bruises he seemed fine. Rudolph said the fight was over some stolen belongings.

But police suspect that Sichiro may have been assaulted by someone connected to a sexual assault complaint alleging that he had had inappropriate behavior with a 12-year-old girl. "She looks older than me, but the investigator told us she's only 12," said Sisi Rudolph, Katamichay's wife.

Sheriff Sterk stated, "We're concerned that if he was injured prior to being booked into jail we may have some

kind of a homicide that we need to be looking at."

Perspective depends upon the position of the observer. From the vantage point of the victim it should be observed that Sichiro was arrested for criminal trespass, obstruction of justice and fourth degree assault. All of which are misdemeanors; none carry the death penalty. Yet he died after spending two days in jail.

So whether Sichiro was fatally injured prior to being booked or after he was in custody, some would argue that there is still "some kind of a homicide that we need to be looking at" – a distinction that Sheriff Sterk failed to make.

As of October 2006, prosecutors were still reviewing the circumstances surrounding Sichiro's death, despite having received a comprehensive report from investigators in April. No charges have been filed. ■

Sources: *Associated Press*, *KXLY.com*, *KREM.com*

Georgia Sheriff Indicted on Corruption Charges, Pleads Guilty

by Gary Hunter

Coffee County Sheriff Rob Smith was indicted on March 20, 2006 on eight counts of abuse of office. Three counts charged Smith with using prisoner labor to construct campaign election signs. The charges also included two counts of violation of oath of office, two counts of malpractice and malfeasance, and one count of theft by conversion for using a state vehicle for personal gain.

The district attorney's office is also investigating allegations that Smith issued release passes to prisoners illegally; one prisoner who allegedly received a pass was a convicted felon sentenced to state prison.

It is unclear whether Smith exercised his right, under Georgia law, to appear before the grand jury and make a statement. Smith's attorney, Jerome Adams, declined to comment on the charges.

Scores of the sheriff's supporters gathered at the Coffee County Jail. Nearly 100 people attended the rally but received no response from county leaders, who

were under a gag order issued by three Waycross Superior Court Judges.

Before Governor Perdue could decide whether or not to appoint a commission to conduct an inquiry into whether Smith could still effectively perform his duties as sheriff, on March 29, 2006, Smith announced his resignation effective April 15. At the same time, as part of a plea bargain, he pled guilty to one count of malpractice and malfeasance in office. The remaining charges were dismissed; Superior Court Judge Mike Boggs sentenced the former sheriff to one year in jail, which was suspended.

District Attorney Rick Currie stated that an investigation into other issues involving the sheriff's office – including the release of prisoners on unauthorized passes, failing to serve felony arrest warrants, and improperly handling bail bonds —would continue. ■

Sources: *www.wsbtv.com*, *www.walb.com*, *Douglas Daily News*

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U.S. Businesses Lobby Government to Curb Federal Prosecutors

by Matthew T. Clarke

U.S. businesses and Wall Street investment companies have begun a campaign to get the Justice Department to reign in federal prosecutors in business crime cases. The effort by the U.S. Chamber of Commerce, Securities Industry Association and Bond Market Association focuses on prosecutors pressuring companies to waive attorney-client privilege and stop paying the attorney fees of employees under investigation.

In 2002, largely in response to the Enron and other U.S. corporate scandals, Congress passed the Sarbanes-Oxley Act stiffening penalties for business fraud. In 2003, then-Deputy Attorney General Larry Thompson issued a memorandum containing guidelines for prosecutors considering indicting a company. The guidelines grant leniency to companies that cooperate with prosecutors. In the memorandum, waiver of attorney-client privilege by a company is considered a sign of cooperation while protecting culpable employees by paying their legal bills is a sign of non-cooperation.

An indictment alone can bring down a company, as it did with Arthur Anderson LLP, an accounting firm associated with the Enron scandal which went from 85,000 employees to bankrupt following its indictment. The now-defunct company was eventually vindicated on appeal, but that did nothing to change the company's dissolution.

Some federal legislators have proposed amendments to Sarbanes-Oxley intended to tone it down.

"It is a mere four years since the capital markets lost trillions in value as investor confidence in business evaporated," said former Securities and Exchange Commission chief accountant Lynn Turner. "In good times, people have short memories, and it appears some members of Congress and the financial community are taking advantage of that."

The U.S. Chamber of Commerce sees it differently.

"We don't have to violate people's constitutional rights, and we don't have to set up cooked deals so it makes it easier for the government to extort a settlement or a guilty plea," according to Thomas Donohue, the chamber's president.

But violations of constitutional rights, planting of evidence, pressure to take plea bargains and financial ruin that

makes it impossible to hire an attorney are problems faced by poor criminal defendants every day. Not surprisingly, no one is coming forth to lobby for them or propose new legislation to curb the awesome power brought to bear against them by government prosecutors.

It seems likely that the lobbyists will succeed. American Bar Association (ABA) President Michael Greco has written Attorney General Alberto Gonzales asking him to revise the attorney-client privilege waiver provision on behalf of the ABA's 600,000 members. In March 2006, Democratic and Republican members of

the House Judiciary Committee criticized the attorney-client privilege waivers, labeling them prosecutorial overreaching and a probable violation of employees' constitutional rights. In a case against KPMG, the nation's fourth-largest accounting firm, federal district judge Lewis Kaplan called the pressure on KPMG not to pay employees' legal bills "shameful" and told the prosecutor KPMG had the right to pay the attorney fees "without your thumb on the scale." Presumably he was referring to the scales of Justice. ■

Source: www.bloomberg.com.

Corruption in Arpaio's Office: AZ County Continues Paying Convicted Sheriff's Sgt.

by Gary Hunter

On August 2, 2005, Maricopa County Sheriff's Sgt. Leo Richard Driving Hawk, Sr. pleaded guilty in Federal District Court in connection with a \$78 million swindle perpetrated by his father's bank.

For over three years Driving Hawk was a vice president at the United States Reservation Bank and Trust while he simultaneously was employed as a member of Sheriff Joe Arpaio's Internal Affairs Division. What has raised eyebrows is that for over four months after his guilty plea Driving Hawk remained on the sheriff's payroll, receiving a \$60,000 annual salary with Arpaio's apparent blessing. According to the Maricopa Co. Sheriff's Department, Driving Hawk remained employed with the department until the end of December 2005.

The tough-on-crime sheriff has remained conspicuously silent on the subject, but one of his aides, Jack MacIntyre, defended the continuing paychecks as an attempt to avoid future liability. "We want to make sure we cross all the t's and dot all the i's so there's no lawsuit that costs even more," he insisted.

Samuel Walker, a criminal justice professor at the University of Nebraska at Omaha, has authored books and runs a website on police accountability. He contends that Driving Hawk's guilty plea was enough to warrant termination.

"Certainly, if he's admitted he's guilty, that would be sufficient. He probably should be terminated – and immediately," said Walker.

MacIntyre said Arpaio's office was

waiting until the judge accepted the plea and an internal investigation was complete. Arpaio's investigation began in late August 2005, more than two weeks after Driving Hawk pled guilty. According to the *Sonoran News*, however, Driving Hawk was named as a defendant in multiple cases involving securities fraud as early as April 2002.

Bob Forry, compliance manager for the Arizona Peace Officer Standards and Training Board, pointed out that misconduct alone is grounds for termination. There is no legal requirement to await a conviction.

Critics claim that Arpaio was hesitant to sever ties with Driving Hawk because the convicted sergeant was part of the sheriff's "inner circle." They claim that Arpaio uses his cadre of deputies to retaliate against political enemies, and speculate that actions against union leaders, covert surveillance, and investigation and prosecution of political opponents are some of the things that Driving Hawk knows about Arpaio's operations.

MacIntyre denies that Driving Hawk was part of Arpaio's "inner circle," but personnel files, obtained under Arizona's open records law, describe Driving Hawk as having been "hand-selected by the sheriff and/or the chief deputy" for the Internal Affairs Division. Records also reveal that Driving Hawk and Arpaio regularly communicated "on sensitive investigations and other matters, including security issues," and that Driving Hawk

was “one of the few supervisors who routinely reports directly to the sheriff.”

Leo’s father, Edward James Driving Hawk, Sr., founded the United States Reservation Bank and Trust in 1992. In 2001 the bank initiated what the Security and Exchange Commission (SEC) called a Ponzi scheme. Investors were promised profits of 20%, and early investors were paid with money from the investors who followed.

Leo pleaded guilty to charges of failing to notify authorities of the fraud and lying to at least one investor. The charges further stated that Leo siphoned more than \$2.5 million from the bank “for no apparent reason,” personally received \$216,258, and diverted other money to casino and racehorse operations owned by the family.

Edward Driving Hawk, Sr. entered a guilty plea on Sept. 7, 2006, and his sentencing hearing is set for November 13.

Leo Driving Hawk’s involvement in the \$78 million scam is suspected to extend back at least 32 years. Arpaio became aware of the allegations raised by the SEC in 2003, yet Driving Hawk continued to receive glowing commendations and promotions. In January 2005 he was given yet another pay raise, which he continued to enjoy for months after he pleaded guilty. Leo is scheduled to be sentenced on April 16, 2007; he faces up to three years in prison.

Given Arpaio’s penchant for openly demeaning convicted felons, including those who reside in his infamous tent jail, his silence

in this case is surprising if not suspicious. However it is typical in that only poor criminals warrant Arpaio’s wrath while the wealthy and well connected, like former Arizona governor Fife Symington, get kid glove treatment. Arpaio’s most recent antics included parading prisoners through the streets of Phoenix in pink underwear and pink handcuffs. But apparently it took over four months for “America’s Toughest Sheriff” to find a pink slip for one of his own employees who had admitted to committing felony crimes. ■

Sources: *The Arizona Republic, Sonoran News*

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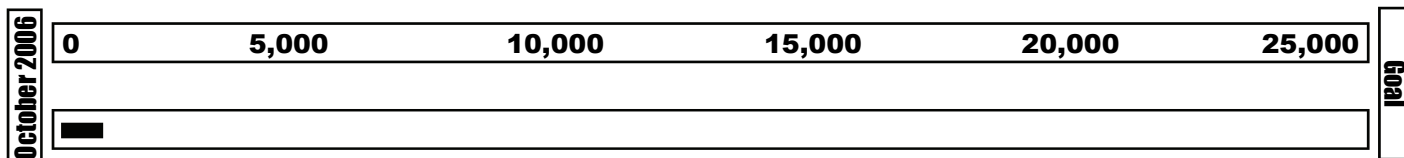
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Georgia Prison Guards Plead to Misdemeanors in Prisoner Beatings

by Michael Rigby

In mid-April 2006, seven Georgia prison guards were indicted by a Tantall County jury in connection with beatings of prisoners at the Rogers State Prison in Reidsville.

As previously reported [see *PLN*, April 2006, p.1], Rogers is a cesspool of violence and corruption. Handcuffed prisoners at the facility are routinely beaten with the explicit knowledge of supervisors, according to Tommy Cardell, a former guard at the prison. Cardell revealed the abuse to the *Atlanta Journal-Constitution* in May 2005 after officials in the Georgia Department of Corrections (GDOC) ignored his complaints.

Cardell said prisoners were punched and kicked in ways that wouldn't leave big cuts or bruises, and stated his supervisors gave him padded black leather gloves to administer the beatings. Prison officials as high up as the warden were sometimes present at the beatings and even encouraged them, said Cardell. He also accused prison medical personnel of helping to cover up the beatings.

After Cardell complained to the newspaper, the Georgia Bureau of Investigation launched an investigation in July 2005. Seven guards were fired and indicted, and Warden Glenn Rich and Assistant Warden P.P. Collins were suspended. Rich retired in August 2005 while Collins was later reinstated.

The indicted GDOC guards included Stewart John Wood, for one count of assault under color of office and one count of making false statements; Michael Byrd, four counts of assault and one count of false statements; Keisha Hopkins, two counts of assault and one count of false statements; Hansford Hunter III, one count each of assault and false statements; Jason Burns, six counts of false statements; Clinton Howard, two counts of assault and one count of false statements; and Tommy Osborne, two counts of assault and one count of false statements.

The false statement charges – which apply to anyone who lies, covers up facts, or falsifies documents in “any matter within the jurisdiction or agency of state government or of the government of any county, city, or other political subdivision” of the state – carry up to 5 years in prison and a \$1,000 fine. The misdemeanor as-

sault under color of office charges apply to state officers who assault individuals without legal justification.

The beatings at the Rogers facility have spurred a number of federal lawsuits against the GDOC. McNeil Stokes, an Atlanta attorney representing 16 former and current Rogers prisoners, said the assaults were a game to the guards. “It became a bloodsport at Rogers to be enjoyed two or three times a week,” said Stokes.

As so often happens in such cases, the indictments proved largely ineffective. On June 5, 2006, prosecutors dropped the felony charges against six of the guards in exchange for their pleading no contest to the misdemeanor assault counts. Each was sentenced to one year in jail and fined \$500. However, as part of the deal, the sentences were suspended on the condi-

tion they testify in a “companion case,” presumably against the seventh guard, Tommy Osborne. The charges against Osborne were then dropped because he hadn't been given an opportunity to appear at the grand jury proceedings.

Stokes said he was disappointed that the felony charges were dismissed. “What if an inmate beat a guard like that?” he noted. “They'd be indicted and sentenced forever. It's unfortunate. As long as they got off easy, it's going to continue.” Meanwhile, with the charges against him dismissed, Osborne returned to work at another Georgia prison on June 8, 2006. It's unknown if he'll be issued a new pair of black leather gloves or will simply use his old ones. ■

Source: *Atlanta Journal-Constitution*

Unique Texas Sexual Predator Civil Commitment Has Successes/Failures

by Matthew T. Clarke

Texas has a unique form of civil commitment for sexual predators which allows outpatient treatment and requires most of the civilly committed to live at a halfway house. A committed man's recent “escape” from a Dallas halfway house brought the Texas model into question.

Seventeen states have laws that allow for civil commitment of sexual predators after they complete their prison sentences. Sixteen of them lock up the committed people with little or no treatment. Texas took another route.

The concept of civil commitment of sexual predators originated in Washington State in 1990. As of December, 2004, 3,493 people had been civilly committed as sexual predators nationwide. 66 of them came from Texas. 427 civilly committed sexual predators (CCSPs) have been released from civil commitment nationwide. None of them were from Texas. 30 of the Texas CCSPs have been returned to prison for violations of the strict civil commitment rules. Violation of civil commitment rules is a third-degree felony in Texas. No Texas CCSP has committed a sex offense after being civilly committed.

Texas began its civil commitment

program in 2001. It provides sex offender therapy for CCSPs and requires that they be closely monitored. The monitoring includes tracking devices worn on the ankle and, for all but two of the CCSPs, living at a halfway house like the Wayback House, which is located just west of downtown Dallas.

Restrictions at the Wayback House are strict and conditions harsh. The men sleep seven to a room in an old converted hotel in an industrial part of Dallas. They are not allowed to leave the halfway house without permission and are required to take drug screenings, sex offender treatment, lie detector tests and sexual arousal tests in which a device is attached to their penises while they are shown photos or videos of simulated sex offenses. Simple liberties such as working, drinking a beer, riding a bus or watching cable TV are typically forbidden. They may not even be allowed to visit or receive visits from friends and relatives, even if the potential visitor is sick and/or elderly. They may be prosecuted as violating civil commitment—a third-degree felony—for “violations” such as writing a state prisoner without authorization or leaving an angry phone message.

Early on May 2, 2006, CCSP Mark

Petersimes cut off his ankle monitor and left the Wayback House. He was last spotted hitching a ride before dawn. He was the third CCSP to "escape." Jose Morales, the first CCSP to leave, is still at large after three years. The second "escapee" was caught soon after he fled the halfway house.

Petersimes had been sentenced to 2 years in prison for a 1981 North Carolina attempted sexual assault and 12 years in prison for molesting his girlfriend's 5- and 7- year-old daughters in Texas in 1991. In 2003; he walked away from an Austin halfway house to which he had been civilly committed. He received a 28-month prison sentence for that "escape" and was civilly committed to the Wayback house upon his release from that sentence.

Petersimes's departure prompted criticism of the Texas model of treating CCSPs on an out-patient basis rather than locking them up in prison-like facilities as the other sixteen states do. Supporters of the Texas model point out that it is cost effective and safe. Texas spends about a half million dollars a year on CCSPs, Florida spends \$22.6 million a year for its CCSPs; California spends \$45.5 million a year.

"The Texas program is safe," said executive director of the Texas Council on Sex Offender Treatment (TCSOT). "Other states now think we have taken a rational approach in dealing with sexually violent predators." TCSOT administers the Texas program.

A second criticism is that not enough of the 44,000 Texas registered sex offenders have been civilly committed. Florida also began its civil commitment program in 2001, but has committed over 450 people whom it imprisons at about ten times the per-committed person cost as Texas. However, Huntsville attorney David O'Neil, who has represented five CCSPs praises the civil commitment rate saying it shows that Texas is really only committing the "worst group of offenders" which is exactly what the civil commitment statute was intended to do. O'Neil is critical of violations of civil commitment restrictions being prosecuted as a felonies.

"The idea that when someone violates conditions that they're subject to a third-degree felony is beyond the pale," O'Neil said. "The conditions are so onerous ... I don't believe most of us would be able to comply."

The Texas state prosecutors who handle civil commitments in Texas say

they would commit more people were additional funding available. Thus far, over 400 sex offenders have been flagged for civil commitment upon discharging their sentence. Some of the 66 CCSPs accepted

civil commitment without a trial. Of those who took it to a jury trial, all but one have been civilly committed. ■

Source: *Dallas Morning News*.

L.A. County Sheriff Settles Two Jail Excessive Force Suits For \$135,000

Los Angeles (L.A.) County settled two civil rights complaints arising from alleged excessive use of force on prisoners in the L.A. County Jail. In January 2005, Jerry Moreno, a prisoner at the Pitchess Detention Facility (North) was brandishing two long metal frame pieces taken from a lighting fixture in his cell. He had to be forcefully extracted from his cell by the sheriff's Emergency Response Team. After firing two pepper balls at Moreno, sheriff's deputies Tasered him, allowing them to grab him off the upper bunk. The still struggling Moreno struck his head on the bunk. He was Tasered again, pending the paramedics' arrival. In the ambulance ride to the hospital, Moreno apparently repositioned himself on his stomach causing him to go into cardiac arrest from which he died. Estimating a potential \$650,000 exposure, L.A. County settled with his family for \$75,000. See: *Moreno v. County of Los Angeles*, USDC CDCA, Case No. CV-06787.

Separately, in December 2004, Desmond Pryer was in the North County jail on drug charges. Pryer refused to get up for chow, and deputies suspected a medical problem. When they escorted him to a dayroom, he started an altercation with deputies. One deputy struck Pryer with his flashlight four times in the upper leg, fracturing the femur bone. Pryer continues to have pain and a permanently impaired gait from his injuries. To avoid a projected \$250,000 exposure on Pryer's excessive force claim, the County settled for \$60,000. See: *Pryer v. County of Los*

Angeles, Los Angeles Superior Court, Case No. BC 338035.

Both Pryer's and Moreno's claims were settled in May 2006. ■

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Supreme Court: No Exclusionary Rule for Vienna Convention Violations

by Matthew T. Clarke

On June 28, 2006, the Supreme Court held that violations of the Vienna Convention on Consular Notification (Convention) do not require exclusion of evidence from a criminal trial and are subject to procedural default rules.

Moises Sanchez-Llamas, an Oregon state prisoner and a citizen of Mexico, was arrested following a shootout with police. During police questioning, he made incriminating statements. Mario Bustillo, a Virginia state prisoner and a citizen of Honduras, was arrested and charged with murder. Neither was notified of his Convention rights, including the right to have his country's consulate notified of his arrest and detention.

Sanchez-Llamas filed a pretrial motion to suppress his statements. The motion was denied. He was convicted and lost his state appeals. The Oregon Supreme Court held that the Convention did not create rights enforceable by an individual. He then appealed to the Supreme Court.

Bustillo was convicted of murder. He then filed a state petition for a writ of habeas corpus arguing for the first time that his Convention rights had been violated. The state court dismissed the petition as procedurally barred because he failed to raise the claim at trial or in direct appeal. The Virginia Supreme Court found no reversible error.

The Supreme Court granted certiorari in both cases and decided them jointly. In Sanchez-Llamas's case, the court held that exclusion of evidence was not required for violations of the Convention. Assuming without deciding that the Convention created judicially-enforceable rights, the court reasoned that the situations which called for exclusion of evidence pursuant to the exclusionary rule were those in which violations of constitutional rights could lead to unreliable evidence or the police gained an advantage by the constitutional violation. Examples of this include coercion of confessions and warrantless search and seizure. However the police gain no tactical advantage by violating the Convention. Convention violations do not lead to unreliable confessions or unlawful searches. Therefore, exclusion of evidence would be too harsh a remedy for the treaty violation.

The Supreme Court also noted that diplomatic avenues were the primary means of enforcement of international treaties and were available for Convention violations. It intimated that it might be possible to sue over violations of the Convention, possibly under 42 U.S.C. § 1983.

The Supreme Court rejected Bustillo's argument that recent International Court of Justice (World Court) rulings meant that procedural bars could not be used against claims of violations of the Convention. The court held that, whereas World Court opinions deserved "respectful consideration" of an international agreement being interpreted by an international court, they were not binding on the Supreme Court.

It also noted that the U.S. withdrew from the Optional Protocol to the Vienna Convention (which gave the World Court the authority to settle disputes between nations over the Convention). Furthermore, violations of the United States Constitution were subject to procedural default and the court did not see any reason to value Convention rights higher than constitutional rights. Therefore, the court held that Convention rights violations were subjected to procedural default. The Supreme Court affirmed the judgments of both state supreme courts. See: *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006). ■

Additional Source: *Legal Times*.

Settlement Agreement Evicts Room and Board Fees From Georgia Jail

by Michael Rigby

The Sheriff of Clinch County, Georgia, has agreed to end a decades-long practice of charging pretrial detainees for "room and board" and to return \$27,000 to those who paid the fees over a 4-year period. Also pursuant to the agreement, signed by U.S. District Court Judge Hugh Lawson on April 14, 2006, the County's insurer will pay an additional \$30,000 to cover plaintiffs' attorney fees and court costs.

In November 2004 the nonprofit Southern Center for Human Rights and the King and Spalding law firm--both based in Atlanta--sued the County on behalf of two men, Willie Williams Jr. and Mickel Jackson. Williams, who spent eight months in the jail, was charged \$4,608. He posted bond in June 2004 but was prevented from leaving the jail until he signed a promissory note agreeing to pay \$20 a week toward the debt or be reimprisoned. Williams said he paid \$140 before the case was settled.

Jackson was charged \$1,415 for three months in jail. He was released on bond in April 2004 and ordered to pay \$100 per month toward his "jail bill." Southern Center attorney Sarah Geraghty told *PLN* that Jackson paid more than \$700 toward the bill, even though the charges against him were dropped.

The class action 42 U.S.C. § 1983 lawsuit, filed in the Southern District of Georgia, claimed the practice of charging pretrial detainees \$18 a day was illegal. Specifically, the lawsuit claimed the practice violated both the U.S. and Georgia constitutions. "It's the court's job to impose appropriate punishment after conviction," said Geraghty. "It's not the sheriff's job to impose punishment on detainees at the jail." According to the lawsuit, the County has been collecting the fees for 30 years, long before the current sheriff, Winston Stephens, took office.

The case was settled during mediation before U.S. Magistrate Judge Mallon Faircloth. Under the settlement, the County agreed to reimburse all detainees who paid jail fees between November 21, 2000 and November 21, 2004. The reimbursement checks will be made available until April or May 2007.

Williams, against whom charges were also eventually dropped, was to receive \$100 under the agreement. Jackson was to receive \$718. Their attorney, Sarah Geraghty, was pleased with the outcome. "I'm really looking forward to delivering the checks," she said. See: *Williams v. Clinch County*, USDC SD GA, Case No. 7:04-CV-124-HL. ■

Additional sources: *Atlanta Journal-Constitution*, *AP*

Ex-Con Denied Admission To AZ Bar

The Arizona Supreme Court has upheld the State Committee on Character and Fitness' (Committee) denial of a convicted murderer's application for admission to the State Bar.

James Hamm served over 17 years in the Arizona prison system for a first degree murder he committed near Tucson in 1974. By the time he was released in 1992, he'd earned a bachelor's degree in applied sociology, summa cum laude, from Northern Arizona University. While on parole Hamm graduated from the Arizona State University School of Law, and in 1999, he passed the Arizona bar exam. In 2004 he filed his Character and Fitness Report with the Committee and requested admission to the Arizona Bar.

Under Arizona Supreme Court Rule 36(g), the Committee must deny an application if it is not convinced of the applicant's good moral character. The applicant may then petition the State Supreme Court for review.

The Committee denied Hamm's application, citing: (1) the extreme violence associated with his murder conviction; (2) his failure to disclose the fact that he'd been questioned by police about an argument with his wife in 1996; (3) his failure to pay child support for his son; and (4) his possible emotional instability. Hamm petitioned the Supreme Court for review.

On review, the Supreme Court recognized that the more serious a past crime is, the more difficult it will be to show current good character. It also found no instance in which a person convicted of first degree murder had been admitted to the bar in Arizona. The court found, Hamm's post-conviction accomplishments notwithstanding, that he had not

overcome the presumption of bad character created by his 1974 murder conviction. The court also found that his failure to disclose the fact that police had questioned him about the argument with his wife and his failure to pay child support weighed against him.

On that basis the Supreme Court concluded that the Committee did not violate Rule 36(g) or the due process

clause by denying Hamm's application. The Committee's decision was therefore affirmed and Hamm's petition dismissed. This case illustrates the often illusory nature claimed by government officials that want to see prisoners "rehabilitated" and "succeed", as long as they don't succeed too much. See: *In the Matter of James Joseph Hamm*, 211 Ariz. 458; 123 P.3d 652 (AZ 2005). ■

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\$6,280,000 Settlement For Illegal California Juvenile Hall Strip Searches

by John E. Dannenberg

On July 10, 2006, the County of Sacramento, California agreed to pay \$6,280,000 to the class of juvenile hall detainees who were illegally strip-searched between January 1, 1998 and October 1, 2004 at the Sacramento County Boys Ranch, Community Programs, Warren E. Thornton Youth Center, William K. Morgan Assessment Center, and the Juvenile Intake and Juvenile Hall facilities. Of this sum, up to \$500,000 is reserved for claims administration and \$1.5 million is to be paid to Sacramento class attorney Mark Merin for fees and costs. \$280,000 is specifically allocated to pay for verified claims of the class action's six representative plaintiffs.

Emily Robinson and Kimberly Kolsowski were principal named plaintiffs in two actions [later joined by the court] brought in U.S. District Court (E.D. Cal.) in 2004 seeking damages from unconstitutional strip searches in Sacramento County's various juvenile detention facilities. They alleged that regardless of their status as detainees, convicted misdemeanants or nonviolent felons, they were routinely subjected to unclothed body strip searches upon arrival at their unit and upon transfer to their units. In addition, they were strip searched in groups following visits and school classes. In no case was advance approval requested or given for such strip searches, in plain violation of California Penal Code (PC) § 4030 et seq. On September 29, 2004, Sacramento County suddenly instituted a comprehensive 14 page revised strip search policy conforming with the relevant statutes.

Discovery revealed that the illegal policy was operative between January 1, 1998 and October 1, 2004, affecting an estimated 29,000 juveniles. A class was certified consisting of all such detainees, with sub-classes specified (a) for those who were booked on misdemeanor, infraction, ordinance violations or other non-felony offenses, not involving violence, drugs or weapons [which are exceptions to the no-strip-search law], and (b) for those with felonies, but not involving these exceptions.

The settlement was designed on a "point" award basis, where more points

were assigned for the least justified searches. Each Settlement Class Member (SCM) who submits a verified claim will receive 1 point for each booking (up to a maximum of three bookings), plus additional points as follows: 5 points if the claimant was only charged with a non-felony, non-violent crime, or 3 points if charged with a non-violent felony not involving drugs or weapons. When all claims have been received (180 day filing period), the \$4 million non-class-representative claimant pot will be divided proportionate to the total points claimed and each claimant's pro-rata share. An exception is if the total points claimed are less than 100 of the estimated potential, in which case each claimant shall be paid a flat \$500 per point. If SCMs are under 18, their claim forms must be cosigned by a parent or guardian. If minors' claims are not cosigned, their checks will be

sent to the class attorney to hold in trust until their 18th birthdays. Any affected person wishing to sue separately may opt out of the class settlement and seek their own relief.

Potential SCMs will be sought by contacting all known prior juvenile detainees at their last known addresses, by posting notices in all Sacramento juvenile facilities, and by public advertising in newspapers and on the radio. Any SCM may write the class attorney and obtain claim forms. The claims administrator, to whom completed forms must be sent, is Gilardi and Co., LLC, P.O. Box 1110, Corte Madera, CA 94976-1110. The class attorney is Law Office of Mark Merin, 2001 P Street, Suite 100, Sacramento, CA 95814. See: *Robinson v. Sacramento County*, U.S.D.C. (E.D. Cal.), Case No. CIV-S-04-1617 FCD/PAN. ■

New York Parole Rates Plunge Under Governor Pataki's Policy

by John E. Dannenberg

The administration of Governor George Pataki has dramatically cut parole release rates for violent felons, especially those with A-1 crimes (e.g., murder, attempted murder, kidnapping, arson). Where 23 percent of New York's parole eligible A-1 felons were released in 1992-93, only 3 percent were approved in 2004-05. The restriction is not the result of any change in statutes or regulations, but is due to the dramatic change in "exercise of discretion" by Pataki's increasingly carefully culled appointees to the parole board.

New York has the nation's highest percentage of prisoners sentenced to life-top terms (20 %), none of whom can be released unless and until the board says so. The Governor does not enjoy veto power over the board in New York, but his personal (read: political) views nonetheless carry the day via public reprovals and new appointments. For example, former political prisoner Kathy Boudin was convicted of second degree felony-murder after three deaths during

a 1982 Brinks armored truck heist. When she was approved for parole in 2003, Pataki angrily replaced longtime Board Chairman Brion Travis in a matter of months. No controversial paroles have been granted since.

The grass-roots citizens' organization Coalition for Parole Restoration complains that the system has "no accountability and no real avenue of judicial review." If a prisoner challenges his parole denial, it takes two years to get through the appeals system. But also in two years, the prisoner will automatically have another parole hearing. George Oliveras (who was eventually released after serving 27 years on a 25-life term) made it to the appellate courthouse steps four days before his subsequent hearing, only to have the court moot his petition. [Note: Mootness should be challengeable here because the issue is "capable of repetition yet evading review."]

Career criminal Alfred Mancuso, 72, got 25-life in 1978. Yet, with a clean

prison record and claims of innocence, he has been denied parole every two years for the last 16 years. "The bottom line is, they are afraid of Governor Pataki. Every time they grant someone parole, [Gov. Pataki] comes out against it in the newspaper. I ... believe they are afraid of the repercussions," he said.

Albany Supreme Court Justice Edward Sheridan noted that the governor has repeatedly called for the elimination of paroles. The judge used this in his 2003 ruling wherein he found "an undeniable inference that the Board has 'gotten the message' and is implementing executive policy." Alfred O'Connor, counsel for the New York State Defenders Association, noted that the newer restrictions are being applied unfairly to those who plea-bargained earlier to get a more lenient term. Brian Jacques, who plea-bargained for 15-life for a murder in 1983 expected to be released in 15-17 years; indeed, the sentencing judge gave him the minimum sentence. Today, with a clean record and 23 years in, he is still in the dark as to when he might be released. He believes the board is following Pataki's agenda, "do not let these people out."

Most board members declined interviews or to answer phone calls on the subject. Chauncey Parker, Governor Pataki's director of criminal justice and who is over the board, does not deny that the board shares the governor's philosophy and follows his agenda to the extent legally permitted. The board can place any weight on any factors and does not have to explain itself to anyone. The current "agenda" is to simply lay the denial of parole to "the seriousness of the crime," an unchanging and subjective factor. "The governor's focus [is on] public safety," Parker said. But retrospectively imposing an arbitrary sentencing system is fundamentally unfair, O'Connor complained.

Yet Mr. Parker states that Governor Pataki favors going to the federal system, where life sentences mean life without the possibility of parole. He would then leave all other sentences to the discretion of the judge, to be rendered as determinate terms in effect eliminating the board. In New York, the 1995 Sentencing Reform Act eliminated parole for second felony offenders; Jenna's Law in 1998 abolished parole for all violent offenders and added a post-release supervision program.

Only non-violent, non-drug offenders receive an indeterminate (but non-life-top) sentence in New York now. Yet, the rate of parole of even those offenders has dropped from 5,196 to 386 in the last decade.

New York's legislature seems stumped on what to do. They have looked at sentencing reforms, but can't come to a consensus when political careers are in tension with concerns for the

burgeoning prison budget. Meanwhile, triple murderer Gerald Balone, who is serving a 25-life sentence, has completed all the vocational and rehabilitation programs offered in his three decades in state prison. As to getting out, he is no less baffled than the legislature. "I am at a loss," he lamented. "I don't know what to do." ■

Source: *New York Law Journal*

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Idaho Population Cap Upheld; \$155,858.68 in Fees and Cost Awarded; 300+ Prisoners Shipped to Minn. CCA Facility

A federal court in Idaho has refused to lift a 1987 population cap on four housing units at the Idaho State Correctional Institution (ISCI). More than 200 beds were removed and more than 300 prisoners were transferred to a Minnesota private prison as a result of the ruling. Many were later moved to private prisons in Texas.

In 1987, the federal district court issued injunctive relief in a class action lawsuit, capping the population of four ISCI units due to overcrowding. See: *Balla v. Idaho State Board of Correction*, 656 F.Supp 1108 (D. Id. 1987).

Pursuant to 18 U.S.C. § 3626(b)(1) and (2) of the Prison Litigation Reform Act (PLRA), in 2005 prison officials moved to terminate the 1987 population caps. The ISCI population had grown from approximately 750 in 1987 to 1,416 prisoners in 2005. The court noted that seventeen “years after the injunctive orders ... Defendants return to court, requesting relief under conditions that are worse ... than when the original injunctive orders were put in place.”

The court first determined that the 1987 injunctions satisfied “the narrow tailoring standard of § 3626(b)(2),” and the “findings required by the PLRA are implicit in the court’s judgment in *Balla*.” It then adopted *Balla*’s extensive findings supporting the population cap.

“Over the past several years, Idaho’s incarceration rate has generally been in the top ten in the country, often in the top five. Seldom have resources maintained pace with the inmate population increases.... Projected growth in the inmate population over the next four years anticipates an additional 1,300 inmates system wide. No funds have been allocated to mitigate the anticipated growth in the ... population,” stated the court.

Finding that “the record clearly shows current and ongoing constitutional violations,” the district court adopted *Balla*’s conclusions of law and injunctive orders. It then “determined that the

prospective relief ordered in *Balla* ... remains necessary to correct the current and ongoing Eighth Amendment violations at ISCI.”

The court then issued a tentative ruling granting the plaintiffs’ motion for attorney fees and costs, noting that in *Dannenberg v. Valadez*, 338 F.3d 1070, 1075 (9th Cir. 2003), the Ninth Circuit held that the full amount of attorney fees incurred to obtain injunctive relief may be awarded. The court indicated, however, that it would suspend its ruling if oral argument was requested.

On December 9, 2005, the district court denied the defendants’ motion for partial reconsideration, finding that the defendants were reasserting arguments that had been previously presented, considered and rejected. The court also adopted its earlier tentative ruling on attorney fees and costs, awarding plaintiffs attorney fees of \$150,054.15 and costs of \$5,804.53. See: *Balla v. Idaho Bd. of Corrections*, 2005 WL 3412806.

In response to the decision, Idaho prison officials transferred more than 300

prisoners to a Corrections Corporation of America (CCA) prison in Appleton, Minnesota, at a cost of \$1.1 million – not including transportation and recordkeeping expenses.

Shipping prisoners out-of-state was the only option to ease overcrowding, claimed Idaho Department of Corrections Director Tom Beauclair. Apparently sentencing reform, releasing prisoners past their parole dates and similar measures are beyond the pale. “Idaho’s prisons and jails can no longer manage inmate growth and our ability to stretch the system is over,” said Beauclair. In addition to the CCA prison, Idaho houses 588 prisoners in county jails, but that is viewed as a short-term remedy because local jails are growing increasingly crowded.

Prison officials plan to ask the state legislature for \$160 million to construct three new prisons, and for an additional \$7.9 million to cover the cost of housing overflow prisoners both out-of-state and in county jail cells. ■

Additional Sources: *Casper Star Tribune*, *Spokesman Review*, *wcco.com*

New York Jail Employee Charged With Sexual Abuse Commits Suicide

On March 27, 2006, a health care worker charged with multiple counts of sexually abusing female prisoners at the Suffolk County Jail apparently committed suicide by stepping into the path of an oncoming Long Island Railroad Train. He was pronounced dead at the scene just before midnight.

Physician’s Assistant Gary Feinberg, 48, had been arrested on February 8, 2006, and charged with 16 counts of second-degree sexual abuse and 5 counts of misconduct, said Sheriff’s Department Chief of Staff Alan Otto. Additional charges were pending. Feinberg, who had pleaded not guilty to the charges, was free on \$2,500 bail and had returned to his job at the jail, though his contact with prisoners was supposedly prohibited.

Feinberg’s suicide coincided with the filing of a \$10 million lawsuit by one of the victims. Rochelle Ramos claimed in

her lawsuit--filed the day of Feinberg’s death--that Feinberg rubbed up against her and fondled her roughly during a routine exam on December 28, 2005. Though Ramos is no longer in jail she still suffers from the assault. “I have to struggle with the feeling,” Ramos, 40, said during a news conference at her attorney’s office. “I feel so gross. I feel so violated.”

Police said Feinberg inappropriately touched at least five women. Ramos’s attorney, Leonard Leeds, said dozens more have come forward since. Leeds, who called the suicide a tragedy, noted the county may still be liable if officials were aware of Feinberg’s behavior and did nothing to stop him. “If there were so many complaints and allegations, why didn’t Suffolk County do anything?” Leeds said. ■

Source: *Newsday*

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Federal Prisoner Awarded \$150.00 For Food Poisoning

by Michael Rigby

On February 17, 2006, the U.S. District Court for the Middle district of Florida awarded \$150.00 to a federal prisoner who contracted food poisoning while imprisoned at FCC Coleman-Low.

On April 23, 2002, prisoners eating breakfast in the chow hall were served ham that had been stored overnight in a malfunctioning cooler. Several of the prisoners, including plaintiff Guillermo Gil, became ill and were treated in the prison medical department. Gil, who experienced diarrhea, chills, nausea, vomiting, headache, and dizziness, was given phenergan for the vomiting and imodium for diarrhea. After returning to his housing unit Gil testified he was unable to eat and did not feel better for three days.

Gil further claimed he became fearful of eating chow hall food, developed a taste aversion to ham, and lost 15 pounds as a result of being unable to eat certain foods.

Gil sued under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq., claiming the United States was liable for damages relating to the food poisoning. The United States admitted liability and a non-jury trial was held on February 13, 2006, to assess damages.

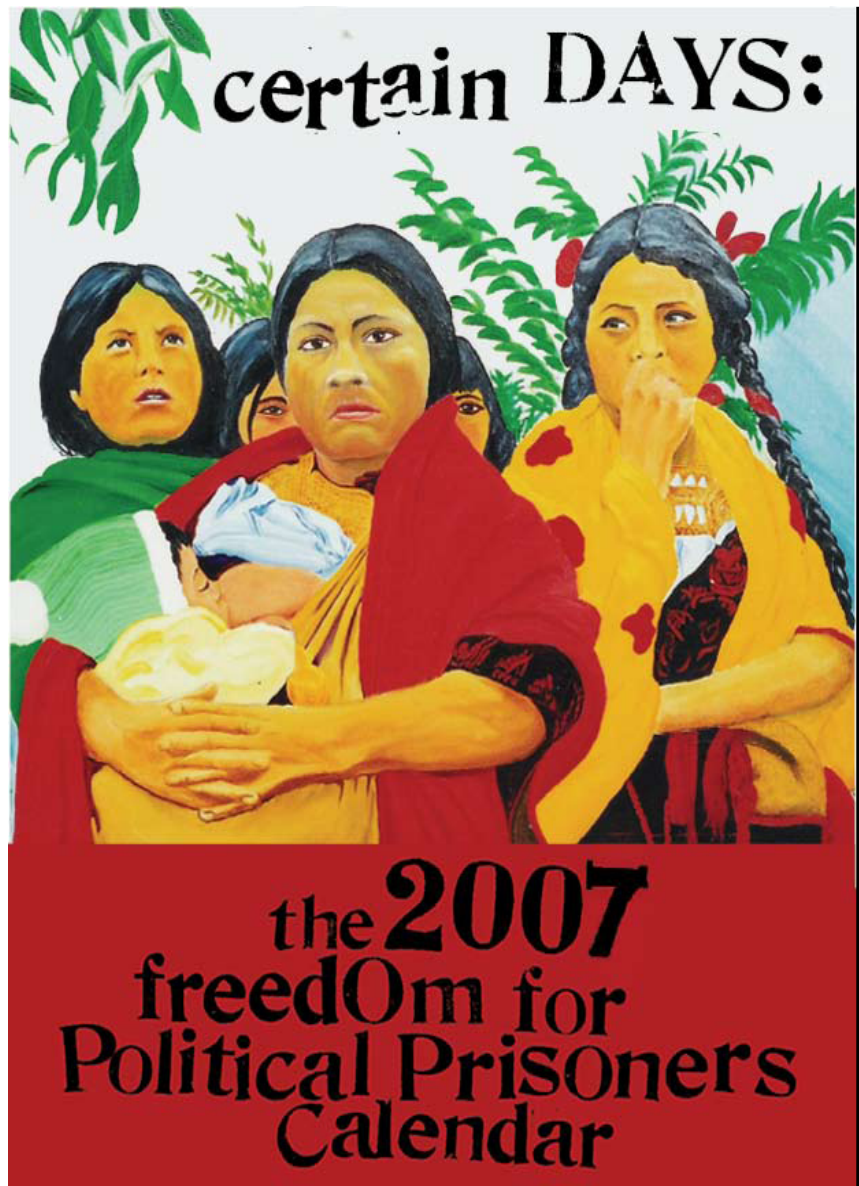
Initially the Court noted that as a federal prisoner Gil's recovery under the FTCA was limited in that "no [prisoner] may bring a civil action against the United States ... for mental or emotional injury suffered while in custody without a prior showing of physical injury."

Based on the evidence presented, the Court found that Gil suffered the effects of acute gastroenteritis for three days. However, the Court further determined that the evidence was insufficient to establish that Gil continued to suffer physical effects from the food poisoning beyond that time. Moreover, the Court

observed that Gil provided no objective evidence showing that he suffered mental injury from the incident or that his aversion to ham "extends to other foods such that he is unable to sustain himself."

Consequently, the Court concluded Gil was not entitled to damages for his asserted mental injury, but he was entitled to intangible damages of \$150 for pain

and suffering, inconvenience, and loss of capacity for enjoyment of life. Gil was represented by Jose H. Cortes, Jr. of the Ocala, Florida firm Blanchard, Merriam, Adel, & Kirkland. Cases such as this affecting large number of prisoners with relatively minor injury are probably better brought as class actions. See: *Gil v. United States Of America*, USDC MD FL, Case No. 5:03-CV-198-0C-10GPJ. ■



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Minnesota Court Invalidates “Some Evidence” Standard in Disciplinary Hearings for Fact-Finding

by David M. Reutter

The Minnesota Supreme Court has held that a Minnesota Department of Corrections disciplinary hearing fact-finder must find by a preponderance of the evidence that a prisoner has violated a disciplinary rule before the Commissioner of Corrections can extend the prisoner's date of supervised release for the rule violation. In so holding, the court held the “some evidence” standard of proof is inappropriate at the fact-finding level.

Before the Court was an appeal of a writ of habeas denial by the Washington County District Court, which was brought by Richard Carillo, a prisoner at the Minnesota Correctional Facility at Faribault (MCFF). Carillo's petition alleged that on May 24, 2002, a fight broke out at MCFF while Carillo was on the prison baseball field with several other prisoners.

The fight caused guards to order prisoners to return to their living quarters. Lieutenant Susan Williams saw another prisoner fall in front of Carillo. She was about 50 yards away, and she radioed guards to intercept “the next white person [who] comes in ****, [and] grab his ID.” Williams then wrote Carillo a charge for disorderly conduct and assault of a prisoner.

At the disciplinary hearing, Williams said she saw a white prisoner put his hands on another prisoner's shoulders and push him to the ground. She could not identify Carillo's face because he was 50 yards away, but she maintained constant eye contact with him until he reached the living quarters. She also identified Carillo by the clothing he was wearing, despite the fact that all other prisoners playing baseball were also wearing a white T-shirt, gray sweatpants and tennis shoes.

Robert Mendez testified that he was the prisoner who fell to the ground. He said he was not pushed but that he stumbled and fell on his own while jogging toward the building; no one shoved him. Another prisoner and Carillo testified that Mendez fell on his own and was not pushed. The hearing officer found that Williams' testimony constituted “some evidence” that a violation occurred and found Carillo

guilty. The Commissioner of Corrections then delayed Carillo's supervised release date by seven days.

Carillo's petition argued that his term of imprisonment was extended without providing sufficient procedural due process. The court concluded it was inappropriate to analyze Carillo's liberty interest by looking solely to statutory language; rather it must examine the nature of the deprivation and the extent to which the deprivation departs from the basic conditions of Carillo's sentence.

Under Minnesota's statutory scheme, sentences presumptively consist of a specified minimum term of imprisonment equal to two thirds of the executed sentence and a specified maximum term of supervised release equal to one third of the executed sentence. Under this scheme, a prisoner's term of imprisonment may be extended by the Commissioner only if the prisoner commits a disciplinary offense. The Court held this scheme implicates due process protection, as any extension of a prisoner's period of imprisonment represents a significant departure from the basic conditions of the prisoner's sentence.

The Court held that the “some evidence” standard of *Superintendent, Massachusetts Correctional Institution at Walpole v. Hill*, 472 U.S. 445 (1985) addressed only a standard of appellate review, not a standard of proof. Whether a standard of proof satisfies due process requires a three-part test: 1) the private interests affected; 2) the risk of an erroneous deprivation of such an interest; and 3) the government's interest.

Carillo satisfied the first test. The Court said that the risk of an erroneous deprivation of an interest is high when the fact-finder uses the “some evidence” standard. As to the final factor, the government has an interest in promoting fair procedures. The “some evidence” standard sends the message to prisoners as well as society at large that once an individual is convicted of a crime, he is presumed guilty of every subsequent allegation.

The Court held that prison hearing officers must find by a preponderance of evidence that Carillo had committed a disciplinary offense before the Commissioner can extend the date of his supervised release. See: *Carillo v. Fabian*, 701 N.W.2d 763 (Minn. 2005). ■

\$50,000 Settlement for Neck Injury Resulting from Seattle Jail Guard's Excessive Force

Washington State's King County Jail has paid a former jail prisoner \$50,000 to settle a civil rights action claiming guards used excessive force and injured the prisoner's neck.

Robert Ward Garrison was confined at the King County Department of Adult Detention and placed in an “unsanitary” cell that was “piss covered.” He “begged,” to no avail for guards to move him to another cell. On March 10, 1998, Garrison pulled apart a fire sprinkler, which ran for 45 minutes, flooding the wing.

A Sergeant ordered Garrison to be 4-pointed on a board, face down. His feet were shackled together, his right arm cuffed near his hip, and his left arm stretched out over his head. After several hours, Garrison's shoulder began to hurt.

Garrison managed to free his feet and sat up. Eventually, guards discovered this and rushed the cell. One guard grabbed Garrison by the hair, slamming his face into the board, causing “a very sharp burning pain.” The guard then dropped his knee on Garrison's neck, which exploded in pain.

Garrison continued to experience neck pain, but it was not until January 1999 that an examination revealed he had sustained a herniated disc in his neck. Garrison then filed a civil rights action in April 2002.

In May 2006, Garrison agreed to settle the suit for \$50,000 with King County. Garrison was represented by Carl Marquardt of the Seattle law firm Stokes Lawrence. See: *Garrison v. King County Department of Adult Detention*, USDC, WD WA, Case No. C02-0880. ■

Sovereign Immunity No Bar to BOP Prisoners' Eighth Amendment Mandamus Suit

The Tenth Circuit Court of Appeals has held that a federal prisoner's mandamus action alleging an Eighth Amendment violation is not barred by the doctrine of sovereign immunity. This action was brought by Bureau of Prisons (BOP) prisoner Ron Simmat, who is incarcerated in the United States Penitentiary at Leavenworth, Kansas.

Simmat submitted a request to BOP staff in August 1999, seeking treatment by a dentist for a cavity. He filed a subsequent request in November 1999. On April 9, 2000, Simmat filed yet another request stating that "his lower chewing molar" had begun giving him "constant pain, which gets really bad when I lay down." Four days later, Simmat was ordered to report for an X-ray, which indicated that the tooth might need to be extracted. Simmat was asked to return for a follow-up in two months. He did not return and received no further dental care for his other dental problems, which included gum disease, several cavities and a root that protruded from his gums.

He filed his pro se complaint in Kansas federal district court, seeking injunctive relief for the denied dental care in violation of the Eighth Amendment. The defendants moved for dismissal on the ground that sovereign immunity deprived the court of subject matter jurisdiction. The district court held that because Simmat only sought injunctive relief, it had jurisdiction. Summary judgment, however, was granted the defendants for Simmat's failure to raise a genuine issue of fact regarding deliberate indifference to a serious medical condition.

The Tenth Circuit held that Simmat's claim met the basic requirements of federal question jurisdiction under 28 U.S.C. § 1331, for it sought recovery under the Constitution or federal law and was neither "immaterial" or "frivolous." But jurisdiction is not enough to bring suit; a plaintiff must also state a claim upon which relief may be granted, what used to be called a cause of action.

The real question before the Court was what type of action is allowed. It held a *Bivens* action against the defendants in their official capacity is not allowed. The appellate court held that a prisoner seeking injunctive relief to compel a government official to perform non—discretionary

duties should bring a mandamus action under 28 U.S.C. § 1361.

The BOP argued that because Simmat's suit would "require affirmative action by [the] sovereign," namely the provision of dental care, it was prohibited by *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The Court held this interpretation "would leave prisoners without a remedy for federal prison officials' failure to carry out their constitutional duties, violating the basic principle that 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be

alert to adjust their remedies so as to grant the necessary relief.'" Moreover, Congress passed legislation to waive sovereign immunity in most suits for non-monetary relief in 1976. See: 5 U.S.C. § 702.

While the Tenth Circuit held that sovereign immunity did not bar Simmat's Eighth Amendment claim seeking a mandatory injunction, or more precisely, relief and the nature of mandamus, his claim was ordered dismissed without prejudice for failure to exhaust administrative remedies. See: *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005).

Wrongly Imprisoned Massachusetts Man Settles Suit Against City For \$2,450,000

On October 14, 2005, the City of Chicopee, Massachusetts, paid \$2,450,000 to settle with a man who was falsely convicted of rape and imprisoned for 14 years before DNA evidence exonerated him.

Eduardo Velazquez was convicted in 1987 of raping a college student at knife point and sentenced to prison. He remained there for 14 years until DNA testing revealed he was not the perpetrator.

Velazquez sued the City of Chicopee and six police officers--James Pollard, Dennis Fontaine, Ron Landry, Mark Coelho, Michael Carroll, and Jeanne Norwalk--for improper procedures. Velazquez claimed the officers suppressed clearly exculpatory evidence, including a car-towing report and police call sheets

that showed he was being questioned by cops in another matter while the rape was occurring several blocks away. Moreover, Velazquez claimed that after the victim reported the rape police officers coaxed her into identifying him as the assailant through "a grossly improper one-on-one show up" at her residence.

The City settled without admitting liability. Velazquez was 21 when he went to prison. He was 39 when the case settled.

Velazquez previously settled with the Commonwealth of Massachusetts for the statutory maximum of \$500,000. He was represented by Mark H. Bluver of Springfield. U.S. District Court Judge Michael A. Ponsor presided. See: *Velazquez v. City of Chicopee*, USDC D MA, Case No. 3:03-CV-30249-MAP. ■

L.A. County Settles With Abused Quadriplegic Prisoner For \$46,000

In February 2004, prisoner Joseph Burriss became exasperated waiting to make a phone call from the Los Angeles County Jail. Burriss, a partial quadriplegic, maneuvered his wheelchair towards a deputy and made a disparaging racial remark. The deputy responded by wheeling Burriss to an isolation cell. When they arrived there, Burriss claims the deputy dumped him from the chair onto the floor. The deputy claimed that Burriss was flailing his arms in an at-

tempt to hit or grab her. She then pepper sprayed Burriss in the face and put him in the cell.

Noting that a jury would not likely find that Burriss was a danger to the deputy, the County rationalized that an unreasonable-use-of-force liability existed. Although Burriss' injuries were not extensive, a settlement was reached in March 2006 for \$46,000. See: *Burriss v. County of Los Angeles*, USDC, SD CA, Case No. CV-04-09967 RSWL. ■

Oregon “Predatory Sex Offender” Designation Order Reversed; Notice and Hearing Required in All Cases

The Oregon Supreme Court held that every offender facing a “predatory sex offender” designation under Oregon’s community notification law is entitled to minimal due process protections (i.e., notice and hearing).

In 1993, Oregon enacted a law requiring community notification when prisoners designated as predatory sex offenders are released on probation or parole. ORS 181.586(1)(a) authorizes the Board of Parole and Post-Prison Supervision (Board) “to determine which of the persons it releases on parole or post-prison supervision should be designated as predatory sex offenders.”

“When the board first took on the task of identifying predatory sex offenders, it adopted a decisional process ... that did not allow for input from the potential designees.” In *Noble v. Board of Parole*, 327 Or. 485, 964 P.2d 990 (1998), however, the Oregon Supreme Court held that this process deprived the designees of due process, which “require[s] the board to give a potential designee notice and an evidentiary hearing before the designation takes place.” [*PLN*, Apr. 1999, p. 14].

In response to *Noble*, the board adopted a new, but similar, designation scheme. “Applying the risk assessment scales ... was a simple process” of simply checking items on the scale that pertained to the particular individual. Certain scores under this system required a predatory sex offender designation while other scores provided for discretion.

“The amount of process that a potential predatory sex offender designee received depended on the category in which the risk assessment score placed the potential designee.” When the score required the sex offender designation the offender was entitled to receive notice of the risk assessment score and an opportunity to submit written objections, but was not entitled to a hearing. When the designation was not mandated by the risk assessment score, the offender was entitled “to a full evidentiary hearing prior to any predatory sex offender finding.”

Applying this scheme, the Board determined that V.L.Y. was not entitled to a hearing. It then rejected his written objections and designated him as a predatory sex offender. The Oregon Court of Ap-

peals, sitting en banc, agreed that V.L.Y. was not entitled to a hearing because the Board “lawfully could, and did, base its designation decision entirely on objective facts drawn from petitioner’s criminal history.” *V.L.Y. v. Board of Parole*, 188 Or. App. 617, 72 P.3d 993 (2003).

The Oregon Supreme Court reversed, holding that the board cannot “reasonably ... use this scale that relies solely on objective and easily ascertainable aspects of the offender’s crime or crimes and excludes other evidence of the offender’s current behavior and characteristics as the sole basis for determining that the offender presently ‘exhibits characteristics showing a tendency to victimize or injure others.’” Therefore, “the board erred in using a procedure that permitted it to rely exclusively on the sex offender risk assessment scale in making its predatory sex offender designation.”

New Jersey Appeals Court Upholds Statute Disenfranchising Felons

The Superior Court of New Jersey, Appellate Division, held that a state law prohibiting felons from voting while on parole or probation did not violate equal protection despite its disparate effect on minority voting power.

Plaintiffs, the New Jersey National Association for the Advancement of Colored People (NAACP), the Latino Leadership Alliance, and others filed a claim seeking to invalidate N.J.S.A. 19:4-1(8), which disenfranchises defendants while on parole or probation for “indictable offenses.”

The plaintiffs conceded the statute was authorized by Article II of the New Jersey Constitution, but argued that because “the criminal justice system in New Jersey discriminates against African-Americans and Hispanics, thereby disproportionately increasing their population among parolees and probationers,” it unfairly diluted their voting power.

The Superior Court of New Jersey, Chancery Division, Union County, in Case No. UNN-C-4-04, held the statute did not violate the plaintiffs’ right to equal protection under the law. The Appellate Division affirmed, holding that (a) the statute is specifically authorized by the

Noting that “the import of [the] court’s previous opinion in *Noble* does not appear to have been fully understood by the board,” the Court re-emphasized that “any party facing such a designation, whatever the reason for that designation, must be accorded the basics of due process. Those basics, at a minimum, include notice and the opportunity to be heard as to all factual questions at a meaningful time and in a meaningful manner.... Because of the nature of the statutory inquiry assigned to it (to determine whether a potential designee ‘exhibits characteristics showing a tendency to victimize or injure others’) the board is not at liberty to substitute a purely documentary exercise for the hearing that any person faced with such a designation is entitled to receive.” See: *V.L.Y. v. Board of Parole & Post-Prison Supervision*, 338 Or. 44, 106 P.3d 145 (Or. 2005). ■

New Jersey Constitution and (b) “[w]hen, as here, a statute is facially neutral, disparate impact is an insufficient basis for relief under [New Jersey’s] equal protection doctrine.” Similarly, the Appellate Division observed that the U.S. Supreme Court held in *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974) that “facially neutral state felon disenfranchisement statutes adopted without a discriminatory purpose” did not violate the equal protection clause of the Fourteenth Amendment.

The court noted that if the statute prohibited only African-Americans or Hispanics from voting, then it would have violated the State’s equal protection doctrine. (Apparently it’s okay to ban minorities from voting as long as it’s based on a technicality.)

The plaintiffs were represented by attorneys Frank Askin and Laughlin McDonald (Rutgers Constitutional Litigation Clinic and Southern Regional Office of the American Civil Liberties Union). See: *New Jersey State Conference-NAACP v. Harvey*, 381 N.J.Super. 155, 885 A.2d 445 (N.J.Super.A.D., 2005), petition for appeal denied, 186 N.J. 363, 895 A.2d 450 (Table) (N.J. 2006). ■

News in Brief:

Arkansas: On July 9, 2006, Rebecca Daniel, the former commissary manager at the Miller county jail was charged with sexually assaulting a male prisoner and giving him chewing tobacco. Prosecutors claim Daniel had sex with the prisoner in the back of the commissary and plied him with movies, food and tobacco.

Belgium: On September 24, 2006, an unidentified 25 year old prisoner died in jail custody. On the 26th at least 100 North African youths rioted to protest jail conditions and torched stores, police cars and a youth center. At least 30 protestors were arrested.

Indiana: On September 28, 200 state Department of Corrections officials announced they had fired two guards and were investigating how Wabash Valley Correctional Facility prisoner Anthony Stockelman, 39, wound up with the words "Katie's Revenge" tattooed on his forehead. Stockelman had been convicted of raping and murdering 10 year old Katln "Katie" Collman in 2005. Pictures of Stockelman and the tattoo have since made it online. He is now in protective custody.

Louisiana: On September 21, 2006, Union Parish jail guards James Webb, 23, and Nicholas Wilson, 21, were charged with smuggling an ounce of marijuana into the jail to give to prisoner Percy Franklin who is also charged with marijuana possession.

Missouri: On September 19, 2006, the Ste. Genevieve county jail reported that an unspecified number of prisoners had staph infections and had been quarantined and treated.

New Jersey: On July 26, 2006, Timberly Gamache, 35, a federal guard at the Federal Correctional Center in Ft. Dix was arrested and charged with providing tobacco and cell phones to Hassan Thomas, a prisoner convicted of drug crimes at the prison. Prison officials set up a sting using a prisoner informant to buy two pounds of tobacco from Gamache for \$1,483.00. Gamache later charged the informant \$2,800 for a pound of tobacco and a cellphone. Thomas and Gamache are both charged with conspiracy.

New York: On July 9, 2006, Marlon Clay, 35, a prisoner at the Erie County Correctional Facility in Alden choked to death in the jail visiting room while attempting to swallow two bags of tobacco given to him by Lisa Howard, a visitor. Howard was arrested and charged with promoting prison contraband.

New York: On September 20, 2006, Donald Keegan, 36, a Long Island landscaper employed by Suffolk County, was charged in Suffolk county supreme court with planning to murder four convicted sex offenders living near his home by setting their home on fire. An undercover cop befriended Keegan who told him, on audio and video tape, that he was planning to murder the sex offenders. In his conversations with police Keegan also expressed his dislike for Blacks, Native Americans and welfare recipients. The sex offenders were also booted from their residence by police who claimed it was too close to a school.

Oklahoma: On July 25, 2006, the Cornell Corrections operated Great Plains Correctional Facility in Hinton was placed

on lockdown after a fight between 25-30 prisoners left five prisoners injured.

Oregon: On September 20, 2006, state police arrested James Price, 34, a guard at the state women's prison in Wilsonville on charges of raping at least one woman prisoner at the facility.

Virginia: On July 25, 2006, former Department of Corrections Lieutenant Bobby Brown, 56, was sentenced to six months in jail after of having consensual sex with Sheron Montrey while she was a prisoner at the jail and impregnating her.

Wisconsin: On September 19, 2006, Eric Hunt, a guard at the Wisconsin Secure Program Facility in Boscobel was charged in Grant County with hitting and abusing prisoner Jorel Norwood while Norwood was handcuffed. ■



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Mentally Ill Arkansas Prisoners Removed From Supermax, CMS Contract Renewed

by Michael Rigby

On April 21, 2006, the Arkansas Board of Corrections approved a new policy designed to keep mentally ill prisoners out of sensory-deprived environments like the Varner Supermax Unit in Lincoln County. The Board also renewed the prison system's contract with Correctional Medical Services (CMS).

The new supermax policy was implemented about two months after an investigation by the *Arkansas Democrat-Gazette* revealed that mentally ill prisoners were housed at Varner in 7-foot by 11-foot cells nearly around the clock because the prison system lacked suitable beds elsewhere. In March "about eight" prisoners were removed from the supermax on the advice of a prison psychiatrist.

The new policy is certainly a step in the right direction, though the idea that these environments can cause a mentally ill prisoner's condition to deteriorate is not exactly groundbreaking. Mental health experts around the country have been saying this for years. What's more, federal courts have ruled consistently that housing mentally ill prisoners in super-

maxes may constitute cruel and unusual punishment.

Under the new policy, housing assignments and other actions that could worsen a mentally ill prisoner's condition are prohibited, said Wendy Kelley, the Arkansas Department of Corrections' (ADOC) top mental health official. "Before it had been more on inmates taking responsibility for their behavior," said Kelley. "The focus now is on determining if an inmate is mentally ill. ... If he's mentally ill, the focus now is on recommendations that will change the behavior." Mental health officials will be charged with making the recommendations, which will include drug therapy, talk therapy, and other psychological treatments.

Also at the Board's April meeting, a one-year extension of CMS's \$43 million contract was unanimously approved. The ADOC contracted with CMS in 2003 to

provide medical care to 13,500 prisoners in the state's 18 prisons. The cost breakdown amounts to \$237.59 per prisoner per month.

Despite the contract extension, the Board criticized CMS for its poor dental services and staff retention, inefficient data collection and analysis, and for not keeping up with prisoners' medications when they are transferred. But if that's the ADOC's only complaint they're doing good. As consistently reported in *PLN*, the St. Louis-based CMS has been condemned by prisoners, advocates, and detention facility officials nationwide for being more concerned about the bottom line than about prisoner health care. See, for example, *PLN*, December 2005, p.1. See *PLN* indexes or visit online at www.prisonlegalnews.org for more. ■

Source: *Arkansas Democrat-Gazette*

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Other Resources

ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 915 15th St. N.W., 7th Floor, Washington, DC 20005.

Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. FAMM-gram, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

Florida Prison Legal Perspectives

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November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

Stop Prisoner Rape

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Western Prison Project

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The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

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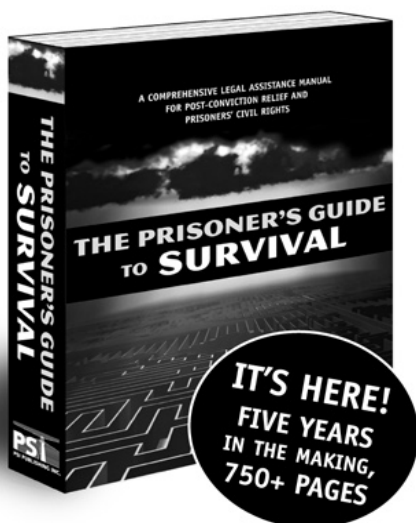
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Florida's Department of Corruption

by David M. Reutter

An underlying principle of our penal system is to instill respect for the laws and rules that govern our society. As such, those charged with running our nation's jails and prisons have an ethical obligation to set an example for all citizens, including employees under their watch and prisoners in their custody. Investigations of the Florida Department of Corrections (FDOC), however, have revealed that more often FDOC'S leaders are seeking to emulate the criminal acts of prisoners.

Where you follow, so shall you go. Prisoners, by their lot, are unemployed and confined in jails or prisons. As of August 2006, more than 50 key upper-

level FDOC staff members have been fired or forced to retire. An additional 21, including former FDOC Secretary James V. Crosby, have been arrested and indicted. They are being transformed from the watchers to the watched.

To those familiar with FDOC's inner workings, the revelations come as no surprise. "Everybody likes to use the phrase 'good ole boys club,' that's what it is out there and they protect one another. There is a code of silence," says a former guard identified by *First Coast News* as "Dave."

But that all began to change when Gov. Jeb Bush perched a good ole boy at the top of FDOC's roost. Trouble usually erupts when a group feels invincible and above the law. "I would equate it to the mafia, yes," said a Florida prison guard who requested anonymity. "Some of them have the mentality that they are untouchable."

The good ole boys kept prisoners and their comrades in line by using plain old fear. "They'll find some way to get even with you and that's well known. The intimidation factor is unbelievable," stated Ron McAndrew, a former FDOC warden.

A Dream Come True

Shortly after Bush became Florida's governor in 1999, he sought an FDOC outsider to make changes in the corrections department. Enter Michael Moore, a former director of the Texas and South Carolina prison systems. From the start, Moore was met with resistance from veteran and well-entrenched FDOC employees. By 2003, the morale of FDOC employees was low.

To remedy that, Bush tapped a veteran prison employee as the new FDOC Secretary. His choice was Crosby, a born and raised good ole boy from the infamous Iron Triangle, an area in rural North Central Florida that is dependent upon prisons to support its economy. It is the area where Florida prisons originated, and you can find a grandfather, father and son working the same shift at the same facility.

After receiving a degree in journalism at the University of Florida, Crosby began his prison career as a classification specialist in 1975 at the North Florida Reception Center, which is the heart of the Iron Triangle because it feeds the body of other prisons. From there, Crosby worked his way up the ranks until he became warden. He oversaw five prisons until he became the overseer of Florida State Prison (FSP).

Crosby was in charge of FSP when guards beat to death Frank Valdez in his death row cell in 1999. [See: *PLN*, Oct. 1999, p.1]. Crosby is currently facing liability for Valdez's death. Shortly after Valdez's death, Crosby was promoted to Regional Director over one-quarter of FDOC's prisons.

Besides being a master at moving up the prison system's hierarchy, Crosby had been heavily involved in Republican politics, beginning in the early 1980's. He served as Mayor of Starke, home of FSP. He also served as a local volunteer for George W. Bush's 2000 presidential campaign, ultimately serving as a delegate at the 2000 Republican Convention. He also organized rallies for Jeb Bush's 2002 re-election campaign. Whether or

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Dept. of Corruption (cont.)

not Governor Bush was repaying a loyal party-man for his work, Crosby's appointment as Secretary of FDOC was wildly popular among the FDOC faithful.

Sen. Rod Smith (D-Alachua), who represents thousands of prison employees, hailed Crosby's 2003 appointment as Secretary as "a dream come true." As it turns out, it was a pipe dream that faced a rude awakening by scandal and investigations.

Roid Rage

"What will make you laugh, will make you cry," goes the old saying. For years, FDOC guards and administrators have laughed as prisoner snitches rat out their fellow prisoners for drugs or other contraband. Usually the rat receives a chunk of change or some other special privilege. More often, however, the snitch's only reward is to satisfy his anger, jealousy or resentment directed at another prisoner.

On October 27, 2003, an angry girlfriend blew the lid off a federal investigation begun in March 2003. That investigation started when U.S. Custom and Immigration officials intercepted strange packages from Egypt. The packages, found in Iron Triangle post offices within Starke, Raiford, MacClenny and Keystone Heights, were addressed to FDOC guards. Once opened, federal investigators found anabolic steroids.

Seeking protection while she moved her belongings out of her boyfriend's house, Ashley Faye Mahoney, 19, called the Clay County Sheriff's Office to oversee the operation. Once finished, Mahoney invited the sheriff's deputy into the bedroom she shared with Florida State Prison guard Benjamin Zoltowski. Once in the room, Mahoney opened a top dresser drawer that contained a folded wad of cash and a cardboard box overflowing with gallon-sized freezer bags filled with pink and blue pills.

After obtaining a search warrant, deputies found 1,900 steroid tablets and ampules of injectable steroids. The real jackpot of Mahoney's anger at her ex-boyfriend, however, was a ledger containing sales of steroids to other prison guards between April and June 2006.

The investigation that followed revealed that Clayton Manning, a former FDOC guard, was working as a body-

guard in Egypt in 2003. He began shipping steroids to friends and relatives in North Florida, making \$73,000 in profits over a two-year period. By January 2006, ten FDOC guards and employees had been indicted on charges of selling or possession of steroids; six pled guilty and all receiving probation. In May 2006, FDOC began random drug testing of all employees for drugs and steroids.

Medical experts say prolonged, high-dose use of steroids can result in "roid-rage," a reaction that can lead to violent outbursts, property damage, and even suicide. This may explain why so many FDOC guards are so mean and violent, and how prisoners like Valdez can be beaten to death by prison staff.

The Ringer

The use of steroids by prison guards begs the question: why use them? "If you (as an employee) start to exist in a system in places where the other side is advanced, where the definition of prison culture is to be bigger, better, badder, meaner than the prisoners, that (behavior) is where the reward seems to be and that can affect lots of those good people," said current FDOC Secretary James McDonough.

Others, however, believe McDonough's response is only part of the equation. The other part lies within similar reasoning behind the steroid scandal that has engulfed major league baseball: To be a better and stronger ballplayer.

"It's security last, ball first. Our lives are at risk by not having enough staff on the compound and that staff is being used elsewhere for other things. Used for example working day shift or Saturday, Sundays so that they can play ball on Saturdays and Sundays," said a guard whom *First Coast News* identified only as "TJ."

Softball was so important among FDOC employees that administrators would pay guards to practice, place ballplayers on the payroll who were not FDOC employees, prepare false prison credentials, and fund parties for the prison's ball team. After Crosby became FDOC Secretary, the "Annual Secretary's Softball Tournament" became more important than prison operations.

An April 1, 2005 brawl at an FDOC softball tournament at the Tallahassee Armory sparked an investigation that uncovered the extremes that prison officials went to to win softball games. Eventually, softball brought the prison system's good ole boy network to its knees.

The April fight began when James Edward O'Bryan, a former guard, slipped on vomit and beer. He fell, knocking down a woman who worked for Regional Director Allen Clark. Clark then straddled O'Bryan, beating him while two other prison officials, Col. Richard Frye and Capt. James A. Bowen, kicked and punched O'Bryan.

While police were never called, the Florida Department of Law Enforcement (FDLE) learned of the incident and began an investigation. O'Bryan was fearful of retribution and refused to press charges. "We know about the intimidation," FDLE agent Tim Westveer told O'Bryan. "We don't want to get anyone else hurt ... this is part of a bigger puzzle."

A bigger part of the puzzle was what insiders already knew. "I only know of two with certainty that were either professional or semi-professional ballplayers that were hired and actually put into positions and whether or not they worked I don't know. It became an obsession to win, to do anything to win," said an FDOC guard.

Mark Guerra is the husband of a woman who works at Apalachee Correctional Institution in Northern Florida. He also used to pitch for the Houston Astros. Prison officials paid him to work in the prison library, but the only time he showed up for "work" was to play in the prison staff's softball tournament. Guerra eventually pled guilty to giving "inaccurate or incomplete information" to state and federal investigators. For that offense he was required to return the \$1,237 he was paid to work at the prison and ordered to

perform 50 hours of community service.

To allow guards to participate in softball tournaments, North Florida Reception Center Assistant Warden Lamar Griffis allowed guards to falsify time sheets; he also issued fake ID's for non-departmental persons so they could compete.

"Wild and crazy things were happening," said former FDOC Warden Ron McAndrew. "One warden took his prison softball team to Las Vegas, gave them \$35,000 and said 'have a good time, boys. You've earned it.'" While it's uncertain which team enjoyed that perk, it is known that the Apalachee team won the 24th Annual Secretary's Tournament.

Before that tournament concluded, another fight broke out among prison guards at the finals in Jacksonville. That fight, on May 14, 2005, occurred in a

Florida Prison Canteen Operator's Offices Raided

by David M. Reutter

Agents from the FBI and Florida Department of Law Enforcement raided the office of American Institutional Services (AIS) on June 7, 2006 and seized the company's business records. AIS ran weekend "visiting park" canteens within the Florida Department of Corrections (FDOC), and following the raid AIS was banned from further operations at FDOC facilities.

AIS was a subcontractor of St. Louis-based Keefe Commissary Network, which has operated all FDOC prison canteens since winning a no-bid contract in October 2003. [See: *PLN*, February 2006, p.22]. In 2004, Keefe took over operations of visiting park canteens and subcontracted with AIS to manage that part of its prison operations. Keefe has since taken over full operations of the visiting park canteens. "We readily agreed to assume those duties," said Keefe spokesman Pat Farrell. Considering how prisoners and their families are being price-gouged, it's understandable why Keefe was so eager to capitalize on that captive market.

A preliminary report indicated that FDOC was losing money on the visiting park canteen operations, but no explanation of how much money was being lost or how that occurred was given.

AIS is owned by Gainesville businessman Edward C. Dugger, who also operates several liquor stores, a pawn shop and an insurance office. AIS has been trying to secure its foothold with Florida's future governor by contributing \$500 to each gubernatorial candidate. However, the company favors Dugger's longtime friend, Democrat Rod Smith. The company donated \$30,000 to a pro-Smith political committee called Floridians for Responsible Government. Smith's campaign also received \$2,500 directly from Dugger and

AIS, which Smith has vowed to return.

"As a former state attorney, I know that investigations are just that, a process to gather facts, but I also recognize public perception," Smith stated. "It's my sincere hope that this investigation is concluded quickly."

It was later learned that the AIS raid was related to an investigation involving former FDOC Commissioner James V. Crosby and former DOC Region I Director Allen Clark [see the cover story for this issue of *PLN*]. Federal investigators accused Crosby and Clark of helping AIS become a Keefe subcontractor in exchange for kickbacks on profits generated by the visiting park canteens. According to a Department of Justice press release, "These kickback payments grew from approximately \$1,000.00 a month up to approximately \$12,000.00 a month and were made from about November 2004 through early 2006. The total amount of kickbacks paid ... to Clark and Crosby during this scheme was approximately \$130,000.00." Crosby and Clark both pled guilty to charges related to the kickback scheme in July 2006.

Meanwhile, Keefe continues to run Florida's prison canteens. FDOC Secretary James McDonough signed a new contract with the company on May 8, 2006; AIS has been barred from doing any future business with the state prison system. McDonough also ended Keefe's ability to raise canteen costs by 10 percent every six months. The new contract allows such increases only one time a year. There was no reason for semi-annual cost increases "except that it was profit, making big money," McDonough stated. ■

Sources: *Associated Press; Miami Herald; St. Petersburg Times*

parking lot at a motel where the guards were staying. One guard, Lt. James Barton, received a broken jaw and as a result missed about 270 hours of work. While no one faced criminal charges stemming from either of the two softball fights, everyone involved was eventually terminated by McDonough. One of the guards, Bradley Tunnell, was the son of FDLE Commissioner Guy Tunnell.

When it was disclosed that softball teams were being funded through employee clubs, McDonough closed the clubs shortly after taking FDOC's reins in February 2006. The clubs were funded by profits from staff barber shops, shoe shines, car washes and canteens. McDonough shut down all but the canteens and ordered audits after he froze each club's account. He also put a stop to Friday casual days, which allowed employees to wear jeans to work in exchange for making a \$5 weekly donation to the employee club. McDonough has ordered all prison employee clubs to have their accounts centralized to prevent abuses like the softball fiasco, which benefited only a few.

The Buddy System

One figure continually surfaces in each aspect of this sorry chapter of FDOC history: Allen Clark. Four guards charged with steroid-related crimes were on a softball team coached by Clark. He was involved in the April 1 softball fight, which resulted in his arrest (charges were later dropped). As will be seen, these are minor aspects of Clark's role in this story.

Clark is the classic FDOC employee prototype. When hired in 1988 at Lancaster Correctional Institution as a guard, he was a high-school dropout who had just finished a stint serving as a military police officer in the Marine Corps. His fortunes began to change when he transferred to Cross City Correctional Institution (CCCI) two years later. It was there that he met CCCI's new warden, James V. Crosby.

What makes Clark such a prototype is that despite amassing a growing disciplinary file, and a number of investigations into his actions, he continued to climb the FDOC promotion ladder. Shortly after arriving at CCCI, Clark returned to Lancaster off-duty and was involved in a fight with another guard. The charges were dropped before trial. Six months later, Crosby promoted Clark to Sergeant

at CCCI.

Clark then followed Crosby when Crosby became warden at New River Correctional Institution in 1993. Less than 18 months later, Clark was promoted by Crosby to Lieutenant. A few months after that Clark was suspended for 60 days for using inappropriate force to quell a prisoner disturbance.

In March 1997, prison officials issued a counseling memorandum to Clark, instructing him not to discuss union issues on the job. In June he was promoted to Captain. Clark then followed Crosby to Florida State Prison (FSP).

Between that time and 1999, Clark was the subject of various complaints. His regional director, George Denman, filed numerous disciplinary charges against Clark in 1999 before sending him back to Lancaster. Clark was charged with moving a kitchen unit from FSP to have it installed in his staff housing, then lying about his involvement and using prisoner labor to renovate his house with prison materials without permission.

He was also charged with cutting the lock off a prison employee ballot box at New River to stuff it with ballots. The bolt cutters were not properly signed out of the prison. Finally, Clark was charged with spending employee club funds improperly. After a meeting with officials, no action was taken on the disciplinary charge.

Shortly thereafter, Clark returned to his place under Crosby's wing at FSP, where Crosby promoted him to Major.

In 2000, Crosby increased Clark's rank to Colonel. When Crosby became FDOC Secretary in 2003, Clark's rising star skyrocketed. Three weeks after Crosby's appointment, Clark was appointed warden at FSP. Five months later he was New River's warden. In 2004, Crosby made Clark a regional director.

While everyone can understand the dynamics of the good ole boy system, an appointment Clark received from Governor Jeb Bush is the most puzzling. Despite being a high-school dropout with no legal training, Bush appointed Clark to serve on the Judicial Nominating Committee, which selects judges to serve six North Florida counties. This only proves that Florida's judicial system, like its prison system, is all about who you know or where your nose has been.

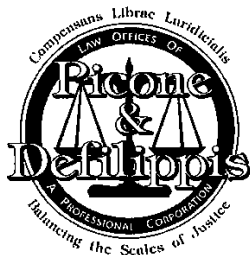
Early into his stint as FDOC Secretary, McDonough had identified over 100 questionable promotions during Crosby's three-year reign. Drunken revelry was apparently the root cause.

"Actually, he inculcated it. He was the leader; again, a whole bunch of nonsense," McDonough said. "Drinking was rewarded. Promotions were done – I'm sure of this, it's not speculation on my part – you have a great softball game, hit a bunch of home runs, have a wonderful party, get stinking drunk and you're the guy that hit the homerun, and you're the guy that drank more than anybody else, by golly, you're ready to be Colonel.

While Crosby was perched atop

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FDOC's roost, it "was run as a fiefdom," said McAndrew.

Widespread Corruption

It is said that power corrupts and absolute power corrupts absolutely. When Crosby progressed from being the warden overseeing Valdez's murder to Regional Director, and then to Secretary, a clear message was sent to FDOC staff and prisoners that malfeasance was perfectly acceptable. "It sent to the field as to what is going to be condoned within the [FDOC]," said Randy Berg of the Florida Justice Institute.

A group of prison guards took advantage of the situation. McDonough emphasized that "this was just a select few" of FDOC's 27,000 employees. Most, he claimed, were "outraged." Nonetheless, theft, prisoner abuse, misuse of prisoner labor and state property, and sexual assault became rampant.

"Goon squads fiercely beat inmates [and] intimidate the rest of the staff," said McAndrew. One lawsuit filed by a group of prisoners alleged that guards used chemical agents on them as a form of punishment.

In 2004, a female prisoner was taken to the all-male Zephyrhills Correctional Institution. She was held in a psychiatric ward for several days, naked. Her supervision on suicide watch was by male guards.

Sexual harassment, however, is nothing new in FDOC, even for employees. Since 2000, over 540 allegations of sexual harassment, discrimination and retaliation have been filed by female FDOC staff. One guard claimed she was called from duty and gang-raped by five prison administrators in a Lake Butler cemetery.

A 2004 lawsuit filed by six female FDOC employees alleges they were subject to constant demands for sex by male guards and supervisors. They endured repeated groping, leering and joking about female anatomy. When they complained they were subjected to retaliation, while women who complied received better assignments and promotions, according to the lawsuit.

In October 2005, FDOC Capt. Keith William Davidson, 39, was found dead of a self-inflicted gunshot wound in his pickup, which was parked in a wooded area near Union Correctional Institu-

tion. The day before Davidson had been fired following an ongoing investigation into the sexual assault of a woman at the Bachelor Officer's Quarters during a party to celebrate the promotion of Christopher Eddins to lieutenant.

Federal investigators further discovered an embezzlement scheme in FDOC's recycling program. FDOC collects all of the used aluminum cans from soft drinks sold to prisoners. Guards Theodore Foray and Paul Miller learned how lucrative aluminum recycling could be, and dipped their hands into the pot. The Iron Triangle guards sold bales of aluminum cans and other materials, and pocketed the money rather than crediting it to the prison. The recycling center's supervisor, Bryan Griffis, plead guilty as a result of the theft investigation.

In July 2006, another eight FDOC guards were charged with grand theft. Some were accused of stealing from FDOC's recycling program while others used prison labor on personal projects. Prisoners were used to make utility trailers, deer stands and other personal items.

One smart prisoner assured that the improper use of his labor and theft of state materials by Col. Richard Allen Frye, Jr. and Lt. Bobbie Dewane Ruise would be verifiable. Ruise told the prisoner that "he needed a utility trailer to transport lawn equipment and supplies for his lawn care business." The prisoner then kept a written journal of the work he performed and welded his name or initials into the trailers he built for Frye and Ruise, who were among the eight charged with theft.

Prisoners were used for a multitude of personal tasks. "If you were having problems with your TV, carry it out to the institution and get a convict to fix it. Inmates are not to be used, not to be used to work on personal property, not for personal gain," said Mark, an FDOC guard.

Sacking the Chief

In August 2004, Clark resigned from FDOC under the weight of media attention focused upon investigations relating to his involvement in the steroid ring and April 1 fight. Crosby offered his resignation to Gov. Bush, who refused to accept it. A few months later, Bush asked Crosby if he had done anything wrong. If he had, Bush said he would ask for his resignation. Crosby said he would stay because he had done nothing improper.

Bush learned otherwise in January 2006. It was then that the FBI advised they were building a strong case against Crosby and Clark, but urged he take no action. "They wanted to make sure they had the case ironclad," Bush said in July 2006. "They wanted to complete their investigation ... I'm not going to step on an FBI investigation."

In February, Bush was given the go-ahead, and he forced Crosby to resign. "As the details come out, it'll be clear that it was the appropriate thing to do," Bush said upon accepting Crosby's resignation. "I can't speak of the details, but today was the appropriate time that we were given the chance to take action. I'm saddened and really disappointed, but I had to do it."

Before the ink was dry on Crosby's resignation, law enforcement agents swarmed his office. They sealed a storage room in the administrative building with evidence tape and removed items from Crosby's office; they asked him to return several items of state property, including a leaf blower and ladder.

In June, federal agents raided the office of American Institution Services (AIS) in Gainesville. AIS was a subcontractor for Keefe Commissary Network, which runs the FDOC's prisoner canteen system. Shortly after that raid, Crosby and Clark began traveling the well-worn path traveled by those they used to watch over: the tangled jungle of the criminal justice system.

After Crosby became Secretary, FDOC entered into the contract to allow Keefe to run the prisoner canteens. In 2004, Crosby and Clark introduced the owner of AIS, Eddie Dugger, to Keefe representatives. They proposed amending the canteen contract to allow Keefe to operate the visiting park canteens, and AIS would handle the case for Keefe, which did not want to handle the money. From weekend receipts, Dugger and Keefe reached an agreement that would allow AIS to make around \$1.5 million annually in profits.

In return, Dugger agreed to kick back 40 percent of these profits to Crosby and Clark. Crosby then ordered FDOC officials to amend the Keefe contract and approve AIS as a state vendor. From November 2004 through August 2005, Clark received \$130,000 from AIS, which he split with Crosby. All proceeds were in cash, ranging from \$1,000 to \$12,000 monthly. On July 5, 2006, Crosby and Clark pled guilty to receiving kickbacks in federal

court. They face up to 10 years in prison and a \$250,000 fine. They have agreed to repay the \$130,000 they received. Florida officials have advised Crosby and Clark they will lose their retirement benefits. Sentencing has been tentatively scheduled for early 2007, having been postponed once already.

That will cost Crosby \$237,000 and his \$66,000 yearly pension. The former amount was a lump sum payment from Crosby's plan under the state Deferred Retirement Option Program. Despite making \$124,000 yearly and living in state housing, greed got the best of Crosby. A result, Crosby's wife, Leslie, divorced him. He now lives with his parents in Starke.

Meanwhile, many guards are wondering if what used to make them laugh will make them cry. As part of their plea agreements, Crosby and Clark agreed to provide investigators with "substantial assistance" against other FDOC wrongdoers. Crosby has already snitched, saying Griffis provided him the items law enforcement requested upon his resignation, which were stolen from FDOC.

Cleaning Up

McDonough, to his credit, has taken full charge since being appointed Secretary of FDOC. Besides demoting and firing good old boys. McDonough is trying to restore credibility and fairness into FDOC.

He is examining and ordered rebidding of privatization contracts that service FDOC. This ranges from telephones, food service, pharmaceutical services to the canteen services. Already, the cost of collect calls has been reduced for prisoner families.

McDonough has no prior prison experience. "But I do have experience in leadership," he said. That experience came

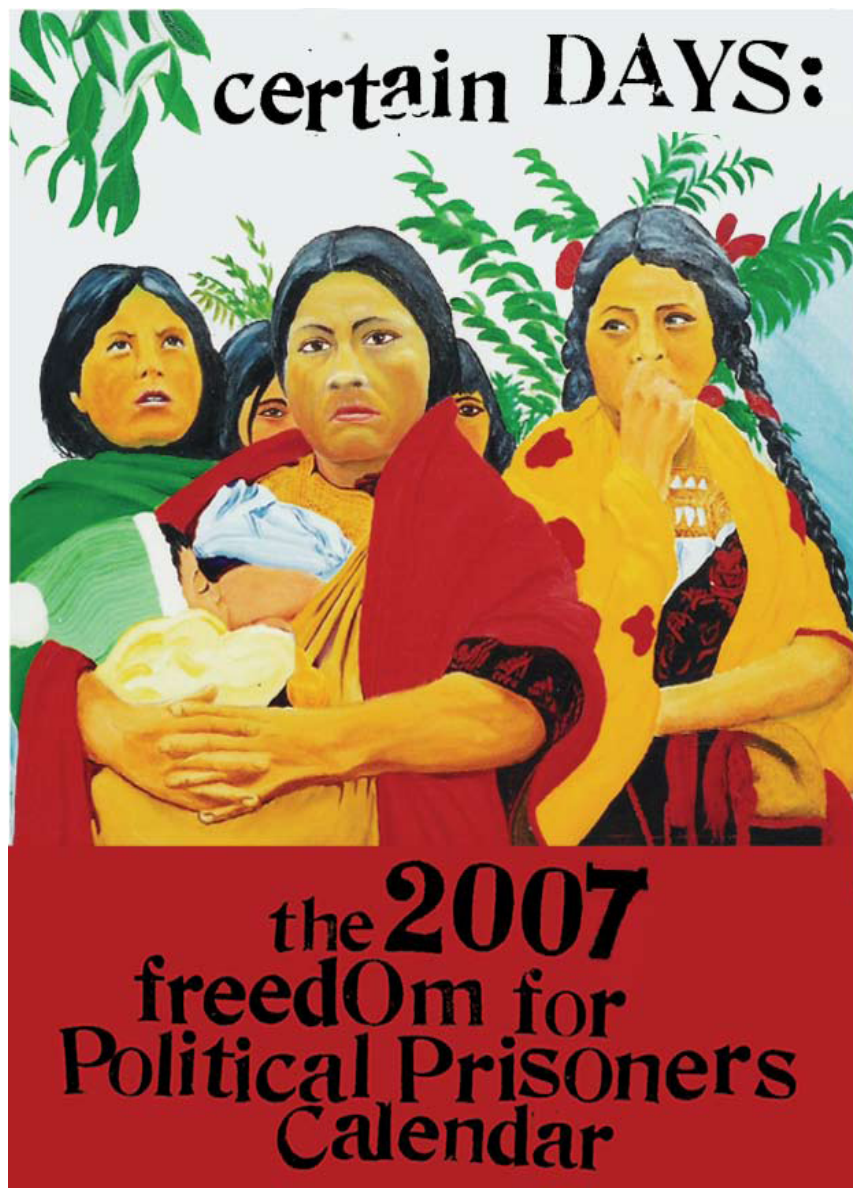
as a commander in the Army, reaching colonel. McDonough has a simple rule: "If you're dishonest, you're fired."

"Many times, when top officials of a public agency are engaged in corrupt activity it fosters a culture of corruption which permeates the department," said FBI investigator Nestor Duarte.

Hopefully, under McDonough's leadership, the FDOC will reach a level of fairness and integrity never witnessed in its history. From its inception, the FDOC has been located in the good old boy neighborhood, but was run from Tallahassee. Corruption and abuse has always been

part of the system, it was just contained and rarely reached the top. McDonough knows he has a tough task before him. "Is it going to be the professional culture that dominates?" he asked. Prisoners, staff, and the public are waiting for the answer. 🐻

Sources: *The Bradford County Telegraph; Gainesville Sun; Florida Times-Union; Tallahassee Democrat; St. Petersburg Times; First Coast News; Miami Herald; New York Times; Palm Beach Post; The Ledger; Orlando Sentinel; Florida Today; Associated Press; Herald Tribune; Los Angeles Times; News Journal Online;*



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From the Editor

by Paul Wright

As the year 2006 closes we have reported a lot of news and major developments, some of it good, some of it not so good. The main thing though is we accomplished a lot as far as getting back on our regular publishing schedule, improving the already high quality of our stories even more and getting our message on behalf of prisoner rights out even more than we have. We also won significant court cases on behalf of prisoners, publishers and advocates alike.

Going into the next year our goals include expanding PLN's size by an additional four to eight more pages. To do this we will need to increase the number of advertisers since advertising is what has allowed to expand in the past. Each full page of advertising translates into three more pages of news and editorial content.

We now have more than 5,000 subscribers and we want to increase that by at least an additional thousand subscribers this coming year.

Upgrading the technology behind PLN's mailing list program and our website are two additional major goals for the year as well.

By now all subscribers should have received PLN's annual fundraiser letter. I hope everyone has donated to help us meet our matching grant total of \$25,000. Every dollar donated to PLN by non-prisoners will be matched, dollar for dollar, by two anonymous donors. Donations by prisoners will be matched two dollars for every dollar donated. There are many worthy causes out there but Prison Legal News is one of the few where even a modest donation generates big results. PLN is

a non profit organization so all donations are tax deductible. We need to receive donations by January 31, 2007, to qualify for the matching grant donation.

Many people, especially prisoners, say they support PLN and the work we do but they simply lack the money to send a donation. If that is the case try to encourage someone else to subscribe. If every subscriber could get just one more person to subscribe we would effectively double our circulation which in turn would decrease our printing and postage costs and go a long way to keeping subscription rates as low as they are.

Everyone at PLN would like to wish our readers and supporters a happy holiday season. We look forward to 2007 as a year of even greater struggle and progress. 📖

Violent Oregon Prisoner Murders Cellmate; County Points Fingers; Family Sues

By all accounts, 22-year-old Thomas Allen "Tommy" Gordon is an extremely dangerous man. In 2001 he fatally shot his friend, Dylan Beck, in the back of the head while they were driving in Vancouver, Washington. While awaiting trial Gordon committed more than 30 major rule violations, including unprovoked assaults on prisoners and staff. Gordon was sentenced in February 2002 to the maximum sentence of 33 years in prison due largely to his extensive record of violent outbursts while awaiting trial.

Just three months into his sentence, Gordon committed an unprovoked assault on a fellow prisoner, according to Washington Department of Corrections (WDOC) records. He stated later that he forgot why he attacked the man. During the ensuing 3½ years, Gordon committed 59 rule violations — including staff assaults, prisoner assaults, strong-arming, throwing objects and other violent infractions. Gordon spent all but approximately two months of his first three years of incarceration in solitary confinement. Prison records describe Gordon as "a very dangerous, violent inmate."

In early 2005, Gordon wrote homicide detectives in Portland, Oregon, and implicated himself in the 2001 death of Vernon Ralph Moranville, whose death

had never been investigated as a homicide before Gordon's letter. Moranville's "body was discovered weeks after he had been killed, and police found no evidence of foul play." According to the subsequent indictment, however, Gordon reportedly strangled Moranville to death one week before he killed Beck.

On May 25, 2005, Gordon was transferred from the Walla Walla state prison to Oregon to face murder charges for having killed Moranville. Pursuant to "a cooperative agreement among sheriff's offices, Walla Walla County Sheriff's deputies first took Gordon to the Umatilla County, Oregon Jail." They warned Umatilla officials about Gordon's violent tendencies.

"I was told that he was a problem, and I had a separate cell waiting for him," said Cpl. Tony Norris of the Umatilla County Sheriff's office. When Multnomah County (Portland) deputies later picked Gordon up, Norris likewise warned them about Gordon. "They responded by isolating him in a separate part of the bus for the trip to Portland."

Once he arrived at the Multnomah County Detention Center (MCDC), however, Gordon was placed in a transitional cell with other prisoners, where he remained without incident for five days.

On May 30, 2005, *The Oregonian*

newspaper published a story about Gordon, quoting the sentencing judge in the Beck case as saying "he was convinced Gordon was prone to random, violent outbursts." Based on this article, jail officials immediately issued a staff alert stating that Gordon "should be treated with extreme caution," and placed him in solitary confinement.

After two weeks in segregation without incident, Gordon "asked to go back to the general population, noting he had not had any problems during the five days he spent there earlier."

MCDC Sgt. Scott Johnson granted Gordon's request and returned him to the general population on June 15, 2005. Johnson placed Gordon in a two-man cell with 43-year-old Dennis J. Saban, who had turned himself in on drug offenses in an effort to turn his life around. Johnson would later defend this fatal decision by stating "[t]here were no negative comments regarding [Gordon's] behavior on that date. At that point [he] had been here for 21 days with no issues whatsoever."

The following morning guards were called to investigate a maintenance issue. "When deputies came back ... something drew them to the cell Gordon and Saban occupied." They did not elaborate on what

drew them to the cell, but upon arrival they found that Saban had been severely beaten by Gordon.

Saban was rushed to a hospital where he died two weeks later on June 29, 2005. While the case remains under investigation, prosecutors have indicated that Gordon will be charged with aggravated murder, a capital offense, in connection with Saban's death. Meanwhile, according to a county jail spokesman, Gordon "has been placed in a small maximum-security jail cell — alone."

"It's disturbing that this occurred," said Multnomah County Sheriff Bernie Giusto. "But it's somewhat unbelievable that it hasn't happened before."

In the wake of Saban's death, MCDC officials have attempted to lay the blame elsewhere. Sgt. Johnson now claims "that if he had known about Gordon's violence in prison, 'this inmate would have remained in [solitary confinement] for his entire stay.'" But, claims Johnson, "jail officials tried for two weeks — without success — to get Gordon's prison records from Washington State Penitentiary in Walla Walla, where he spent the past 3½ years."

A June 1, 2005 "safety alert" dis-

tributed within the jail refutes Johnson's claim, however, noting that "Washington prison officials warned almost immediately that Gordon was a threat to inmates and staff." Washington officials argue, however, that neither statement is true — Multnomah County never formally asked for any information about Gordon until after Saban was assaulted. "To the best of my knowledge, the Multnomah County Sheriff's office did not ... [request] records regarding inmate Thomas Gordon through any of the regular methods," stated Joni G. Aiyeku, acting public disclosure coordinator at the Walla Walla prison.

Further, according to a jail status report prepared by District Attorney Michael Schrunk that was sent to county commissioners on Sept. 11, 2006, the MCDC deputy who placed Gordon in the cell with Saban had worked more than 1,600 hours in overtime over the previous two years, which "raises serious concerns about the effect that excessive overtime usage might have on staff effectiveness and jail operations." The report also noted that the sheriff's office had waited over a year after Saban's death before initiating an internal affairs investigation.

On September 14, 2005, Saban's family filed a wrongful death action against the county seeking \$500,000 in damages. According to the suit, Saban "suffered multiple facial fractures and massive bleeding that led to his death...." The suit alleges that "[t]he county, knowing of Gordon's violent history, had a duty to prevent him from harming others," but failed to do so. The county declined to comment. *PLN* will report any future developments in the case. ■

Source: *The Oregonian*

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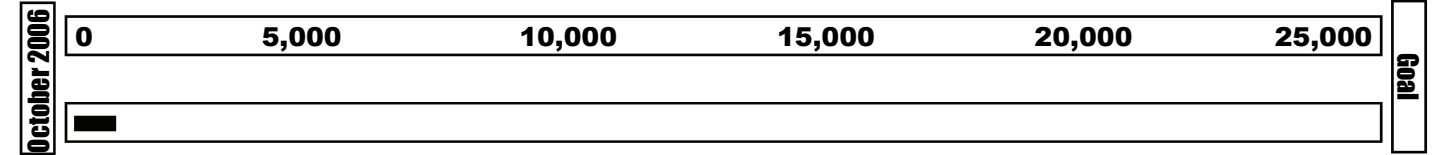
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Aramark: Prison Food Service with a Bad Aftertaste

by John E. Dannenberg

Aramark, Inc. is a Philadelphia-based \$10 billion/yr. Fortune 500 company providing diverse institutional food services. Its Illinois-based subsidiary, Aramark Correctional Services, Inc., (ACSI), which bought out Wackenhut's Correctional Foodservice Management division in 2000, contracts with 450 prisons and jails in 40 states, serving over 300,000 prisoners. In addition to food, it provides commissary services, laundry services, maintenance, and vocational prisoner training in food services. But Aramark's record is replete with allegations of making political donations to gain contracts, over billing on their contracts, skimping on food portions, maintaining poor sanitation, and offering poor food quality. Contracts have not been renewed, fines have been levied and Aramark employees have been arrested for smuggling contraband into prisons. This report chronicles Aramark's checkered past in 19 states and Canada.

Colorado

At the El Paso County Jail in 2005, many of the 1,300 prisoners filed suit in the 4th Judicial District against foodservice contractor Aramark and the jail, claiming that Aramark's food fails Colorado's statutory requirement for "good and sufficient" food for prisoners. Claims included repetition (turkey was served for five consecutive meals), spoiled fruit, and a 25% reduction in portion size beginning in March 2005. The situation was so bad that some prisoners were dumpster diving to retrieve scraps of garbage while tougher prisoners pressured weaker ones for their issue. Prisoner Michael Holmes' complaint charged Sheriff Terry Maketa with standing idly by while Aramark "shirks its responsibilities by serving unhealthy disease causing garbage."

District of Columbia

At Lorton Reformatory Maximum Security Facility, then prisoner Lawrence Caldwell frequently failed to receive his approved vegetarian diet. The meals, prepared by Aramark, were also allegedly prepared in a wholly unsanitary fashion. In 2002, he sued Aramark and D.C. officials under 42 U.S.C. § 1983 and the Religious Freedom Restoration Act, claiming racial discrimination by Lorton's chaplain Willie Caesar and Eighth Amendment violations

for the unsanitary food preparation. The U.S. District Court denied both Caesar's and Aramark's motions for summary judgment and set the matter for trial. See: *Caldwell v. Caesar*, 150 F.Supp.2d 50 (D.D.C. 2001); *PLN*, July 2002. The case later settled for \$50,000.

Florida

In July, 2001, Florida's Department of Corrections (FDOC) inked a \$58 million/yr. contract with Aramark to take over food operations at 126 of FDOC's 133 prisons, providing meals at \$2.32/day per prisoner. This was sharply criticized at the time because Aramark had just failed a similar program at Ohio's prisons. The *Tampa Tribune's* investigative reporting showed that in Ohio Aramark had failed to deliver the projected level of savings, served substandard portions, billed for meals it never served and after being the low bidder, demanded more money only four months into the contract.

A year later, the *St. Petersburg Times* reported that Aramark had saved FDOC millions of dollars. But the savings appeared to come out of the prisoners' diet. One day at Madison Correctional Institution, Captain Hugh Poppell noted a particularly soupy batch of sloppy joes. To his horror, he watched the Aramark staff further dilute the entree even more with ketchup and tomato paste to make it stretch among the remaining 700 hungry prisoners. When Warden Joe Thompson investigated, he found that Aramark had shorted the recipe by 70 pounds of meat, along with all the onions, celery and green peppers specified. This was just one instance of malfeasance that resulted in Florida assessing \$110,000 in fines against Aramark as of June 2002. While money was "saved," it came at the price of dirty kitchens, late cooking schedules that interrupted prison operations, poor food quality and failure to follow the rule that every prisoner get the same meal. Serving the first 600 prisoners a whipped dessert and then giving the rest only an apple can cause serious security concerns or riots.

In Marion County, prisoner kitchen workers were ordered by Aramark to soak spoiled chicken in vinegar to take away the smell before cooking. Guards found out, and ordered 500 pieces of foul fowl thrown out. In Brevard County, inspections found "hor-

rendous conditions," including maggots on serving trays and kitchen floors. In Indian River County, the Aramark supervisor was sound asleep as prisoner workers struggled to prepare the pancake meal. Aramark workers were reportedly often late or absent, leaving guards to do their work.

In Putnam County, Aramark was infractioned for serving pans of refrigerated food with altered dates, "saving" money by serving poisonous leftovers. And in Hernando County, Aramark made a spaghetti dinner using chili carne from the previous week and creamed chipped beef from the day before. The cream was washed off so the meat could be reused.

At Avon Park work camp, prisoners complained that pork roast portions were the size of a saltine cracker. Former Aramark employee Norma Schamens reported on how workers were ordered to scoop food from the pan so as not to fill the ladle. She was fired from her job in Gulf County. Hardee County prisoners staged a one day food strike over short portions. Aramark's short portions and poor food led to severe tension in the dining hall in Jackson County. In Walton County, angry prisoners yelled and rattled cell doors noisily to protest undercooked food. According to the *St. Petersburg Times*.

Floridians for Alternatives to the Death Penalty (FADP) took further umbrage to reports of Aramark's food poisoning of condemned prisoners in November 2003. FADP posited a rotten connection between the food service reports and Aramark's 2001 \$42,000 donation to the GOP when Florida's Republican Governor Jeb Bush privatized prison food services.

In October 2001, the *Naples Daily News* reported that Aramark employee Debbie Quashie bought cocaine from an undercover sheriff's deputy to bring it into Hendry Correctional Institution for a prisoner. Quashie was arrested and charged with smuggling and receiving a bribe from a prison employee. In April 2003, the *St. Petersburg Times* reported that another Aramark kitchen employee, supervisor Norman Mango, was arrested in a sheriff's sting operation in a supermarket parking lot in Zephyrhills. Mango had been handed 9 ounces of marijuana to smuggle into Zephyrhills Correctional Institution. Pasco County deputies were tipped off by FDOC staff.

Florida prisoner complaints spilled over in June, 2005, to include commissary overpricing. Six prisoners at St. Lucie County jail in Fort Pierce sued Aramark, following the lead of prisoner Coleman Sule, who sued the sheriff's office over the same issue. The plaintiffs objected, inter alia, to paying \$4 for Suave conditioner and \$.55 for a 3 oz. cup of Ramen soup. Their claims are grounded in Florida law requiring commissary prices "not to exceed the fair market price of comparable items sold within the community where the facility is located."

Aramark spokeswoman Sarah Jarvis said it had conducted a "market basket survey" at local stores including Flying J, Pilot, Walgreen's and Wal-Mart and found that Aramark's commissary prices were below all but Wal-Mart's. Sule replied that only 20 of 219 issues were surveyed, and that survey prices were skewed because Flying J truckstops cater to truckers and "are notoriously high priced." The prisoners sought refunds of alleged overcharges. An Aramark representative later testified that the company takes only a 5% profit, but is also required to collect a 30% surcharge for the jail's inmate welfare fund, which pays for GED classes, substance abuse help and a chaplain. In September 2005, Sule and the St. Lucie sheriff settled. Circuit Judge Ben Bryan found that the sheriff and Aramark had "substantially complied with the law," but ordered the sheriff to have an outside agency and a review committee annually audit prices to determine if they were fairly set.

Illinois

Chicago's Cook County Jail (CCJ) is another Aramark victim. Prisoner Martin Drake, suffering from ulcers, cirrhosis of the liver, Hepatitis B and C and in need of a liver transplant, sued Aramark in federal court for knowingly providing CCJ prisoners with food prepared in unsanitary conditions, including serving meals on trays despoiled with decaying food from previous meals. The complaint alleged improper food handling, preparation and equipment sterilization, practices which hindered Drake's ability to recover from his illnesses and caused an "immediate and substantial risk to his health." Aramark had failed to rectify these concerns. He alleged under 42 U.S.C. § 1983 for violation of his due process rights and violation of Illinois law (Ill. Admin. Code tit. 20, § 502.42 (2002)). Aramark moved to dismiss the complaint, but was denied. The court

found that Drake's "well-pleaded allegations" described both ongoing injuries and "an immediate threat of injuries resulting from Aramark's conduct." The court further found that Drake's complaint was properly brought under Fourteenth (and not Eighth) Amendment standards because Drake was a pre-trial detainee. The alleged facts of food contamination were found sufficient "to constitute a deprivation so extreme as to violate the Fourteenth Amendment." Accordingly, the court denied all of Aramark's motions to dismiss and set the matter for trial. See: *Drake v. Velasco*, 207 F.Supp.2d 809 (N.D. Ill. 2002). However, Drake failed to appear at court hearings after his release and the case was dismissed for failure to prosecute.

Notwithstanding the above atrocities, Aramark's \$50 million contract was renewed for four years in August 2004. The Compass Group had intended to bid against Aramark, but dropped out, charging that insider deals and patronage made bidding "flawed and biased" in favor of Aramark. Compass vice president Michael Gaebel complained that the county delayed handing over necessary data to bid on and that the county had hired two former aides to Sheriff Michael Sheahan, John Robinson and John Maul, to serve as consultants on the food contract. Robinson, former under sheriff and an attorney had resigned after revelations that he had used sheriff's office stationery to promote an alleged investment scam. Maul had been acting executive director of CCJ. Compass noted Aramark's known unsanitary food processing and decried that Aramark is putting

the county "in a potential high-risk situation" with it. In September 2004, the Aramark contract was extended three months while county officials investigated the effect of the alleged patronage, notably, Aramark contributions of \$11,240 to officials including county commissioners and Sheriff Sheahan. When only one bid was received (Aramark's), it was not opened, consistent

with bidding rules, and a rebid process was declared to try to elicit competition. Meanwhile, rodents continued to feast on rotting food in meal preparation areas. Cook County Board Commissioner Forrest Claypool called for blocking of any award to Aramark because of CCJ's denial of needed jail data to Compass to prepare a bid. Aramark bid \$.77/meal, well under Illinois' prison expenditure of \$1.01 just to purchase food. Compass, a division of Aramark competitor Canteen Corp., implied that Aramark cut costs through lowered standards and deferred maintenance. In any event, CCJ prisoners will suffer the results until 2008.

Indiana

Indiana Governor Mitch Daniels announced in May 2005 that by contracting with Aramark, the Indiana Department of Corrections (IDC) will save nearly \$12 million/yr. IDC awarded Aramark a \$258

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Aramark (cont.)

million ten-year contract to provide meals in IDC's 30 prisons at \$.99 each, instead of IDC's prior \$1.41 cost. Aramark will use 298 people to staff its IDC operation, displacing 336 state employees. But Daniels said that all would be given priority in filling Aramark positions or offered positions elsewhere in IDC (albeit not necessarily at the same compensation). In November 2005, it was reported that at Indiana State Prison and Westville Correctional Facility, many employees took jobs with Aramark, and at the Michigan City prison, only 1 out of 26 left the state system. Prisoner workers will be trained in food service preparation as part of the deal.

When Aramark took over, letters to the media began flowing from prisoners complaining about the service and food. Some prisoners attributed the death of one of their own to a cell fight that began in the chow line. Tension grew due to the hours they had had to wait for their dinners, only to receive insufficient portions. Some meals were withheld as punishment. Aramark replied that the men were simply not used to its "heart-healthy" fare. Aramark also has contracts with county jails in Vanderburgh, Hendricks and Marion Counties.

Kansas

Sanitary and storage problems in August 2004 were so bad at Wyandotte County jail that Sheriff LeRoy Green volunteered to close it down for a day to clean it to the satisfaction of Joe Connor, county health director. The juvenile detention center also supplies meals to adult prisoners. Serving a total of 450 prisoners, the kitchen was faulted for improper grease buildup and food storage. Cleaning is a responsibility of food service contractor Aramark, which is paid \$669,000 annually. Subsequently, when bidding opened for food service at Winfield Correctional Facility and the Kansas Veteran's Home, Aramark bid \$1.60 per meal, well above the \$1.25 the county paid Sheriff Bob Odell to purchase food, and who uses prisoners to prepare the meals. Other food service vendors will be contacted for future bids, said County Administrator Jay Newton.

Kentucky

In January 2005, Aramark commenced its \$9.5 million/yr. contract with the Kentucky Department of Corrections (KDOC) to feed its 11,000 prisoners in

twelve prisons. KDOC spokeswoman Lisa Lamb stated that KDOC expected to save \$5 million annually, "significant" for Kentucky taxpayers. But this 1/3 reduction in food expenses will no doubt be significant to KDOC prisoners, too.

Charles Wells, head of the state employees association, stated, "We do not feel that selling off state agencies to private contractors is in the best interest of the public. While there might be short term savings, it could eventually cost taxpayers more." Wells was clearly concerned for his 81 displaced food service employee members (who were guaranteed another position in their geographic region at the same pay rate, or offered a job with Aramark), since he was aware of problems at other Aramark prison operations, including Florida, Illinois and Ohio.

In a non-food-service related Aramark embarrassment on July 21, 2004, state police and federal agents raided its law enforcement-equipment subsidiary Galls, Inc. in Lexington pursuant to a July 15 federal court search warrant. The agents seized handcuffs, helmets, listening devices and other law-enforcement equipment made by Galls which were destined for foreign shipments, albeit allegedly without proper licenses. 100 documents, including tapes and computer hard drives detailing Galls' foreign sales, were also seized. The affidavit alleged that unauthorized shipments had gone to Macedonia, Jordan (destined for Iraq), Azerbaijan, Zambia, Japan, and Kuwait, some under a license number issued to Galls in 2001 to ship 50 sets of handcuffs to Denmark. Galls allegedly reused that same number on 1,199 separate occasions to ship controlled products to foreign countries. The illegally shipped controlled items included bulletproof vests, riot shields, fingerprinting equipment and night vision devices. Galls is reportedly cooperating with investigations by the Commerce Department, Customs Enforcement, Homeland Security and the Department of Defense.

Minnesota

The sheriff in Goodhue County contracted for laundry and food service with BEST, Inc. Food Service Management in 1998. BEST was purchased a few months later by Fine Host, which maintained BEST's good service. In December 2002, Fine Host was purchased by Aramark

(ACSI), following which there was a steady decline in the quality and service received. Aramark changed many vendors, resulting in lower pricing, albeit at the sacrifice of quality of food served. Aramark's dietician eliminated many of the fresh fruits and vegetables, replacing them with baked goods. The result only nominally met Minnesota Department of Corrections' (MDOC) nutritional standard, so MDOC enforcers investigated. They found that MDOC was paying Aramark \$3.78/meal, including kitchen equipment amortization costs. But the original principals of BEST had started a new company, US BEST, and offered Goodhue County an equivalent price of \$2.75/meal. The net reduction of food and laundry service costs using US BEST would run approximately \$120,000 annually. For this reason, and the declining food quality, the Goodhue County Board of Commissioners (GCBC) terminated its Aramark contract in November 2003 and contracted with US BEST, according to the Minutes of the GCBC (October 21, 2003).

Montana

Aramark employee Kelly Jerad McCann, kitchen supervisor at the Cascade County Jail, was arrested there in October 2005 for allegedly smuggling drugs, tobacco and smoking paraphernalia to prisoners for "a small fee." He was charged with felony transfer of contraband to prisoners. Guards became suspicious when two randomly selected prisoners tested positive for marijuana. Then, Capt. Dan O'Fallon noticed two prisoner money transfer orders to the same person on one day. One was payable to "Jerad McCann," the other to "Kelly McCann." The prisoners said it was for hobby material. A search of records showed five such checks made out to McCann. Two of the prisoners worked with McCann in the kitchen, part of Aramark's heralded prisoner "food service training program." McCann confessed when confronted. He faces up to 13 months in jail and a \$1,500 fine. O'Fallon stated that over 900 of Cascade County jail prisoners are smokers. When they can't get cigarettes (contraband), they save lettuce from their meals to smoke when it dries out.

New Jersey

In December 2002, Passaic County sheriff's deputies arrested Aramark employee Pamela Oliver, supervising cook at the county jail, for possession of a bag of less than 50 grams of marijuana in her

work locker. Asserting his non-tolerance of illegal activity in his jail, Sheriff Jerry Speziale declared Oliver "no longer welcome" there.

And in June, 2005, Aramark employee Leslie Harwell was arrested for possession of heroin, intent to distribute and distribution of heroin. She was held on \$50,000 bail.

Morris County jail guards learned that Harwell was able to do this because employees are not searched when entering the facility. They set up a sting by arranging for a sale near the jail, and promptly arrested Harwell when she gave the undercover officer the money. Harwell was selling drugs to kitchen prisoner workers whom she was training in food service.

But Aramark employee crimes were not the driving force behind Passaic County's dissatisfaction with Aramark. In June 2005, Passaic County reluctantly agreed to continue its \$1.45 million/yr. contract with Aramark on a "month to month basis." Passaic officials believed that they could do a cheaper and better job. This was a complete turnaround from Sheriff Speziale's 2002 pre-contract belief that by then going with Aramark, "outsourcing food preparation would cost half as much as doing it in-house." Aramark was the only bidder.

New Mexico

286 of the 330 minimum security prisoners at the Los Lunas Correctional Facility refused to go to lunch on July 8, 2004 as a protest to the Aramark-prepared food. One prisoner reported that they "had nothing but ground turkey for days. You can't eat some of this stuff." Another prisoner reported that the Aramark kitchen had been serving a soy meat substitute, which he described as tasting like cardboard. Both prisoners complained about a chorizo sausage, calling it "inedible." New Mexico DOC spokeswoman Tia Bland said that as a result of their discussions with Aramark, Aramark had agreed to put more beef in the menus.

But the changes perceived by the prisoners were neither illusory nor accidental. A scant week earlier, on July 1, 2004, Aramark (which had contracted with New Mexico since 2000) signed a new contract for which it was receiving only \$1.44 per meal -- \$.20 less than before. Typical of low-bid food service programs, the "savings" were at the expense of food quality, nutrition, and ultimately the security of the prisoners.

Ohio

In 1998 Ohio Department of Rehabilitation and Corrections (ODORC) tested the waters of privatization of its prison food service with a two year pilot program for the 2,500 prisoners at Noble Correctional Institution, awarded to low bidder Aramark. Immediately thereafter, prisoners noticed substantially reduced portion sizes, consistent with Aramark's bid of \$1.24 per meal. Grumbling pris-

oners threatened to riot. The problem snowballed when attendance (Aramark was paid by the head count at mealtime) fell in response to its poor food quality and quantity. Prisoners threw food; some boycotted the meals. ODORC responded by permitting Aramark to bill at the daily population count, not the actual chow attendance. This was done without any re-bidding or even amendment paperwork. From this sweetheart deal, Aramark pocketed an extra \$1,478,825 as

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Aramark (cont.)

of March 2000 and over \$2 million by the end of their contract in September 2001. When Noble's Deputy Warden Howard Wilson objected to the added payments, ODORC support services division Chief David McKeen told him to "knock it off -- leave it alone." Haskins resigned one month later and retired when threatened with a transfer, bitterly ending his 21 year ODORC career.

The matter led to an ODORC audit. State Auditor Jim Petro found that the verbal agreement amounted to a 60% increase in the contract payments, a \$2.1 billion overage on Aramark's original bid. The audit revealed that only 630 of Noble's prisoners bothered to take the Aramark meals, while Aramark billed at 1,000 of the daily population. So, the worse Aramark made the meals, both as to quality and quantity, the more money they made. Specifically, Aramark was paid for 4,462,649 meals while only serving 2,803,722. The Ohio Civil Service Employees Union, who wanted the jobs back, argued that they could provide better service for less money. Indeed, when Aramark's contract expired on October 31, 2000, they took over food service operations at Noble at a lower cost. See: *PLN*, Oct. 2000, Dec. 2002.

In April 2004, the Lorain County Sheriff's Department ended a contract with a local blind man, Rick Bryant, who had run the commissary for 12 years as part of a state program to employ the visually-impaired. The Ohio Rehabilitation Services Commission was angered, having invested \$50,000 in capital equipment at Lorain in hopes to attract visually impaired employees. Bryant was unceremoniously dumped upon the award of the commissary to Aramark, ending a 30 year history of visually impaired operators at the commissary. While state jobs are protected by disability preferences, county and local jobs are not.

When Aramark took over the food service contract at Coshocton County Justice Center in July 2004, the two former cooks were retained by Aramark at their former salaries. However, they lost insurance and retirement benefits from the county, and will suffer a 100% increase in their insurance premiums to keep them. Their past retirement contributions will be retained, but no new accruals will be allowed.

In March 2005, three Lucas County prisoners were hospitalized after eating what appeared to be metal shavings in their meal served at Correctional Treatment Facility, which receives its meals from the county jail, under contract with Aramark. Others reported the contamination, and the food was thrown away. It was suspected to be aluminum foil. A complaint was lodged with Aramark, whose contract was soon up for renewal amid other concerns about their food service.

Oklahoma

In May 2005, Tulsa County commissioners awarded a \$1.06 million contract to Aramark for the Tulsa jail. Aramark was lowest among five bidders. Nonetheless, Sheriff Stanley Granz estimated Aramark's bid was still \$42,500 higher than his own estimate for doing the food preparation with county jail staff. Granz is a longtime opponent of prison privatization.

Oregon

Jackson County jail contracted with Aramark in January 2002 to run its food operations. Only three months later, Aramark's supervising cook Daaron Kiefer was arrested for supplying tobacco to prisoners in the jail. It was the first time any employee had brought contraband into the jail, said Lt. Jim Warren. The prisoner, Christopher Rocha, worked under Kiefer as a "trustee" in the kitchen for about \$1 per day. Kiefer was instructed to bring the contraband inside when he went outside to empty the trash, retrieving the cigarettes from his car. Kiefer was fired.

Pennsylvania

In 1996, Raymond McCullum was a prisoner in Philadelphia's Curran-Fromhold Correctional facility where he worked under Aramark contract cook supervisor Keith Smith. When Smith led a tour of judges through the kitchen one evening, McCullum piped up and said the food portions were inadequate. After the tour group departed, Smith took McCullum into a cold packing room and assaulted and severely battered McCullum. He sued Aramark and the City of Philadelphia under 42 U.S.C. § 1983 for damages. Aramark's motions for dismissal on grounds that as contractors they were not state actors, and that they were protected under the theory of respondeat superior, were both denied. See: *McCullum v. City of Philadelphia*, U.S.D.C. (E.D. Penn.),

No. CIV A 98 5858. Eventually the case was dismissed.

Aramark was sued for \$50,000 in 1999 by three black employees who claimed discrimination when one, James Royal, was fired for giving a bag of potato chips to a prisoner. This pervasive practice to motivate prison workers was widely known, but no white workers were ever so disciplined, let alone fired. 32 other black employees were awarded \$20,000 each, after they filed discrimination charges or gave witness statements.

In December 2001, two Aramark contract food service employees were fired after they were implicated in the smuggling of a cell phone, battery and charger into the Allegheny County jail's disciplinary unit. Jail spokesman Chuck Mandarino denied that guards had brought it in, instead blaming Aramark workers. The suspicion came from the phone records that showed the phone had been used to call one of their homes the night before it was discovered being used by a prisoner.

Thirteen prisoners at Snyder County jail refused to lock up in February 2005 at the Snyder County Jail in Selinsgrove. They were upset that their personal commissary orders failed to arrive, and they were hungry from lack of adequate food in their Aramark-supplied meals. Four hours after police in riot-gear came in, Warden George Nye consented to give the prisoners the sandwiches they asked for, rather than risk staff getting injured in a takeover. Nye told reporters that a few months earlier, Aramark had taken over the food service. "We had a heck of a menu before. Inmates don't get the extras, like ice cream, that they used to get." Nye said that Aramark's supposed 3,000 calorie/day meals were projected to save the county \$100,000 per year. Police union representative Donnie Delvert opined that such budget cutbacks were putting guards unnecessarily at risk. The union also grieved the loss of union jobs to Aramark, holding up any renewal of Aramark's contract. The labor board ordered the county to rescind Aramark's contract, and reinstate the displaced workers, with back pay. The matter is on appeal.

Northampton County Prison came under fire in August 2005 when Easton Health Bureau inspectors found food stored in a bathroom, no hot water or soap for kitchen workers to wash their hands with, and refrigerators that could not maintain proper temperatures. The records,

refused to the media by the city, were made public only after a legal challenge.

City inspector Ed Ferraro described the violations as so severe that, were they found in a private business, he would have shut the business down. Acting Warden Scott Hoke played down the deficiencies, describing them as "no worse than any other kitchen ... in the Lehigh Valley." The kitchen, serving 1,800 prisoners, is old and in need of remodeling, Hoke admitted, adding that "the county just couldn't afford it." But they could afford Aramark, who is responsible for running the kitchen under contract. Hoke said that violations such as storing chicken and beef at room temperature or storing food in the bathroom would fall on Aramark's shoulders. Food in the refrigerator was measured at 73 degrees, which Aramark blamed on the constant opening of the refrigerator's door. (Normal refrigeration temperature is 37 degrees.) Aramark's spokesperson Sarah Jarvis said these problems had been fixed a year earlier, and that Aramark was "pleased with how we maintain this kitchen." Ferraro stated that one year later, all the earlier deficiencies noted had been fixed. Source: The Morning Call.

The U.S. District Court dismissed Allegheny County jail prisoner Kamau Bailey's 42 U.S.C. § 1983 complaint as frivolous. Bailey had sued Aramark for selling canteen packets of cocoa for \$.30 each, when the packets were clearly marked "not for retail sale." The court found "no possible violation of [Bailey's] constitutional rights." See: *Bailey v. Clemmons and Aramark Corp.*, U.S.D.C. No. Civ A 05-963 (Sept. 16, 2005).

After the Dauphin County grand jury investigated Aramark's books (prior to contract renewal) following repeated prisoner allegations of watered down food and over-billing in its Dauphin County Prison food service contract, Aramark agreed in September 2005 to reimburse the county \$65,000. County District Attorney Edward Marisco made no criminal charges, however. The \$65,000 was for over-billing in 2002 and 2003, when Aramark charged for meals that were never made. Aramark had made the gain by charging a flat amount rather than using the required actual population served. See *PLN*, June, 2006 for more details.

Aramark won a \$1.15 million/yr. renewed three-year contract effective November 1, 2005 at Lackawanna County Prison, after underbidding two competi-

tors. Aramark will serve 2,790 meals per day at \$1.13 per meal. Nutrition, Inc. had bid \$1.19 and Canteen had bid \$1.26. Curiously, the new contract replaces their 1999 contract of \$1.2 million/yr, and that figure did not include amortizing replacing all the kitchen equipment for \$100,000. Not explained is what impact the contract will have on prison food, given increases in food, energy and labor costs over the life of the contract (2008).

Texas

"Get it right or get out," exasperated Tarrant County commissioners told Aramark in February 2004. This 30 day ultimatum required Aramark to "cook up solutions to problems" that had county jail prisoners refusing meals. Prisoners were on the warpath, said Sheriff Dee Anderson after Aramark took over food service in December 2003, complaining about rancid food, unsanitary conditions and short portions. Aramark's contract, for \$3.3 million, covers four county lockups. By its terms, if Aramark fails to deliver, it can be replaced by bidder Mid-State Services, which held the contract before being underbid by Aramark. County Purchasing Director Jack Beacham reported that jail administrators backed up the prisoners' complaints. "There were 17 pans of pinto beans that had soured. We spit them out when we tried them," Beacham said. "I had to take the suit I was wearing to the cleaners at the end of the day because

you could still smell the spoiled beans in it. It was bad." Beacham saw one Aramark employee spill a batch of flour tortillas on the floor, then pick them back up and put them on the serving line. Sloppy joe mix (apparently a signature Aramark meal), was only maintained at 90 degrees, versus the requisite 120-150 degrees. Aramark's bid was \$600,000 lower than Mid-State's earlier contract, bidding \$.88/meal v. \$.96. At contract award, some commissioners questioned whether Aramark could serve proper food at that price.

In March, Beacham staged a surprise inspection at Tarrant County jail. They found prisoner meals being transported in a rented panel truck with dried spoiled cake inside. A stench came from the truck when it was opened. In fact, food oils had permeated the wood panels of the truck, rendering it unsuitable for transporting meals.

Push came to shove on March 9, 2004, when Tarrant County told Aramark to get out by March 22. Aramark resigned from its contract, and Mid-States regained its \$3.79 million contract to serve 3,500 prisoners per day. Aramark said it suffered only from "start-up glitches." It would be more accurate to say Aramark's product was so bad it gave prisoners and officials a "start."

Wisconsin

Brown County Jail used to spend \$2.88 per hot meal for its 600 prisoners, but under a January 2005 contract with

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Aramark (cont.)

Aramark, will only pay \$1.18 per meal. Sheriff's Capt. Jack Jadin said that prisoners shouldn't see any significant changes, adding that they would continue to get cubed pork noodle casserole, a staple there. However, 16 of 34 county kitchen employees were displaced, angering union officials. Prisoner Anna Graf of Green Bay wrote, when the plan was announced, "As I sit in my jail cell thinking of the \$2.88 meal I just ate, I wonder what they could feed us for \$1.18." Graf faulted the food for being "starchy, fatty and a lot of filler foods." Prisoners should soon find out. Aramark's plan is to use prison labor to prepare the meals.

Aramark's Wisconsin record was tarnished by a salmonella-tainted spaghetti dinner in 2003 at the Winnebago County jail. Oshkosh attorney George Curtis represents eight of the ten prisoners in a lawsuit. The contamination was traced to turkey meatballs served in the downtown jail and a work release center. More than 50 prisoners complained of symptoms including diarrhea, cramps, vomiting, and dehydration, lasting for weeks. The state limits such claims to \$50,000.

Virginia

The Newport News Jail recently laid off four staff kitchen workers when Sheriff Charles Moore accepted Aramark's low bid of \$.94 per meal to feed the 580 prisoners. Aramark's bid of \$600,000 for one year was \$100,000 lower than Canteen Corp.'s, and included laundry services. The Sheriff projects saving \$235,000 annually in food and laundry costs. But Aramark's low bid wasn't the only thing Sheriff Moore accepted from Aramark. Six months earlier, Aramark had given Moore four tickets to a Redskins game worth \$320. Moore said the award decision had nothing to do with the tickets. Moore did declare, as state law requires of elected officials, the receipt of a gift worth more than \$50. After serving them only \$.94 meals, Aramark might score more points by offering to let the prisoners watch the Redskins game.

Aramark also has a contract with the Hampton Roads jail. Last year, Aramark gave \$1,250 to Hampton Sheriff B.J. Robert's reelection campaign. Roberts was offered football tickets, too, but gave them to his friend Moore.

Toronto

Aramark has Canadian and British enterprises, as well. In the Toronto East Detention Centre, an Aramark employee was charged in May 2000 for attempting to smuggle drugs in. He was arrested inside the facility, while delivering canteen orders to prisoners. Drugs were found in the cigarette packs.

Food for Thought

The purpose of imprisonment is punishment. The punishment is the denial of liberty. Inflicting detestable conditions, such as poorly prepared food, is not only constitutionally wrong, it backfires with added, not saved, costs. The real measure of "savings" as to such important prisoner morale drivers as food is not the bare cost of the meals as reported on some balance sheet, but on the ultimate goal of "correction" or "rehabilitation" to aid these men and women to prepare for a successful post-incarceration reintegration into society. Doling out short portions to goad prisoners' ire, hiring low-budget workers who bring in drugs, making prisoners ill in the short term (tainted food from unsanitary conditions) or in the long term (poor diet that raises eventual medical bills) is truly penny-wise and pound-foolish. Aramark may have succeeded in whittling down the food service portion of prison wardens' obligations in incarcerating prisoners, but by thereby putting prisoners' health, welfare, and safety at risk for

the sole measure of food cost "savings," Aramark's prison food service leaves a bad aftertaste in the mouths of both prisoners and taxpayers.

But, bad food or not, business is booming for Aramark. On August 8, 2006, Aramark announced it would allow itself to be bought by an investment group led by chairman and CEO Joseph Neubauer for \$6.3 billion, plus the assumption of \$2 billion in debt. This will remove Aramark from the list of publicly traded companies. Once the transaction is complete Aramark will again be a private company.

Despite a well documented track record of corner cutting, serving wretched products and corporate criminality, Aramark is doing a booming business with colleges and universities and prisons and jails alike. The main difference of course is that students have a choice as to where they eat, prisoners do not. ■

Sources: *Colorado Springs Independent*, *Palm Beach Post*; *Fort Pierce Tribune*, *Chicago Sun-Times*, *Daily Herald*, *Indy Star*, *Heartland Institute*, *News Dispatch*, *Lexington Herald-Leader*, *Great Falls Tribune*, *Daily Record*, *The Record*, *The Santa Fe New Mexican*, *Columbus Dispatch*, *Lorain Morning Journal*, *Newport News Daily Press*, *OPSEU*, *Green Bay Press-Gazette*, *Fort Worth Star Telegram*, *Nation's Restaurant News*, *Toledo Blade*, *The Daily Item*, *Coshocton Tribune*, *Tulsa World*, *Mail Tribune*, *Private Prison Report International*, *Pittsburgh Team 4*,

Private Prison Execs Win Big While Guards and Prisoners Lose Out

by Michael Righy

Many of the problems associated with imprisonment in the U.S. – high staff turnover, prisoner neglect and abuse, and the introduction of contraband by employees, for example – can be attributed to the paltry salaries and few benefits that most guards receive. But while low-paid guards must make do with their miserly paychecks, those at the top of the prison hierarchy – especially the executives of private prison companies – are living lives of lavish excess.

Like those they watch over, many prison guards make a barely livable wage. In Mississippi, for example, the starting salary for state prison guards is \$19,620 a year; in Tennessee it's \$21,000 and in Ala-

bama \$25,352. These salaries are generally far less than those of their bosses. For instance, the commissioner of the New York Department of Corrections (DOC) makes \$136,000 a year, and California's top prison official earns \$129,000. At the Bureau of Prisons, where annual pay for guards starts at \$34,000 to \$35,000, the BOP commissioner draws a healthy \$160,000 salary. The dichotomy is perhaps most striking in Texas, however, where Brad Livingston, Executive Director of the Department of Criminal Justice, rakes in \$165,000 a year – more than 7 times the \$22,400 starting salary of a TDCJ prison guard.

Still, that's nothing compared to

the disparity seen in the private prison industry, where executives make millions while their employees receive menial wages. In April 2006, for instance, the GEO Group – formerly Wackenhut Corrections Corp. [see *PLN*, June 2004, p.16] – was hiring prison guards in Indiana for \$8.00 an hour. Cornell Companies, Inc. was recently paying guards \$8.50 per hour in high-wage Alaska. Corrections Corporation of America (CCA) was paying between \$10.50 and \$11.50 for guards at three Colorado prisons, and less than \$8.00 an hour for guards in Kentucky.

Contrast these low-end wages with executive payouts. As President and Chief Executive Officer (CEO) of CCA, John D. Ferguson made \$1.36 million in 2005 and exercised stock options worth \$3.66 million. Thus, his total compensation was more than 300 times the annual salary of a CCA guard in Kentucky. The company's Chief Financial Officer (CFO), Irving E. Lingo Jr., earned slightly less, drawing a mere \$677,000 in salary and exercising \$793,000 in options. At least three other top CCA executives earned nearly \$1 million in combined salary and stock options in 2005 (and these figures don't include current stock holdings, unexercised options, accrued retirement packages and other benefits).

At Cornell, CEO James E. Hyman, who was named Chairman of the company in February 2005, received an initial compensation package of \$1.07 million plus \$1.14 million in restricted stock awards and the option to purchase 50,000 shares of common stock over five years. CFO John Nieser received \$225,000 in salary and options on 46,000 shares of stock. [See *PLN*, February 2004, p.1 for more on Cornell].

Executives at other for-profit prison service companies are paid similarly hefty salaries. Take Joseph Neubauer, CEO of Aramark, the parent corporation of Aramark Correctional Services. He made a cool \$2.6 million in 2005 and exercised \$13.1 million in stock options. The company's CFO, L. Frederick Sutherland, did nicely too, with a salary of \$943,000 and \$995,000 in exercised options. At America Services Group, which owns Secure Pharmacy Plus, Prison Health Services (PHS), EMSA and Correctional Health Services – all of which have horrendous track records of sacrificing prisoner health and safety in pursuit of larger profits – executive compensation

is slightly lower but still excessive. CEO Michael Catalano earned a base salary of \$525,000 in 2006, while CFO Michael Taylor made \$260,000. This was in addition to their stock options, which in 2004 were valued at \$142,500 and \$45,000, respectively.

Most people would not begrudge private prison executives reasonable compensation for their services. In many cases, however, greed quickly overcomes reason. To boost their company's bottom line, these executives tend to skimp on employee pay and benefits, training, background checks and prisoner services. They then reward themselves with enormous salaries and extravagant perks. Consider executives at the GEO Group, based in tony Boca Raton, Florida. Dr. George Zoley, the company's Chairman and CEO, drew \$2.2 million in salary and bonuses in 2004 and received \$1.4 million in "other" compensation, according to company pay.com. CFO Wayne H. Calabrese reportedly made \$1.14 million in salary and bonuses and \$1.04 million in other compensation.

For Zoley, the money will continue rolling in even when he no longer works for the private prison company. If he is fired "without cause," according to GEO's proxy statement, he'll receive title to the company car he's been using, employee benefits for 10 years, and twice his current annual salary plus a bonus of \$1.82 million. If he retires the company will owe him a one-time, after-tax payment of \$2.9 million.

Yet while Zoley and Calabrese are growing fat on their multi-million dollar compensation packages, others in the GEO family are begging for scraps. A case in point is the GEO-operated Tri-County Justice and Detention Center in Illinois, where guards are clamoring for a raise after four years at the same salary. In arbitration with the guard's union, the International Labor Union of North America Local 773, GEO offered to boost the hourly wage by \$.25. The guards, however, are holding out for at least \$1. "I've been working here for 7 years and 6 months," said Tri-County guard Peggy Keith. "I started at \$8.00 per hour, and now we make \$8.85, that's it."

Despite four months of arbitration the parties remained at an impasse as of June 2006. GEO won't offer more and the union won't accept less. Pulaski

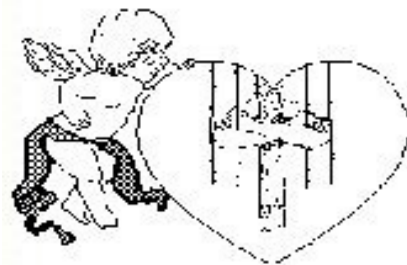
County Sheriff Randy Kern is worried that the jail might close if the two sides can't come to an agreement. "I hope we can get something [worked] out over there so we can keep the jail up and running," he lamented. "That way we can keep prisoners there, so everybody can make money."

It's just that private prison executives will make much more money at the expense of their underpaid employees. ■

Sources: *kfvs12.com*, *palmbeachpost.com*, *Sun-Sentinel* (Fort Lauderdale, Florida).

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Habeas Hints

by Kent Russell

This column is intended to provide "habeas hints" to prisoners who are considering or handling habeas corpus petitions as their own attorneys ("in pro per"). The focus of the column is habeas corpus practice under AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

HABEAS HIGHLIGHTS – SUPREME COURT TERM 2005-2006

As 2006 winds down, this column takes its annual look at the U.S. Supreme Court (USSC) decisions during this past term which are likely to have the most significant impact on nationwide habeas corpus practice. At the end of each of the summaries, I've suggested one or more "Habeas Hints" based on the Court's decision.

***House v. Bell*, 126 S.Ct. 2064 (2006).**

A state prisoner who had been convicted of capital murder and rape sought relief on habeas corpus. He powerfully supported his petition with newly discovered DNA evidence showing that semen on the victim's clothing came from the victim's husband rather than from petitioner, and by evidence that the husband had since admitted being the killer. The district court found that petitioner's claim was marred by a state procedural default (failure to make the current claim on an earlier habeas corpus petition); but granted the petitioner an evidentiary hearing to determine whether he fit within the "actual innocence" exception to procedural default that the USSC had recognized in *Schlup v. Delo*, 513 U.S. 298 (1995). After an extensive hearing, the district court denied relief, finding that the petitioner had not definitively proved that he was "actually innocent" of the charged crimes, and therefore had not done enough to get through the *Schlup* "gateway" to federal consideration of the merits of claims that had been procedurally defaulted in State court.

The USSC reversed, finding that pe-

titioner had satisfied the *Schlup* standard because the new evidence introduced on habeas by petitioner had demonstrated that it "was more likely than not, in light of the new evidence, that no reasonable juror would have found him guilty beyond a reasonable doubt." At the same time, because he had failed to make the "extraordinarily high" showing that a finding of actual innocence demands, the Court rejected petitioner's claim for relief on that basis alone. Rather, as the court had previously done in *Herrera v. Collins*, 506 U.S. 390 (1993), it merely held that "whatever burden a hypothetical free-standing innocence claim would require, this petitioner has not satisfied it." In sum, although finding that petitioner had not proved "actual innocence", the court still found that he had satisfied *Schlup*'s less stringent "gateway" requirement for overcoming a state procedural default. The USSC's split decision in *House* effectively makes it easier to get through the *Schlup* gateway, but harder to show actual innocence. Therefore:

- Consider removing "actual innocence" language entirely from your *Schlup*-type claims. By finding that the petitioner had satisfied the *Schlup* standard even though acknowledging that he had failed to go so far as prove that he was "actually innocent", *House* makes clear that it is *not* necessary to prove with 100% certainty that the petitioner is "actually innocent" in order to do what is necessary to overcome a state procedural default. Rather, one makes it through the *Schlup* gateway simply by introducing new evidence on habeas corpus that makes it likely that a new jury, hearing the new evidence, would have a reasonable doubt as to petitioner's guilt. Granted, that is difficult to do, but it is a heck of a lot easier than proving innocence to an absolute certainty. Therefore, I recommend that habeas petitioners who are trying to excuse a state procedural default (or, for that matter, a federal procedural default, such as an AEDPA statute of limitations violation) omit "actual innocence" language entirely, and allege instead that the procedural default should be excused because they have established "a reasonable doubt as to whether they are guilty".

- Similarly, habeas petitioners who are trying to prove to the court that they are

innocent – which, after all, is what most solid habeas petitions are trying to do -- should not make a free-standing claim of "actual innocence", but rather should couch their claim of innocence inside some other, recognized habeas corpus claim. For example, if a prisoner has managed to come up with new evidence that powerfully suggests that s/he is not guilty, rather than argue that s/he is entitled to habeas relief based on "actual innocence", the petitioner should claim instead that trial counsel was *ineffective* in failing to bring forward that evidence of innocence at the trial.

***Davis v. Washington*, 126 S.Ct. 2266 (2006).**

Davis involved two different cases with claims based on *Crawford v. Washington*, 541 U.S. 36 (2004), the landmark USSC case that bars admission of "testimonial" statements of an available witness who did not appear at trial and whom the defendant did not have a previous opportunity to cross-examine. The first case involved a 911 call that a domestic violence victim made while actually being attacked by the defendant. The second one concerned a domestic violence victim's statements in a written affidavit given to a police officer some time after the attack had occurred.

The USSC held that the 911 call was not "testimonial" because its primary purpose was to deal with an "ongoing emergency"; but that the affidavit was testimonial because the primary purpose was not to report present events, but to describe past events in preparation for a later criminal prosecution. Hence, the 911 call was admissible, but the admission of the affidavit violated the Sixth Amendment.

- *Crawford* was predominantly a theoretical decision that did not give very much practical guidance as to what kinds of statements were "testimonial" – and hence cannot be admitted without an opportunity for cross-examination – and those which are not (and therefore are admissible). *Davis* is useful because it applies *Crawford* in settings that frequently occur in real life, and thereby sets out some concrete tests for determining what is testimonial and what is not. Based on *Davis*, try to show that a challenged statement

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was testimonial by arguing that there was no actual emergency in progress; that the person making the statement was in a safe environment; that the statement occurred some appreciable time after the crime was committed; and that the police questions were directed, not at what was actually happening at the time of the questioning, but rather at what had happened before the questioning began.

***Washington v. Recuenco*, 126 S.Ct. 2546 (2006).**

The defendant was convicted by a jury of assaulting his wife with a “deadly weapon”. The jury was not asked to determine whether the weapon in question was a “firearm”. At sentencing, the judge found that the defendant had, in fact, assaulted his wife with a firearm, and as a result imposed a 3-year firearm enhancement rather than the 1-year enhancement that would have applied based solely on the “dangerous weapon” finding the jury had made. Subsequent to the sentencing, the USSC decided *Blakely v. Washington*, 542 U.S. 296 (2004), which holds that the judge cannot sentence the defendant to a term greater than that which would have been justified solely on the basis of the findings made by the jury. The Washington Supreme Court not only reversed the firearm enhancement, finding that *Blakely* error had occurred, but also found that the error was “structural” – meaning that reversal was required regardless of whether it was harmless.

The USSC reversed, finding that *Blakely* error, like most other errors, will not result in a reversal where it is found to be harmless. Accordingly, the USSC reversed and remanded for a determination as to whether the *Blakely* error was harmless or not.

•Despite the obvious down-side to this case -- that *Blakely* error will not result in a reversal if the State shows that the error was not harmless beyond a reasonable doubt -- I find this decision helpful in its summary of the other *Blakely* requirements. First, the sentence here was imposed in 1999 but the decision by the Washington Supreme Court did not come down until 2005. Nevertheless, neither the WA court nor the USSC ever questioned the applicability of *Blakely*, which was decided in 2004. Hence, *Recuenco* makes it perfectly clear that *Blakely* applies to sentences imposed years before *Blakely* came down, so long as the direct appeal had not been finally

decided by the time that a *Blakely* claim was made. Secondly, it is plain from this case that *Blakely* claims are still viable in attacking state sentences, even though they have been largely emasculated in federal cases by the *Booker* decision, which makes Federal Sentencing Guidelines advisory only. Third, *Recuenco* applies the more petitioner-friendly “*Chapman*” test for harmless error where constitutional rights are infringed: i.e., that the State has the burden of proving that the error was harmless beyond a reasonable doubt, rather than the petitioner having to show that the error actually affected the sentence. Thus, even though *Recuenco* requires a petitioner to demonstrate that *Blakely* error was harmless (something that most courts were requiring anyway), it provides convenient “one-stop-shopping” for the most important things that a habeas corpus petitioner is required to show when attacking a sentence that was based on findings made by the sentencing judge rather than by the jury.

***Holmes v. South Carolina*, 126 S.Ct. 7272 (2006).**

Defendant was charged in South Carolina with robbery and sex offenses. The State relied heavily on forensic evidence (mainly blood and DNA) at trial. Defendant challenged the forensic evidence on the basis that it was contaminated and that the police had tried to frame him, and sought to introduce evidence that another person had been in the neighborhood and had either acknowledged committing the crime or had admitted that the defendant was innocent. The trial judge, relying on a South Carolina rule that permitted the court to exclude “third party culpability” evidence where the prosecution’s evidence of guilt was “strong”, prohibited the defendant from introducing the evidence suggesting that somebody else had committed the crime,

The USSC reversed, finding that the State’s exclusion of the evidence denied the defendant a fair trial by infringing on his “right to present a complete defense”.

•This case is an excellent authority for any habeas corpus claim based on the State’s exclusion of evidence that would have helped the defense. The following language from *Holmes* is particularly useful: “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Pro-

cess or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense’.” *Id.*, at 1732.

•There are some limits to the *Holmes* holding which should be recognized: First, the USSC did uphold certain well-established State rules excluding defense evidence, for example the almost universal rule that prohibits the introduction into evidence of polygraph tests. Second, although the USSC condemned the South Carolina rule because it tied the defense’s hands in virtually any case where the trial court could find that the prosecution evidence was “strong”, the USSC emphasized that, in addition to offering the evidence of third-party guilt, the defense had also called experts to challenge the prosecution’s forensic evidence. Hence, while a habeas petitioner can and should rely on *Holmes* to challenge any conviction obtained after the State court excluded potentially exculpatory defense evidence, a petitioner whose trial counsel did not also challenge the State’s forensic evidence at trial should do so on habeas corpus, supported by expert witness testimony if it can be obtained. 📄

Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus and AEDPA. The new 5th Edition (completely revised as of September, 2006) is now shipping, and can be purchased for \$39.99 (cost is all-inclusive for prisoners; others pay \$10 extra for postage and handling). No particular order form is necessary; send your check or money order to: Kent Russell, “Cal. Habeas Handbook”, 2299 Sutter Street, San Francisco, CA 94115.

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How to Exit California's Sexual Predator Prison: Refuse Treatment

by John E. Dannenberg

California, with 538 sexually violent predators (SVP) civilly committed at its Department of Mental Health's Atascadero State Hospital (ASH), has an efficacious five-step psychological treatment program to prepare its wards for reentry into society. The problem is that the program is so arduous that only four prisoners have ever graduated. However, another 54 SVPs were released as of December 2005 who chose a more viable alternative: refusing treatment. These men took their chances on simply going before a court every two years for a determination as to whether they were still too dangerous to be released. Absent any new indicia of dangerousness, these 54 escaped unanimous jury findings that they should be recommitted.

It's Better Not to Be Treated

Ironically, after release, the treated suffered harsher lifestyles than the untreated. An ASH "graduate" is placed on strict parole supervision, with a GPS ankle bracelet, quarterly registration requirements, and lots of publicity as to his placement and whereabouts. Any minor infraction will result in immediate reincarceration at ASH.

But a court-released SVP must simply register annually, and no public ("Scarlet Letter") notification is made as to his location. The process of untreated-release involves convincing state psychiatrists that the predators are unlikely to commit a new offense. Some have been deemed so old or infirm as to not be a risk of reoffending. When there is doubt, a jury is asked to make that determination, every two years. Still, fully two-thirds of the 54 underwent no treatment at all.

The 2006 ASH post-release record shows that 11 of the 54 are back in custody, three for sex-related crimes. Another ten left the state to gain the benefit of less stringent monitoring requirements. Seven more have died, and three are missing, having not met their registration requirements. By contrast, of the four who "graduated" from treatment, one has been released-from monitoring and another was returned to ASH after only two months.

A major advantage of being released via the courts and not from treatment is that SVPs' names are not distinguished from California's 63,000 other Internet-listed sexual registrants. But the *Sacramento Bee* undertook a detailed investigation to

uncover the whereabouts of all 54 court releasees. The *Bee* published their names and photographs in a three-part series beginning February 16, 2006. It found four living in San Francisco. When queried, San Francisco Police Inspector Jim Zerga said that policy dictates only that neighbors be notified that a high-risk sex offender has moved into the city, but not where. With this protection, many predators simply fade back into the communities.

Three more were found living in Sacramento—one only 0.3 miles from a day care center. This illustrates another advantage of the non-treatment release option: only the treated (and hence parole monitored) are restricted from living within 2,000 feet of a school or child care center.

Of course, if the offender leaves California, his whereabouts becomes even more attenuated. A 63-year-old retired mechanic and child molester now lives in Oregon, one of two states where sex-offender information is not posted on the Internet. His San Francisco Bay Area victim lamented, "I don't think a person like that can ever be healed. ... You're always going to do it. I don't feel that there's reform for it." Similar fear has fomented varying remedies in different locales. Washington state sequesters its worst offenders on a island off Tacoma. Iowa bars offenders from living within 2,000 feet of a school.

In spite of the clear benefits of gaining court-ordered release in lieu of treatment, in August 2005, California opened a new \$388 million mental hospital in Coalinga, which can house 1,500 SVPs. Current civilly committed SVPs at ASH are scheduled to be transferred there. Since the program was initiated in 1996, over 6,200 SVPs have been evaluated, 538 of whom have been committed.

Monitoring Is Spotty

The commonly admitted goal of released SVPs is anonymity, so that they can just rebuild their lives. The media is their worst enemy, threatening at any moment to suddenly blow their cover and once again put hounds on the heels of the fox. The public is so focused on vigilantism against sex offenders that SVPs remain perpetual pariahs. When one SVP retired to Arizona, and authorities notified residents that an SVP was moving in, six neighbors sold their condos and moved.

The SVP told reporters he would never set foot in California again, adding that if given the choice between ASH and prison, he would choose prison. He is bitter that California violated his rights by incarcerating him at ASH after he had served his prison sentence for his crimes. Ventura County prosecutor David Lehr, who handled his commitment proceedings, called this now successfully relocated SVP "the first one I'd be concerned about." His sole monitoring is to register annually in Arizona.

Post-treatment Punishment

The four ASH "graduates," Brian DeVries, Cary Verse, Patrick Ghilotti and Matthew Hedge, bore an incredible barrage of public scorn and threats when they were released. Hostility from neighbors in Salinas, California, caused prison authorities to rehouse DeVries in a trailer on the grounds of nearby Soledad State Prison. After completing the program, he left the state, where media spotlights followed him to his new rural Washington State home.

Cary Verse was hounded by media and thrown out of motels in four counties before sympathetic attorneys gave him cover in a cottage in a gated community in Contra Costa County. To this day, he wears a satellite-monitored tracking device on his hip. He must map out his weekly and daily schedules, even for such mundane things as a trip to McDonald's. If he goes out with friends, they must first sign a "chaperone form" indicating they know of his past. The costs of his supervision and housing are borne by the state, via its subcontractor Liberty Health Care, Inc.

Patrick Ghilotti came back to Marin County, where he has support from his family's established construction business. Matthew Hedge, like DeVries, was forced out of the community into a prison-based trailer in San Diego County. But after two months, he violated his continuing treatment conditions, so the state obtained a court order for his recommitment to ASH.

Failure Remains a Risk

When Donald Hunt was court-released in 1999 and immediately moved to Colorado, he settled into a new home in Cation City where he began baby-sitting two young girls. In March 2002, he was

arrested for molesting them. He had not registered in Colorado, and his sordid past was not revealed until after he was arrested while looking at lewd pictures of the girls on his computer.

After James Rodriguez was released in 2004 to an Indian reservation near San Diego, he burned his satellite tracking device and put it in a truckload of manure. He was later arrested for arson by parole authorities, who also found him in possession of two firearms.

ASH expert Dr. Karl Hanson said that they are reliably able to classify future re-offenders into two categories, those that have over a 50% chance of re-offending, and those who have less than a 10% chance. The higher rate attends those pedophiles who dwell on male children and have had previous trouble with the law. They will likely re-offend within 15 years of release. By contrast, the "normal" re-offending rate for sex offenders in general is 20% after 10 years.

Treatment Option Is a Major Challenge

For SVPs accepting the treatment alternative (only one in four SVPs do), California spends \$138,000 per year at ASH trying to cure their predatory addictions. The four-step in-house program (the fifth step is controlled release) can take many years. Presently, ten candidates are in the fourth step looking towards release. The challenge facing ASH personnel is exemplified by the case of candidate SVP James Lamb.

At age 46, Lamb has been in ASH's treatment program for eight years. Although convicted of molesting five boys, he has admitted to more than 80 victims. Lamb exists in an environment at ASH that tugs both ways. While staff nurtures self-examination and change in both individual and group sessions, other imprisoned SVPs secrete newspaper ads depicting children and even coerce their fellow pedophiles into sexual relations. "There's guys who stalk these hallways," said Tony Iannalfo, a rapist from Los Angeles who has been at ASH for eight years.

Lamb was once married and fathered two daughters, after an adolescence marked by pursuit of prepubescent boys. Recognizing his need for treatment, Lamb has diligently pursued every opportunity offered by ASH. In addition, he voluntarily was surgically castrated. One of Lamb's child victims ("Ben"), now 28, is still haunted by his sexual trauma, and believes that only life-time lockup will satisfy the need

for public safety from the likes of Lamb.

Lamb put his own 4-year-old daughter in a bathtub with 6 year-old Ben and began encouraging them into sexual "games." "He completely overpowered us intellectually, physically, emotionally," Ben related very emotionally to a *Bee* reporter. Lamb got 18 months in prison for molesting Ben, whereupon Lamb moved to the tiny Monterey County community of Spreckels to become a Boy Scout leader. Lamb was arrested again in 1991 after a neighbor observed him bouncing on a trampoline with a small boy, both in boxer shorts, wherein the 300 lb. Lamb coerced the boy to take his boxers off. Ultimately, Lamb was convicted of molesting both the boy and his 11-year-old brother, whose sex acts Lamb had videotaped.

Back in prison, Lamb made money writing child-porn stories for other prisoners, focusing on the recurrent theme of seducing small boys. When he was paroled from this term, he was arrested weeks later after prison officials discovered a letter he had written to another prisoner describing Internet porn Lamb had acquired. Detectives found on Lamb's computer records of Lamb's correspondence with the North American Man Boy Love Association, an organization that encourages sex between adults and children. Lamb finally was committed to ASH in 1998.

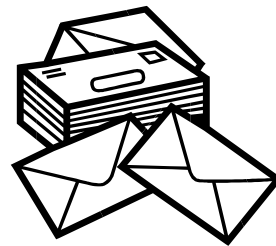
Treatment Option Is the Harder Way to Go

Part of the treatment includes admitting to one's crimes. This raises a major concern for many would-be treatment candidates. While experts believe that frank discussion of their crimes is key to a sincere desire for change, many SVP patients believe that such open counseling sessions could be used against them in court to cause recommitment. Indeed, it has happened.

Still, Hanson admits that determining which SVPs are just putting on acts still eludes researchers. "We don't know yet how to measure whether somebody has benefited from therapy," he said. The only way to find out is in Step Five, controlled release.

Or to simply forget the whole therapy/treatment experiment, keep your mouth shut, and roll the dice on having a court rule in your favor on a statutory biennial recommitment hearing. If you demand a jury, and two juries are unable to unanimously recommit you, the judge must let you out. The score is 54 to 4. ■

Source: *Sacramento Bee*.



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Wrongfully Imprisoned Wisconsin Man Awarded \$400,000, Now Accused of Murder

by Michael Rigby

On February 14, 2006, a Wisconsin man who spent 18 years in prison for a rape he didn't commit settled his lawsuit against Manitowoc County for \$400,000. He'll likely use the money to defend himself against a recent murder charge.

News of the settlement came as the plaintiff, Stephen Avery, sat in a Calumet County jail cell charged with the brutal rape and murder of Teresa Halbach, a 25-year-old photographer for *Auto Trader Magazine*. Prosecutors contend that on October 31, 2005, Avery lured Halbach to his property to photograph a minivan he had for sale. Once there, prosecutors say, Avery and his nephew, Brendan Dasser, 16, chained Halbach to a bed and took turns raping her. Halbach was then stabbed, strangled and shot. Her body was dragged to a fire pit and burned. Police say that when they searched Avery's property they found charred human remains and the key to Halbach's SUV in Avery's bedroom. The SUV was discovered in an adjacent salvage yard.

Dasser was charged in connection with Halbach's murder on March 1, 2006, and provided investigators with a videotaped confession. Several months later, however, on June 29, he recanted in a letter to the judge over his case, saying he had lied. Both Avery and Dasser are scheduled to go to trial on Feb. 5, 2007 on charges of murder, kidnapping, first-degree sexual assault, false imprisonment and mutilation of a corpse. Avery, who has repeatedly proclaimed his innocence, contends county officials framed him in order to derail his civil suit.

Avery had become the poster boy of a criminal justice system gone wrong after his release from prison on September 11, 2003. His rape conviction, which was largely based on the victim's own testimony, was overturned after DNA evidence discovered almost two decades later proved he was not the rapist. Instead, the evidence pointed to a man already serving a 60-year sentence for other sex assaults. Avery's case spawned legislation aimed at reforming certain aspects of the criminal justice system. Signed into law in December 2005, the new Wisconsin statute establishes guidelines for preserving

DNA evidence, requires written policies on the use of eyewitness testimony, and allows courts to order post-conviction DNA testing. The law, initially called the Avery Bill, has since been renamed.

Milwaukee attorney Stephen Glynn, co-counsel with Walter Kelley in Avery's wrongful conviction lawsuit, said his client intends to hire a private attorney to represent him on the pending charges. As a result of the \$400,000 settlement, of which \$160,000 went to Avery's attorneys for legal fees, he no longer qualifies for a public defender. He also faces a wrongful death lawsuit filed by Halbach's estate.

Following Avery's arrest in the Halbach case, the Wisconsin Innocence Project pulled his photo from their website. Avery had been one of the Project's

biggest success stories. Keith Findley, co-director of the Project at the University of Wisconsin-Madison law school, said he was "horrified and saddened" by the recent allegations but does not regret helping Avery win his freedom. "Whatever may or may not be happening now doesn't change the fact that he did not commit that crime in 1985," Findley said. "It's absolutely undisputed." Findley said the decision to pull Avery's picture was made out of respect to Halbach's family. He didn't say why they chose to do so before Avery was actually convicted – a seeming irony, since he was innocent the first time around. ■

Sources: *AP*, *USA Today*, *Appleton Post-Crescent*, *CNN.com*

City Of Tulsa, Oklahoma, Settles Wrongful Imprisonment Claim For \$12,250,000

by Michael Rigby

The City of Tulsa, Oklahoma, will pay \$12.25 million to settle with a man who spent 14 years in prison for a rape he did not commit, according to a settlement agreement filed in the U.S. District Court for the Northern District of Oklahoma on June 16, 2006.

Alvin McGee Jr. was originally awarded \$14.5 million by a federal jury in March 2006. But with his acceptance of the lesser amount the City agreed to forego its appeal.

McGee, 44, was convicted of abducting a woman from a Tulsa laundromat in October 1987. The woman had been driven to a remote location in her own vehicle, raped repeatedly, then locked in the trunk. She escaped and notified police.

After two unsuccessful jury trials prosecutors won a conviction. The third jury convicted McGee of rape, kidnapping, forcible sodomy, robbery by force, and unauthorized use of a motor vehicle. He was sentenced to a combined total of 283 years in prison. McGee was finally freed in 2002 after DNA testing exonerated him. The testing ultimately linked

another man to the crime, but the seven-year statute of limitations had already expired.

McGee sued the City in 2003 claiming that Tulsa police officer Randy Lawmaster violated his constitutional rights by failing to properly investigate the case. He also accused Lawmaster of fabricating and manipulating evidence, improperly conducting a photo lineup, and deliberate indifference.

Under the settlement McGee will receive two equal payments of \$6,125,000: the first within 60 days and the second by June 1, 2007.

McGee said the case was about more than monetary compensation, however. "Like I told everybody from the get-go, this has never been about money," he said after the settlement was announced. "I'm glad we could get it hashed out. I hope the jury doesn't take it as a blow that we took less than what the verdict was." See: *McGee v. The City of Tulsa, Oklahoma*, USDC ND OK, Case No. 4:03-cv-00704-CVE-PJC. ■

Additional sources: *Associated Press*, *fresnobee.com*

Many U.S. Prisoners Give Birth In Chains

by Michael Rigby

Childbirth is sacred in most cultures. But for many female prisoners in the U.S., the process can be cruel and degrading. According to a March 1, 2006, report by the human rights group Amnesty International U.S.A., 23 state prison systems and the federal Bureau of Prisons expressly allow the shackling of prisoners during childbirth.

One of those states is Arkansas, where Shawanna Nelson, a prisoner at the McPherson Unit in Newport, has filed a lawsuit challenging the practice. Nelson was in labor for more than 12 hours before prison authorities transferred her to a local hospital on September 20, 2003.

With chains around her ankles and in excruciating pain (she had been given nothing stronger than Tylenol all day), Nelson says she begged to have the shackles removed. But her guard refused, even though a doctor and two nurses joined her request. "She was shackled all through labor," said Cathleen V. Compton, Nelson's attorney. "The doctor who was delivering the baby made them remove the shackles for the actual delivery at the very end."

Dee Ann Newell, who has taught prenatal care and parenting classes in Arkansas prisons for 15 years, called the practice appalling. "If you have ever seen a woman have a baby, you know how we squirm. We move around," she said.

Like Arkansas, many states justify the use of restraints by arguing that women in labor remain escape risks, though supporters of this ludicrous proposition can't point to a single instance of this happening. "You can't convince me that it's ever really happened," said Ms. Newell. "You certainly wouldn't get far."

In most instances, according to people who have studied the issue, women are shackled because prison rules are unthinkingly enforced in other environments. "This is the perfect example of rule-following at the expense of common sense," said William F. Schulz, executive director of Amnesty International U.S.A. "It's almost as stupid as shackling someone in a coma."

Only two states--Illinois and California--currently outlaw the use of restraints during labor and delivery, although the New York legislature is considering a similar ban. The Illinois statute, enacted in 2000, states that under no circum-

stances "may leg irons or shackles or waist shackles be used on any pregnant female prisoner who is in labor." The California law took effect in January 2006 and prohibits shackling prisoners by the ankles or wrists during labor, delivery, or recovery. "We found this was going on in some institutions in California and all over the United States," said Democratic assemblywoman Sally J. Lieber. "It presents risks not only for the inmate giving birth, but also for the infant."

In her lawsuit against the Arkansas Department of Corrections (ADOC) and its oxymoronic medical provider, Correctional Medical Services, Ms. Nelson, who is now known as Shawanna Lumsey, claims the ordeal of going through labor without anesthesia and while largely immobilized has left her with residual back pain and damage to her sciatic nerve.

Yet despite the problems associated with shackling women in labor, Arkansas has resisted banning the practice. But Nelson's suit has already had some positive effect. Arkansas now uses nylon restraints

that are softer and more flexible, said ADOC spokeswoman Dina Tyler, and they are removed during the actual delivery.

The prison systems of five states--including Washington, Connecticut, and Wisconsin--and the District of Columbia also currently ban the practice of shackling women in labor, though as a matter of departmental policy rather than law. The Wisconsin DOC, for instance, ended the use of restraints after a state newspaper, the *Appleton Post-Crescent*, reported on the issue in January 2006.

One Wisconsin prisoner, Merica Erato, reportedly went through labor in May 2005 with her legs chained together, her husband, Steve, said in an interview. "It is unbelievable that in this day and age a child is born to a woman in shackles," he said. "It sounds like something from slavery 200 years ago."

About 2,000 babies are born to U.S. prisoners annually, according to an estimate by the Sentencing Project. ■

Additional source: *The New York Times*

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Virginia Jail Disgraceful

by Gary Hunter

Richmond City Jail is in such bad shape newly elected Sheriff C.T. Woody called it a "...disaster. I knew it was bad, but I had no idea it was that bad," he said.

On January 4, 2006 a report was issued detailing the deficiencies of the 40-year old jail. Mayor L. Douglas Wilder's Commission on City Jail Issues reported a variety of problems ranging from commonplace to highly unusual.

The three month study ran from August to November 2005 and noted the following problems.

- Jail staff was determined to be severely under trained. Most staff received no follow-up training after the academy;

- Richmond City Jail was neither accredited by the American Correctional Association (ACA) nor were there any current efforts to get accredited. The Commission reasoned that both training and accreditation was vital to "ensure the health, safety, and welfare of staff and offenders within a correctional setting."

- Record management in the jail was inefficient in that it was not automated and lacked efficient communication with the Sheriff's Office and the Police Department;

- Searches before and after visits were virtually nonexistent;

- Prisoners were placed at risk because current classification procedures are based on bed space with no regard to nature of offense, size of offender, strength or age considerations of prisoners who are housed together. Such oversights enhance the probability of assaultive incidents as weaker prisoners might find themselves housed with others who are violent or predatory.

It was the death of Gregory Robinson, in August 2005, that prompted the study. Robinson was beaten to death by a prisoner who was able to manipulate the cell door locks to escape from his own cell and access Robinson's.

- The commission also determined that defective classification procedures enhanced risk to prisoners with respect to communicable diseases, escape risks, mental problems and a host of other areas;

- The jail was determined to be holding critically ill and terminally ill prisoners, who posed no threat to society, while costing taxpayers money;

- Hypodermic needles were left unattended in the infirmary "accessible to

passing inmates and staff." Inspectors also found medical staff lunches stored in the refrigerator with body fluid samples;

- Medical administrative services were not computerized and prisoner's requests for medical services were not being held in a confidential manner;

- "Commission members observed extreme idleness of inmates at the city jail" and recommended that educational programs be provided.

Woody agreed with the commission's assessment. "It's truly a disaster," he said of the jail. "I stepped into a hornet's nest. It's a shame and a disgrace."

The commission also determined that, apart from the necessary improvements to the current jail, funds should be allocated to build a new one. Capacity for

the current jail is 882 prisoners. However, the jail consistently houses up to 1,300.

In the current jail, over \$150,000 is needed to repair the plumbing in just three of the dormitories. Additionally, the commission recommended the complete replacement of boilers, windows and much of the electrical system. They also recommended upgrades for the kitchen, heat distribution units, showers and cell doors. These were all cited as changes necessary to meet and "maintain minimal constitutional standards for the inmates housed" in the jail.

Needed improvements would cost the city \$15 to 20 million. ■

Sources: *Virginia Times Dispatch*, *Mayor's Commission on City Jail Issues*

Deplorable Delaware Prisoner Health Care; Another Prisoner Death Results

by David M. Reutter

Despite mainstream media pressure, public outcry, and a federal investigation, the Delaware Department of Corrections (DDOC) continues to keep its head in the sand about prisoner health care. Not surprisingly, it has resulted in another prisoner's death.

PLN reported the deplorable health care given to DDOC prisoners. See: *PLN*, Dec. 2005, pg 1. The Delaware Legislature, as we reported, refused to provide money to upgrade that care.

The latest DDOC prisoner death occurred at Young Correctional Institution (YCI). IN the early morning hours on May 30, 2006, guards found Thomas J. Burns hanging in his cell. Burns had only been off suicide watch for a few hours.

Burns' saga began when police arrested him on a forgery arrant. When arrested, he was found at his sister's house in the midst of a suicide attempt, using pills and alcohol. He was taken to Christina Hospital, where he remained until taken to YCI.

Once at YCI, Burns, 56, was placed in a strip cell on suicide watch. Despite mental health advocates' phone calls to warn YCI that Burns would kill himself, a Correction Medical Services counselor decided Burns could be removed from sui-

cide watch. Within hours of being moved, Burns was found dead.

Initially, DDOC's Commissioner, Stan Taylor, said "The system did not fail" Burns. Yet, YCI claimed to have no knowledge of Burns' earlier suicide attempt. "That information was not available at that point in time."

In response to the federal investigation into health care services provided to DDOC prisoners, Delaware's Attorney General has hired a private attorney and his law firm to represent and advise the state in the federal investigation. Washington D.C. based attorney Michael Bromwich and his firm are charging Delaware \$425 an hour.

Many think the money could be better spent. "One could ask the question, why money has not been spent on an outside expert to evaluate the health care and see if improvements are needed," says Jules Epstien, associate professor at the Widener University of Law.

Perhaps, the answer is that privatized medical care is not the viable, money saving alternative to proved prisoner's constitutional health services. For the prison industrial complex never concedes, it only circles the wagons. ■

Source: *The News Journal*

Robotic Medicine Dispensers Pillage Jail's Cost Savings

by John E. Dannenberg

“ROBOT,” a \$1 million automatic pill dispensing system installed at the Contra Costa County (California) jails in February 2005 and advertised to save the county \$240,000, has so far instead cost the county \$60,000 in overtime pay for people to supplant the non-functional machinery. A May 25, 2006 Contra Costa County Grand Jury report, subtitled “Who Drugged ROBOT?”, branded the program an apparent failure in both mechanical operation as well as in cost/benefits.

In September 2004, Contra Costa County leased three ROBOT systems for five years for \$971,082. (See: *PLN*, May 2006, p.27.) The contract justification forecast savings from replacement of the pharmacist with a pharmacy technician (\$89,000), simplification of the drug formulary (\$100,000), and efficiencies from daily instead of monthly dispensing (\$60,000). When comparing total reductions (\$249,468) against lease costs (\$196,616), the projected annual savings were \$54,852. But the grand jury found these “savings” illusory.

First, the vendor only delivered two of the three ROBOTS, and both of those were still not operational as of May 2006 due largely to lack of a project manager. Second, the jury determined that replacement of the pharmacist with a technician

and simplification of the formulary had already been achieved without ROBOT. Third, the county had incurred added overtime costs including at least \$60,000 of health services information technology (IT) staff time and an undetermined amount of sheriff IT staff time. “No one has been minding the store,” the report concluded, due to delays from “lack of coordination and failure to assign a project manager.” Moreover, three-fourths of the anticipated savings attributable to the hardware had been achieved without it. “Thus, the economic justification for the ROBOT system was flawed.”

The grand jury recommended that the sheriff and health services departments get all three ROBOTS operational by September 30, 2006. It further admonished the county administrator to do a better job of cost/benefit analyses in future contracts. Finally, it ordered the administrator to install a project manager to take responsibility for multi-department projects such as this.

But a glaring omission from the report was whether prisoner healthcare -- the ultimate touchstone of ROBOT's performance improved or worsened during the intervening year of non-operation. See: *New Automated Drug Dispenser In County Jails, Contra Costa County Grand Jury report No. 0605.* ☐

William L. Schmidt, Esq.

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Florida Boot Camps a Bust, Replaced by Less Fatal Programs

by Gary Hunter

A study of the Pinellas County, Florida boot camp for juveniles, requested by Sheriff Jim Coats, found the program to be a phenomenal failure.

The study's results, reported in March 2006, revealed that 90 percent of boot camp graduates eventually return to a life of crime and delinquency. Of the 740 youths who participated in the Pinellas County program between November 1993 and November 2005, a staggering 666 were rearrested after successfully graduating; 607 received some form of criminal conviction.

A state report indicated that between 2003 and 2004, 61 percent of the boot camp graduates were in trouble again within a year. Fifty-two percent were charged with felonies, many of which included property, drugs and violence. Juvenile justice researcher Steven Chapman stated that between 2003 and 2004, Florida boot camps as a whole had a recidivism rate of 41 percent, which was just 3 percent lower than halfway houses for moderate-risk youths.

"Somewhere, there's a breakdown in the system here," said Coats. He suggested that the program would benefit from a residential re-entry facility for boot camp graduates, believing that a more gradual transition back into society is needed.

The camp houses 14 to 18-year-old youths in "platoons" of 10-15 each. The juveniles attend discipline-oriented classes and are subjected to a highly structured lifestyle. Transition training is also provided before a graduate returns to the community, which raises the question of how much a re-entry facility would actually help.

County Commissioner Bob Stewart expressed surprise that the boot camp was such a failure. He also was skeptical about investing more in the program. "I can see the advantage of such a plan," said Stewart. But he noted a re-entry residence "could be a very expensive proposition."

The State and County currently pay \$2.7 million a year to operate the failed facility. But at least the Pinellas County program is only costing money.

As previously reported in *PLN*, on January 6, 2006, the Bay County boot camp cost one boy his life. Martin Lee Anderson, 14, was punched and kicked by boot camp guards after he complained of being unable to breathe. Six guards

were captured on video assaulting the boy. The Bay County medical examiner said the assault did not cause Anderson's death, but on March 10, 2006 his body was exhumed for a second autopsy, which found he had been suffocated. [See: *PLN*, July 2006, p.9].

Hunter Hurst, a senior research assistant at the National Center for Juvenile Justice, stated, "I think boot camps are misguided." Hurst maintains that statistical data does not support the belief that boot camps are more effective than other types of programs. "There are other experiences – like wilderness camps, for example – that

could be more constructive."

The Pinellas County boot camp for juvenile offenders was closed at the end of June 2006, along with a similar boot camp in Manatee County. On July 1, 2006, largely due to Anderson's death, a new state law went into effect that replaced the state's juvenile boot camps with residential "Training and Respect" programs that prohibit physical discipline and focus on education, job training and counseling.

Such programs will likely be less fatal, too. ■

Sources: *The St. Petersburg Times*, *AP*

Ten Months Later: 66 Maximum Security Prisoners Still Improperly Housed In CDCR Reception Centers

Following up on the August 2005 statewide directive to tighten up on procedures for properly segregating known dangerous new commitments at the reception center prisons, the California Inspector General (IG) conducted an audit on October 14, 2005 of CDCR's Distributed Data Processing System to determine housing and custody status of all prisoners at the six reception centers: San Quentin State Prison, Deuel Vocational Institution, Wasco State Prison, North Kern State Prison, California Correctional Institution and R.J. Donovan Correctional Facility. The report was released in March, 2006.

The IG found that 66 maximum custody prisoners were improperly placed in the general population at five of the centers, i.e., the very type of "administrative lapse" that caused the death of prisoner Gaurd Gonzalez only ten months earlier. The misplacements were not merely procedural in nature. Four such prisoners had already been involved in violent attacks since entering reception; two had attacked guards and one had attempted to murder another prisoner with a shank.

The IG noted that in 2004, CDCR had processed 125,422 male prisoners in the six reception centers. While 66 errors in one snapshot might not seem like much, it takes just one to permit a preventable assaultive incident. The IG noted that at the one prison (R.J. Donovan) where

no errors occurred, the prison had taken extra precautionary procedures over those recommended in the August 2005 CDCR directive. This inspired the IG to recommend added procedures to be implemented statewide to stem the problem.

Noting that previously segregated violent prisoners when returned to prison were not properly "coded" as to their prior status, the IG suggested that a code designation be added to every such prisoner upon his prior departure (similarly to that already done for those needing single cell status), so that the Distributed Data System would flag this immediately upon his subsequent re-arrival. This should be coupled with a lockout feature to prevent even inadvertent placement of such a prisoner in the general population until his file had been processed in "committee." The IG further recommended incorporating these recommendations into CDCR's regulations, so that compliance would not vary between locales. This procedure would also prevent the opposite error -- improper housing of new arrivals in expensive administrative segregation cells (\$1,000/mo. added cost) when their custody had in fact been downgraded before they paroled earlier. ■

Source: IG report, Special Review: Improper Housing of Maximum Custody Inmates at California State Prison Reception Centers, March 2006.

Texas Parole System “Sick From Top to Bottom”

by Gary Hunter

Parole in Texas has never been very reputable. During the 1920's and 30's Miriam “Ma” Ferguson, Texas' first female governor, and her husband “Pa” Ferguson, who preceded his wife in office, enriched themselves with bribes of land and cash in exchange for parole. “Ma” Ferguson paroled or pardoned about 100 prisoners per month. “Pa” Ferguson, who set the standard, is the only Texas governor to ever be impeached.

Legislative changes were made but by the mid 1940's corruption came in a different guise. “Professional parole seekers” would build personal relationships with board members to obtain their clients early release. No sentence was too long, no crime too heinous for those who could afford the services of the “seekers.”

In 1947, the legislature enacted a disclosure law to address this concern. The law required anyone appearing before the board to file an affidavit affirming or denying having been paid for their assistance. However, the law was not put into effect until 1953.

By 1989 parole seekers had come to be called parole consultants and paying for parole had again become common. Consultants often charged large fees for little work. Successful representation was based on the buddy system as opposed to the merit system.

Many consultants were former board members. So grave was the concern of abuse that in 1989 former parole employees were prohibited, by law, from acting as consultants for two years after leaving the board. When that had no effect the limit

was lengthened to 10 years in 1993.

Corruption came to a head again in 1994 when former parole board chairman James Granberry was convicted for federal perjury. Granberry lied about the number of prisoners he had represented from the time he left the board in 1991.

Records disclosed that parole consultants had manipulated the early release of convicted murderer Kenneth McDuff. Granberry, who was on the board at the time, voted for his parole. McDuff is believed to have killed at least nine more women after his release.

Desperate for a solution the legislature eventually enacted a law that only allowed attorneys to act as parole consultants. It hasn't helped. If anything attorneys showed more adeptness at getting around the law.

In 2005, 535 attorneys filed the required disclosure forms. Records reflect that they earned over \$3.6 million for a total of 3,700 cases. Over 80 of those attorneys failed to list client names or fees paid.

“It's a mess,” said veteran parole attorney William “Bill” Habern. “It's just another example of how the parole system in Texas is sick beyond the telling of it from top to bottom.”

Texas currently houses well over 150,000 state prisoners. In 2005, 19 parole employees reviewed over 70,000 potential parolees. Many files received less than 60 seconds of consideration. Of the 70,000 prisoners considered for parole less than 20,000 were actually released.

Prisoners and their families are aware that to receive serious consideration they must hire a lawyer to represent them.

“Families shop around for someone who can promise, ‘We can handle this. We have a great success rate,’” said attorney Paul Leech. “Most have been on the parole board or say they have influence with them.”

Failure to file the appropriate forms annually is a misdemeanor but it is seldom enforced. Even many state-hired attorneys violate disclosure laws. The parole board hired 234 attorneys in 2005, at a cost of \$733,600, to work on parole revocation cases. Few filed the annual report.

“If the original intent of this law was to keep parole from being sold ... it serves no useful purpose now,” points out Austin parole attorney Gary Cohen. “No place in state law are attorneys required to disclose specific fees like this, and even if you know what someone charges, you still can't make any judgment about whether qualified or reasonable services were provided.”

Still, Parole Division Director Bryan Collier suggests that a stricter enforcement of disclosure laws may be in order.

“If we're supposed to be doing it, we should be doing it right,” he said.

Former board members who are found in violation can be charged with a Class A misdemeanor which carries up to a year in jail and a \$4,000 fine. Attorneys in violation can be fined up to \$500. ■

Source: *Austin American Statesman*

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Federal Judge Suspends Some Georgia Sex Offender Residency Restrictions

by Matthew T. Clarke

On June 29, 2006, a federal judge in Georgia granted class-action status and a temporary restraining order (TRO) suspending enforcement of some provisions of Georgia's sex offender residency law (SORL), Ga.Code Ann. § 42-15.

The SORL was passed in 2006 and included provisions prohibiting registered sex offenders (RSO) from living, working, or loitering within 1,000 feet of any area where minors congregate. This includes any public or private school bus stop. The effect of the law is to banish most sex offenders from their housing while prohibiting RSOs from living in, the vast majority of Georgia residences.

The law affects all Georgia RSOs. This is seen by many as draconian because some RSO are low-risk, non-violent offenders. For instance, Wendy Whitaker, 26, the lead plaintiff in a lawsuit challenging the school bus stop provision, was convicted of having consensual sex with her 15-year-old boyfriend when she was 17. She was sentenced to 5 years of probation, which she completed without incident. She also had no further charges following her probation. Despite her exemplary record, Whitaker was required to move from the 106-year-old bungalow she and her husband recently acquired in the tiny north Georgia village of Harlem when Georgia passed its first SORL. The reason was that her house was within 1,000 feet of a child care center.

To comply with the SORL, Whitaker and her husband moved in with his brother in a cramped mobile home. Then Georgia amended the law to include school bus stops. Now Whitaker has been told she will have to move from the mobile home as well. She fears the SORL will force her to live separately from her husband. She also complains that the SORLs are additional

punishment added after the fact to the sentence for the crime she committed.

"I feel punished over and over again for something I did as a teenager," said Whitaker.

Some attorneys agree with Whitaker that the SORL's school bus stop provision violates the ex post facto law prohibition in the U.S. Constitution.

"It is a fundamental concept of justice: You don't add punishment to people after the fact," said Lisa Kung, director of the Southern Center for Human Rights, a nonprofit Atlanta-based law center that filed the lawsuit along with the American Civil Liberties Union of Georgia. "Here we have people who had five years' probation that's punishment. And suddenly wow 10 years later, they're banished from Georgia."

And banishment it is, affecting almost all of the RSOs in Georgia. For instance, all 490 RSOs in suburban Atlanta DeKalb County would have to move. Ironically, none of the 490 are dangerous sexual predators, according to DeKalb County Sheriff Thomas F. Brown.

"The fortunate thing for me is that there are no dangerous predators in DeKalb County, not one," said Brown who explained that most of the RSOs in DeKalb County were men who as teenagers had sex with 14- or 15-year-olds.

That's a good thing too because, as Brown notes, he doesn't have the resources to make sure that none of the 690 live within 1,000 feet of a school bus stop. Brown, who calls the law "almost unenforceable," says that his office will issue warrants on anyone who doesn't comply with the statute should it take effect, but won't search for anyone who doesn't pose a threat to public safety.

Many see the law as an overreaction to a non-existent problem as only 14 of Georgia's approximately 11,000 RSOs are classified as dangerous predators.

Indeed, one of the criticisms of the residency statute is that it may cause RSOs to drop out of sight rather than face draconian residency restrictions. That appears to be what has happened in Iowa where residency restrictions that prevent RSOs from living within 2,000 feet of schools and parks were recently upheld

by the Eighth Circuit court of appeals. *Doe v. Miller*, 405 F.3d 700 (8th Cir.), cert. denied, 326 S.Ct. 757 (2005). Sheriff Donald Zeller of Linn County, Iowa, notes that his office used to know where 90% of the county's sex offenders lived. Since passage of the residency restrictions, this has dropped to less than 50%.

"The law is supposed to create a completely safe environment," said Zeller. "It isn't working."

This will likely also happen in Georgia if the school bus stop provision stands.

"The level of desperation is amazing," said Kung. "People are trying very hard, but they literally have no place to go. Many people will just disappear off the grid."

So why do legislators vote for statutes that don't work and may even exacerbate the problem they were intended to fix? Savannah Democrat Regina Themes, the only legislator to vote against the Georgia bill, says the motivation is fear. Not fear of the sex offenders, fear of the political consequences of not voting for any bill that gives sex offenders a hard time.

"Nobody, Republican or Democrat, wanted to be seen as voting for child molestation," said Thomas. So, for appearances sake, they voted for a bill that likely makes the streets less safe for children while likely violating RSOs's constitutional rights. Score one for political cynicism.

Fortunately, on June 27, 2006, Atlanta U.S. District Judge Clarence Cooper had the courage to stand up to the potential political fallout. He issued a TRO enjoining enforcement of the school bus stop provision in the SORL while noting that it was probably unconstitutional and had the perverse effect of putting the public in greater danger by making it harder to monitor the RSOs. The state has announced an immediate appeal to the Eleventh Circuit. See: *Whitaker v. Perdue*, U.S.D.C.-N.D.GA-Atlanta Div., Civil Action No. 4:06-CV-0140-CC. ■

Additional sources: Lisa Kung; Southern Center for Human Rights Statement (6-26-06); *Rome News-Tribune*; *Associated Press*; *Los Angeles Times*; *Atlanta Journal-Constitution*.

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See Page 45 for more information

Federal Court Orders California DOC to Pay \$58 Million In Overdue Medical Bills

by John E. Dannenberg

On March 30, 2006, the U.S. District Court, N.D. Cal., ordered the California Department of Corrections and Rehabilitation (CDCR) to pay its backlog of overdue medical subcontractors' bills within 60 days. The bills, some as old as four years, and totaling \$58 million, had been submitted by contract medical providers at all of the 33 CDCR prisons, but not paid purely due to bureaucratic gridlock. As a result of non-payment, some providers were refusing to provide needed services, putting constitutionally adequate medical health care at risk.

Upon recommendation of the court's recently appointed CDCR health care receiver (see: *PLN*, Mar. 2006, p.1, Federal Court Seizes California Prisons' Medical Care; Appoints Receiver With Unprecedented Powers), the court responded to the receiver's emergency request to break the obvious logjam that was impeding prisoner medical care. The court called this "yet another chilling example of the inability of the CDCR to competently perform the basic functions necessary to deliver constitutionally adequate medical health care," adding, "the abdication not only threatens the health and lives of inmates but also has significant fiscal implications for the State."

The court referred to the March 27, 2006 report of its appointed Correctional Expert John Hagar, which noted CDCR's failure to competitively bid work and its use of flawed negotiating practices, acceptance of excessive rates of compensation and failure to follow existing CDCR contracting policies. The court was further chagrined when Hagar reported that although CDCR agreed to "fix" the discrepancies, all they really did was agree to more bureaucratic largesse such as "plan to make a recovery plan." Bluntly stated, the court described this as a "stunning example of the State's bureaucratic inaction" ("trained incapacity") and said the responsible state contracting agencies just "stuck their collective heads in the sand."

Even at CDCR's California Medical Facility (hospital prison), there were dozens of contracts with doctors and

other entities including cardiology, radiology, eye prostheses and emergency surgery that remained unpaid. Contractors were beginning to simply refuse more medical services, denying critical medical care even for prisoners urgently medically transferred to CDCR's own hospital.

The court ordered a three-point recovery plan. First, all overdue bills were to be paid within 60 days of the court's order, with all claimants notified of their coming payment within 30 days. In addition, all new invoices must be paid within 60 days, until a new contracting procedure is in place. The order applies as well to frustrated vendors who had sought legal and financial relief through the Victims and Government Claims Board [formerly, Board of Control]. Second, CDCR was ordered to establish and fund within 30 days at least one full time contract analyst at each of its 34 prisons where one does not currently exist. CDCR must report to the Receiver the progress on its hiring program, and train all such new analysts within 15 days. Third, the court ordered CDCR to essentially reinvent its contracting process, streamlining it considerably. The order listed six specific administrative changes to State policy and procedure to this end, which are due to be implemented within 180 days.

Until then, the court excused CDCR from following state laws that impede the court's schedule. The order closed ominously by stating that any inability to successfully implement the streamlined procedures may not be construed

as an excuse for failing to provide constitutionally adequate medical health care services to all CDCR prisoners in the interim, leaving the Receiver expressly empowered "to order all appropriate remedies." See: *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), Case No. C01-1351TEH. ■

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BOP Must Let Prisoners Control Their Outside Assets; Pays \$10,500 To Settle Grievances

by John E. Dannenberg

In a convoluted pro per suit, two federal Bureau of Prisons (BOP) prisoners, who had been retaliated against after they grieved the BOP's having infringed them for controlling their legitimately-acquired outside assets from inside the walls ["running a business"], won a damage settlement totaling \$10,500 and an agreement that they will be permitted in future decisions to make arrangements to have others care for their assets.

BOP prisoners Keith Maydak and Paul Lee sued the U.S. Attorney, U.S. Secret Service, Grand Jury foreperson and BOP officials regarding what amounted to aggravated harassment in an investigation into their in-prison commodities trading activities. They complained both of violation of their rights to control their assets from within prison as well as Security Housing Unit (SHU) disciplinary mistreatment in retaliation for grieving their complaints.

In a 74-page Magistrate's Findings and Recommendations, the United States District Court (N.D. New York) dealt with 23 causes of action in 336 numbered paragraphs in the amended complaint. The bulk of the legal scrum was over procedural issues regarding motions to dismiss, to file a supplemental complaint, to take judicial notice, and motions/cross-motions for summary judgment.

The BOP's angst was that Maydak was intercepted by BOP investigators on the telephone trading commodities, while using another prisoner's telephone account to do so. In his subsequent punishment for the resulting disciplinary infraction, Maydak complained of loss of property, being housed in filthy conditions, being given spoiled food, having dysfunctional cell plumbing and being denied recreation and adequate law library access. Co-plaintiff Lee, who had sought services of a commodity broker through the mail, was similarly infringed for running a business and misuse of mail in violation of federal prison rules.

The Secret Service was called in to investigate Maydak and Lee, and became defendants in the ensuing suit for violation of plaintiffs' rights to financial privacy, protected under 12 U.S.C. §§ 3401-22. However, these counts were dismissed

because the court ruled that "commodities brokerage accounts" did not qualify as "financial institutions," within the literal meaning of the protective statute.

Plaintiffs were more successful in going after Warden Wiley regarding their complaints of unconstitutional conditions of SHU confinement. The court found genuine issues of fact and denied Wiley qualified immunity. Plaintiffs' Tort Claims Act for damages was not dismissed on summary judgment. Significantly, the court denied plaintiffs' motion for summary judgment, which had alleged that preclusion from commodities trading violated their First Amendment rights. But Lee, whose \$22,000 in personal assets was seized by the BOP, was permitted to continue to seek recovery on Fourteenth Amendment claims of unlawful seizure of property without due process of law. The court concluded by permitting an

amended complaint consistent with its findings.

Subsequently, the parties entered into a settlement agreement which paid Maydak \$9,500 and Lee \$1,000 to dispose of all claims in the action, past and future. The BOP agreed to "make every reasonable effort to consistently and correctly apply to the Plaintiffs the agencies' regulations and program statements as they relate to an inmate controlling and managing his legally and legitimately acquired assets while incarcerated. Specifically, the Plaintiffs will be permitted, on an occasion where a decision must be made which will substantially affect the inmate's assets, to make arrangements to handle the matter." It was not reported if Lee got his seized money back. See: *Maydak v. Christine*, U.S. District Court (N.D. New York), Case No. 9:98-CV-1186 (DNH/DEP). ■

NY Appellate Court Reverses Denial of Parole

by John E. Dannenberg

The Appellate Division (1st Dept.) of the New York Supreme Court granted a non-life prisoner's article 78 petition challenging the Parole Board's denial of his parole that had been based upon the nature and seriousness of the offense, alleged limited insight into his criminality, and alleged lack of remorse. The appeals court remanded to the Board for a new and proper hearing within 60 days.

Now-disbarred attorney Jay Wallman, 64, was convicted of looting \$4.7 million from his clients' accounts and sentenced in August 2000 to three concurrent terms of 3 1/3 to 10 years for grand larceny. Based upon Correction Law § 805, he was granted an "earned eligibility certificate" and a Merit Time certificate. The latter permitted an early release consideration at 5/6 of his minimum term of imprisonment; however, the Merit Board denied his application.

In June 2003 he became eligible for parole consideration. In spite of numerous support letters, the Parole

Board denied him parole for two years. The Board determined that "there is a reasonable probability that you would not live and remain at liberty without violating the law and your release at this time is incompatible with the welfare and safety of the community." The Board based its decision on the fact that Wallman's crime involved "misappropriating \$4.7 million in client funds, ... injur[ing] people seeking legal redress and compensation for their injuries ... [and] involving violations of the victims' trust." They further cited his "limited insight" into his crimes. After exhausting administrative appeals Wallman petitioned the Superior Court.

His petition alleged the requisite showing that the Board's decision was "irrational bordering on impropriety." The Supreme Court denied and dismissed the petition, agreeing with the Board that Wallman had only paid "lip service" to claims of remorse and had attempted to downplay the seriousness of his crimes by noting that most of

the purloined money had been repaid by the Lawyers Fund. Wallman appealed.

A unanimous appellate panel found that the Board's decision was indeed "irrational bordering on impropriety" as to two issues, and found insufficient evidence in the record to support the third. Specifically, the panel first found that § 805 imports a rebuttable presumption for parole upon the granting of an eligibility certificate, although it "does not preclude the Board from denying parole, nor does it eliminate the Board's discretion in making the release decision." The panel further interpreted § 805's language that any Board action "shall be deemed a judicial function ... not reviewable if done in accordance with law" to mean that intervention is not warranted unless there has been "a showing of irrationality bordering on impropriety."

Applying this high burden, the panel nonetheless found that the Board's "exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized re-sentencing of the defendant," noting that precedent required "some significant aggravating or egregious circumstances surrounding the commission of the crime" to deny parole exclusively for the severity of the offense.

The panel further found the Board's discussion of Wallman's lack of insight to be wholly perfunctory in light of his lifelong law-abiding and good prison records. It found this factor failed the test of the "reasonable probability" standard. As to the alleged lack of remorse, the panel found "no supportive facts." Indeed, it found evidence in the record of just the opposite.

Thus, although the panel recognized that \$2.7 million of the purloined \$4.7 million was used to pay Wallman's law firm's operating expenses and \$900,000 went into his own pocket, the litmus test for parole could not simply be that he "did the crime." Parole is to be based on public safety and § 805 presumes suitability upon being granted eligibility. The appeals panel ordered the Board to conduct a new hearing within 60 days, wherein it must state its determination in "non-conclusory terms" per Executive Law § 259-i[2][a]. See: *In re Wallman v. Travis*, 794 N.Y.S.2d 381 (2005). ■

Indiana Justice Agency Head Fired for Misallocating \$417,000 in Funds

by Michael Rigby

On May 26, 2006, the executive director of Indiana's Criminal Justice Institute was fired for misallocating \$417,000 in grant money earmarked for a program to help the children of prisoners.

Heather Bolejack, 31, allegedly funneled the money to a family friend who intended to use the lucre for personal pursuits such as cars and travel. A written statement detailing Bolejack's firing also suggested she altered documents to cover up her misdeeds.

According to the governor's office, Bolejack had also "directed another federal grant be awarded for \$80,000 to McKenna shortly before she was placed on leave; and that employees inside the agency refused to process the grant."

Bolejack, an attorney, was appointed to the \$86,716-a-year position in April 2005 by the Governor's office. As head of the institute Bolejack oversaw the administration of more than \$60 million in federal grants, including the one in question.

Bolejack was suspended on April 25 pending the outcome of an investigation by the state attorney general's office. That investigation found that Bolejack improperly awarded the \$417,000 grant to McKenna Consulting "outside the review and approval process" and failed to disclose her relationship with Michael McKenna, a childhood friend of her husband. The investigation also found that McKenna never provided any services and planned to spend more than half the money on salaries, office space, cars, and travel.

Bolejack's deputy director, Susanne Katalina Gullans, 28, was also implicated in the scandal. Accused of falsifying travel reimbursement documents and lying to investigators, she was also dismissed on May 12. Gullans tried to resign, but the institute's board of directors chose to fire her instead. The firing was intended to send a

"strong message" to other state employees, said Indiana Attorney General Steve Carter, who is a member of the board.

Criminal charges and a lawsuit may be pending. Carter said his office plans to file a civil suit to recoup \$80,000 of the \$417,000 grant dispersed before the payments were stopped in April. Additionally, Marion County District Attorney Carl Brizzi said a special prosecutor would be appointed to determine if criminal charges were warranted. Brizzi said he expected a federal investigation as well.

Bolejack claims she did nothing wrong and says she has no regrets about how she performed her job. She said ordeal has taught her a lot about trust and loyalty. "I've learned to really watch my back," she said. Ironically, that lesson could prove valuable if she's sentenced to jail. ■

Source: *The Indianapolis Star*

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\$225,000 Settlement for Female Colorado Prisoner Raped By Guard

In August 2005, Penifer Salinas, a female Colorado Department of Correction (CDOC) prisoner at Denver Women's Correctional Facility (DWCF) entered into a proposed \$225,000 settlement with the State of Colorado. The settlement was a result of a Federal civil rights claim alleging a sexual assault against her by former CDOC guard David Christensen. Salinas alleged that Christensen violated her Fourteenth Amendment rights by failing to keep her free from physical abuse, sexual assault, battery, and intentional infliction of emotional distress.

Salinas also named as co-defendants DWCF Warden Joanie Shoemaker, Captain Christopher Phillips and guard Terry Unruh for engaging in retaliation against her and attempting to cover up not only this assault but prior assaults against women prisoners by Christensen.

Salinas' complaint, filed on November 8, 2004, alleged that she was raped and sexually abused by Christensen in April of 2002, although she didn't report the incident until August of 2002, fearing retaliation by guards. The assault caused physical and mental injuries which were never treated. After reporting the rape, Salinas claimed that guards retaliated against her by being repeatedly strip searched, having all mail (including legal mail) opened and read by guards, termination of rape advocate visits, and having her mother's letters returned.

Upon reporting the retaliation, guard Terry Unruh called Salinas a "liar" and stated "none of her officers" would engage in such behavior and that she had "made her own bed." Captain Phillips was alleged to have covered up Christensen's prior inappropriate sexual behavior with other female prisoners and failed to discipline him because he was a personal friend.

Christensen was subsequently convicted of sexual assault upon Salinas and was sentenced to an indeterminate term of incarceration between five years and the remainder of his natural life. Such sentence in Colorado also carries a mandatory term of parole with a minimum of ten years up to the remainder of natural life.

The Release and Settlement Agreement was publicly disclosed pursuant to the Colorado Open Records Act (CORA), stating that Salinas' civil rights claim was

dismissed with prejudice by stipulation of the parties. Salinas agreed not to bring further suit in this matter. The settlement also stated that neither party was admitting to "any wrongful or improper actions, but rather reflects the parties' desire to

resolve this matter amicably without additional expense or litigation." Per the settlement agreement, fees and costs were borne by the parties. See: *Salinas v. Christensen*, USDC D CO, Case No. 04-MK-209(OES). ■

New California SVP Facility Struggles to Attract Staff

The new \$338 million Coalinga State Hospital (CSH), which opened in October 2005, houses only the best-behaved 170 Of Atascadero State Hospital's (ASH) 550 sexually violent predators (SVP), as of March 2006. Although the physical plant is in place, the staff is not. Of the 32 housing units at CSH, 30 do not have the legally required complement of licensed nurses and psychiatric technicians. Nor is the problem temporary. In 2005, the California Legislature reluctantly suspended its existing laws for six years to permit the supervision of mental patients with fewer skilled staff.

SVP Anthony Iannalfo, recently transferred from ASH, likes the new facility because of its amenities, which include private music rooms with keyboards and drums, woodworking and printing studios, a "gleaming" gym, computer classes, and

a Native American Sweat Lodge. Still, he refuses treatment, because he is banking instead on eventual court-ordered release. Paradoxically, it was the lack of staff at CSH that made Iannalfo a prime candidate for transfer from ASH.

The virtually empty CSH was initially staffed by only a skeleton crew of two hospital police officers (and no licensed caregivers) per 50 man housing unit. With its remote location in California's central valley, and offering relatively low wages, CSH portends uncertain prospects for fulfilling its SVP mental hospital mission. Indeed, the standoff appears to Pacific Grove, California SVP defense attorney Jean Matulis to confirm his observation that the not-so-subtle real purpose of California's SVP program is de facto incarceration -- not treatment. ■

Source: *Los Angeles Times*.

Missouri Prisoner Calls Get Cheaper; But Lowest Bid Rejected

The competitive bid process is normally used by state agencies to compel companies to compete with lower bids while providing the same service. Usually, the lowest bid prevails. In the case of providing collect calls for Missouri prisons, the contract was awarded to a company that provided a bid that was higher than three other competitors.

Selecting the higher bidder will cost family and friends of Missouri prisoners about \$3.4 million a year more than if the lowest bid had been accepted. "Why allow this money to go into the pockets of providers?" asks Sen. Maida Coleman.

Prison Officials say the new provider will still result in a savings of about \$2 million a year over the current service. The new contract was awarded to Public Communications Services (PCS).

PCS' bid charges 10 cents a minute for long distance calls, compared to 7 cents a minute under the cheapest bid. A local call under PCS will be \$4.50 plus a \$1 surcharge for a 35 minute call. In contrast, the lowest bidder, Consolidated Communications Public Services, proposed 95 cents for local calls regardless of the duration.

Prison officials justify high prisoner phone calls on the need for equipment to record and monitor those calls. Equipment the phone companies are willing to provide for free in exchange for the contracts. Often, however, prison systems receive a kickback of profits from prisoner calls. In the long run, society loses by degraded family relationships that make recidivism more likely. ■

Source: *The St. Louis Dispatch*

Hate-Filled Religious Fanatics Find a Home in the Kansas Prison Industry

by Alex Friedmann

Hate is a strong word. Many prison employees and DOC officials are contemptuous of or indifferent to the prisoners in their custody. Detention facility staff are sometimes negligent, retaliatory and even abusive, but they seldom display a fanatical hatred toward prisoners. There is, however, one group whose deep burning hatred and extremism are apparently well suited for employment in the criminal justice field.

For those who aren't familiar with Rev. Fred W. Phelps, Sr., the 77-year-old reverend leads the fire-and-brimstone Westboro Baptist Church in Topeka, Kansas. Phelps and his religious clan – consisting of approximately 80 followers, including numerous members of the Phelps extended family – have gained national attention through their high-profile protests at funerals of soldiers killed in Iraq.

The Westboro Baptist Church believes that the United States is being punished due to a tolerance of homosexuality; they have various other beliefs, all of which center around such slogans as “God hates fags” and “God hates America.” The Phelps clan has also demonstrated at funeral services for gay murder victims and for the 12 West Virginia mine workers killed in an accident earlier this year, and planned to protest at the funerals of five Amish children murdered in Pennsylvania in October, 2006.

As one writer put it, the church members “also rejoice in the 9/11 attacks, Hurricane Katrina, the tsunami that devastated Asia two years ago, and AIDS. They believe God hates Santa, Jews, Catholics, Muslims, soldiers, me, and if I had to guess, they probably believe that God hates you.” Apparently Phelps and his followers believe they are the only people whom God doesn't hate.

The Westboro Baptist Church protests include inflammatory picket signs, name-calling, desecration of the American flag, and an extra helping of Phelps' hate-filled philosophy. Laws have been enacted across the nation to limit such funeral demonstrations, including federal legislation signed into law in May 2006, but several such measures have been struck down by courts

on free speech grounds.

Interestingly, many of the Phelps are attorneys. Patriarch Fred Phelps, Sr., who had a lengthy law career, has been disbarred; eleven of his 13 children are lawyers. More interestingly, six of the Phelps family are or were previously employed by various jails and the Kansas Department of Corrections.

Margie Phelps, an attorney, currently works for the Kansas Dept. of Correction as the agency's Director of Re-entry Planning; she attends the group's funeral protests outside of work hours. Her brother, Fred Phelps, Jr., a former parole officer, is a staff attorney with the Kansas DOC. Both Margie and Fred Jr. were previously temporarily suspended from practicing law following disciplinary action. Timothy Phelps is presently employed as a spokesman for the Shawnee County Dept. of Corrections. Lee Ann Phelps and Elizabeth Phelps both formerly held positions with the Shawnee County Sheriff's Department, while Abigail Phelps, another active participant in the group's funeral protests, works in the staff development office for Kansas' Juvenile Justice Authority.

Despite their hate-filled, anti-American ranting outside the workplace, the Phelps' personal beliefs apparently do not affect their on-the-job performance. Jack Rickerson, director of the state's human resources department, stated that Margie Phelps' activities outside of work “violated no state policy.” Kansas DOC Secretary Roger Werholtz was quoted as saying, “I don't agree with her views,” but said Margie Phelps was “a good employee.” Kansas state Senator Jean Schodorf called the situation an embarrassment, stating that members of the Phelps clan employed in corrections “...kind of flaunt that they work for the state and can't be terminated” due to civil service protections.

Under the be-

lief that practicing law and acting as an officer of the court are inherently inconsistent with the hate-mongering practiced by members of the Phelps clan, in February 2006, Prison Legal News associate editor Alex Friedmann filed an ethics complaint against Shirley L. Phelps-Roper. Phelps-Roper, an attorney with the family's law firm, Phelps Chartered, actively participates in the church's funeral protests. The state Office of the Disciplinary Administrator, however, refused to file the complaint, stating First Amendment concerns would “preclude a successful investigation and prosecution of the Phelps....” A request for reconsideration of the Disciplinary Administrator's decision was refused.

Apparently fanatical hate, inflammatory name-calling and intolerance are acceptable practices for attorneys – and prison and jail employees – in the state of Kansas. ■

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Florida Judge's Brother Receives Medical Furlough, Recuperates at Home

The Florida Department of Corrections (FDOC) has sent one of its prison doctors to review if a prisoner should return to prison to heal from heart surgery. The prisoner's connections have some wondering if Kenneth Ackerman is receiving preferential treatment.

Ackerman is in the ninth year of a 15-year sentence for DUI manslaughter for running over 24-year-old Chad Cowen. The connection for Ackerman is his brother, David Ackerman, an Escambia County Judge. FDOC released Kenneth from Union Correctional Institution on March 9, 2006,

he proceeded to a Texas hospital for surgery, where he remained for six weeks.

Ken now is recuperating at his brother's residence on house arrest. Since his family paid for the medical care, Cowen's mother, Mary Cowen, does not mind that Ken received top-grade medical care. She does, however, question his current status.

"I can't see how he would get better treatment in a home outside of a medical facility than he would in a fully accredited prison hospital with nurses on every floor," said Mary Cowen.

Ken's surgery replaced his descending

aorta, had his spleen removed, his lung was deflated, and arteries feeding other essential organs had to be reattached. "The danger of infection to Ken Ackerman is a most serious, life-threatening problem," Judge Ackerman wrote in a statement. "Hospitals and prisons are the two institutions in our society where the greatest danger of infection lies."

While Ken recuperates from medical care denied indigent or less connected prisoners, he continues to receive time off his sentence. The FDOC's doctor assessment will determine when Ken returns to prison. ■

Bacterial Contamination In Prison-Made Milk Fells 1,344 Prisoners and 14 Staff in 11 California Prisons

by John E. Dannenberg

Between May 16 and May 23, 2006, a milk-borne illness caused by the bacterium campylobacter caused vomiting, diarrhea, fever, headaches and dehydration in 1,344 prisoners and 14 staff in eleven California state prisons.

The mass outbreak began with 379 cases -- five requiring hospitalization -- surfacing at the Deuel Vocational Institute (DVI) where the milk was made as part of the 6,000 gal./day Prison Industries program. Within days, it had spread to 200 Mule Creek State Prison prisoners, 400 at Valley State Prison for Women, 11 at Wasco State Prison and 10 at Folsom State Prison. Visiting was suspended, as were transfers. By May 28, other confirmed prisoner cases included 32 at the California Medical Facility (prison hospital); 4 at California Rehabilitation Center; 75 at California State Prison Sacramento; 94 at Central California Women's Facility; 130 at Sierra Conservation Center; and 9 at Avenal State Prison. Not explained was how prison staff became ill from milk made by and intended for prisoners.

Transmitted from animals through food, unpasteurized milk or contaminated water, campylobacter contamination is the byproduct of improper food handling and poor personal hygiene. Originally, officials believed the infection was from the norovirus ("cruise ship virus"), but later testing exposed the bacterial culprit. Prison spokeswoman Terry Thornton said, "We still don't know where it originated from." Yet prisoners who have been at DVI over the years recall previous outbreaks transmitted through the

prison's dairy. The California Department of Corrections and Rehabilitation ordered destruction of 25,000 1/2 pint cartons of milk produced between May 8 and May 18.

But prisoners shouldn't just "cry over spoiled milk." The spread of serious diseases is legion in America's prisons and jails. PLN has reported frequently on the high prison Hepatitis C (HCV) infection rate (often 40%), the high prevalence of AIDS (HIV), and on prisons being a major vector for the spread of Tuberculosis (TB). Especially fearsome in lockups is methicillin resistant staphylococcus aureus (MRSA), a highly

contagious and difficult to treat bacterial skin infection that can become systemic and fatal. The worst part about these diseases is that when untreated during incarceration (typical), they are carried unabated back into the communities when prisoners parole. Some prisoners are never told that their tests for hepatitis or AIDS came back positive, and they unwittingly go on to infect loved ones upon release. ■

Sources: *recordnet.com*, *San Diego Union-Tribune*, *Los Angeles Times*, *thereporter.com*.

New York Prisoner Wins Brutality Suit, Loses Award to Son-of-Sam Law

A New York prisoner won \$15,000 in a suit over having been beaten by prison guards only to have a jury return a \$42 million adverse verdict under New York's Son-of-Sam law.

Abdul Majid, 57, a New York state prisoner was convicted of killing New York City police officer John Scarangella in 1981. Majid was formerly known as Anthony LaBorde and was convicted along with another member of the Black Panthers of shooting Scarangella and his partner, Richard Rainey, during a traffic stop in Queens.

Prison guards "roughed up" Majid, who sued and won an award of \$15,000. This prompted Rainey, 57, and Scarangella's family to sue Majid under New

York's Son-of-Sam law. On May 29, 2006, after eight hours of deliberation, a jury in Poughkeepsie awarded Rainey \$25 million and awarded Scarangella's widow, Vivian \$17 million. Although the plaintiffs are unlikely to see much of the award, they expressed their pleasure at depriving Majid of his award.

"He doesn't deserve anything," said Scarangella's son, Tom, 33. "He deserves to spend his life in jail--and that's it."

The most disturbing aspect of this development is that it takes away from prisoners any monetary incentive to pursue legal action against guards who brutalize them. ■

Source: *New York Daily News*.

PLRA Administrative Exhaustion Requirement Distinguished in Two California Excessive-Force Suits

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals consolidated two interlocutory appeals from U.S. District Courts in California that distinguished under what circumstances administrative exhaustion is deemed satisfied if the grievance process has been truncated below the highest available level.

California's four-level grievance process (Form 602) begins with the informal response level (for most issues) and ends with the Director's level review in Sacramento. A prisoner ultimately seeking court relief for violation of his civil rights under 42 U.S.C. § 1983 must first "exhaust all administrative remedies as are available." (42 U.S.C. § 1997e(a)). The question presented here is if and when such remedies may be deemed exhausted at a level less than the Director's level.

Of course a grievance appeal might be fully granted at an intermediate level, but afterwards the respondent may welch on delivering the granted remedy. In such a case, the prevailing prisoner may bring suit to compel compliance without going higher in the grievance appeal process. But if an appeal is "partially granted," and no further remedy is available through the administrative process, must the prisoner continue to exhaust futile procedures? In the instant decision the two underlying cases provide analysis and guidance. Both cases involve prisoners complaining of excessive use of force by guards, and seek punishment of the guards as well as monetary relief. In both cases the prisoners stopped below the Director's level of review and proceeded to federal court.

In the case of prisoner Peter Brown, Brown was told that his grievance was being treated as a complaint-on-staff (California Penal Code § 832.5), and that whenever the staff investigation was completed (one year, by regulation), the outcome would necessarily be confidential. Brown was further told at his last response level that monetary compensation was beyond the scope of the appeals process. Importantly, he was not told that he could take his complaint to the Director's level for further review.

Robert Hall, incarcerated at another

prison, sought similar claims as Brown but with the addition of issues related to inadequate medical care and property taken from his cell. The last level of review he sought advised him (correctly) that the complaint-on-staff issue must be separated out, and each of the other issues appealed independently. Importantly, he was advised that if he was not satisfied with that disposition he could seek Director's level review. He didn't, and instead sued in federal court.

The Ninth Circuit relied upon *Booth v. Churner*, 532 U.S. 731 (2001) and *Porter v. Nussle* 534 U.S. 516 (2002) to conclude that as long as some action could possibly be taken as to an appeal, exhaustion was not yet complete. Applying these guidelines, a majority of the Ninth Circuit panel concluded that Brown could gain absolutely nothing by further administrative action; i.e., that nothing was "available." However, Hall had separable issues that were susceptible to administrative consideration, and hence he was deemed not fully exhausted. The appeals court therefore permitted Brown's suit to proceed but barred Hall's lawsuit for failure to exhaust.

A thoughtful dissent by Judge Reinhardt opined that prior case law didn't leave any wiggle room: even "futile" appeals must be exhausted because an exasperated prison administration might decide to change its rules in response to litigation pressures. Judge Reinhardt recommended that Brown and Hall be therefore found lacking in exhaustion because both failed to exhaust the Director's level of appeal. See: *Brown v. Valoff*, 422 F.3d 926 (9th Cir. 2005).

This writer supports Judge Reinhardt's implicit advice to always fully exhaust administrative appeals, noting that it forecloses any procedural challenge and thus speeds the eventual results. To the extent that prisoners are loathe to spend the postage to mail their Director level responses to Sacramento, note that if one submits the Director level response internally to the local prison appeals office, they must forward it to Sacramento. (See, e.g., *In re Brodheim*, Solano County, Case No. FCR 219566 (2005). ■)

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Court Invalidates BOP Prisoners' UCC Liens Against Judges and Officials

A Virginia federal district court has entered a permanent injunction against two federal prisoners who filed liens under the Uniform Commercial Code (UCC) against judges and prison officials. The United States government brought this action against Lorenzo Grade Martin and Reginald Anthony Falice, prisoners serving life sentences at the United States Penitentiary in Lee County, Virginia.

On October 8, 2003, Martin and Falice filed financing statements with the Virginia State Corporation Commission (SCC), claiming Falice was a secured party for a debt of \$8 million allegedly owed by Patricia Conner, Clerk of the Fourth Circuit Court of Appeals, and Robert Bruce King, Karen Williams and Clyde Hamilton, judges of the same court who had served on the panels that affirmed Falice and Martin's criminal convictions.

The same day, Falice and Martin filed another UCC statement claiming Falice was the secured party for a \$100 million debt owed by Troy Miller, Jerry Jones and David Haas, all current or former Bureau of Prisons employees. Martin was named as the person to whom acknowledgment of filing should be sent. In response, the U.S. government filed correction statements with the SCC, incurring a cost of \$140 in the process. The government then filed this action.

Martin and Falice moved to dismiss. First, they argued the government lacked standing to sue. Because the defendants had filed the liens based upon the alleged debtors' actions in pursuit of their official government functions, the court held the government had standing.

The district court then turned to the validity of the liens. When confronting such claims, the courts have consistently refused to recognize liens based upon a claimed breach of contract or fraud by federal officials in the performance of their official responsibilities.

Because the evidence showed the purported liens were not filed on the basis of any genuine commercial obligation owed to the defendants, they were held to be false and fraudulent in that they were without any basis in law or fact, entitling the government to judgment as a matter of law. The court further held the government made the requisite showing necessary for the imposition of a perma-

nent injunction.

Additionally, the district court held that Martin and Falice were liable for the \$140 in actual damages that the government had incurred, plus the fees and costs the government had incurred for the guardians *ad litem* appointed them. The government, however, was not entitled

to an award of attorney fees under 28 U.S.C.A. § 2412(b), for it does not qualify as a party under that statute.

Accordingly, the court denied the defendants' motion to dismiss and granted the government's motion for summary judgment. See: *United States v. Martin*, 356 F.Supp.2d 261 (W.D. Va. 2005). ■

San Francisco Jail's Strip Search Policy Ruled Unconstitutional By Federal Court

by John E. Dannenberg

The U.S. District Court (N.D. Cal.) ruled on motions for summary judgment that the City and County of San Francisco's blanket jail policy of strip-searching all pre-arraignment detainees, regardless of offense or adjudication status, violated the Fourth Amendment rights of those prisoners for whom no specific, pre-ordained reason would necessitate such a bodily intrusion. But because the district court grounded its findings on federal constitutional grounds, state law statutory minimum damages were precluded from the suit. The plaintiff class' attorney estimates that 27,000 former prisoners will come under the ambit of the court's ruling; defendants assert the number is closer to 7,000 to 9,000. Either way, millions of dollars of damages may result.

Mary Bull is a frequent ardent protester for liberal social causes, whose aggressive stance has often landed her in jail. Consequently, she has become a plaintiff in numerous lawsuits against California jails where she was arbitrarily strip-searched as a detainee for her non-violent citations or misdemeanor charges. Under representation by Sacramento attorney Mark Merin, Bull has succeeded in class-action lawsuits brought in state court alleging violations of California Penal Code (PC) § 4030, which restricts such searches and mandates a minimum of \$1,000 in damages for each violation. (See: *Bull v. Blanas*, Sacramento Superior Court, Case No. 01A501545 [\$15 million settlement]). While she could yet bring suit in state court under § 4030, she proceeded here in federal court where damages are not specified and must be proved to a trier of fact. Merin has other strip-search cases pending in federal court against San Mateo County (*Gallagher v. County of San*

Mateo, U.S.D.C. N.D. Cal., Case No. C 04-448 SBA) and against Marin County.

San Francisco County Sheriff Michael Hennessey changed the jail's strip-search policy in 2004 to conform to the standards demanded in the lawsuit. The damage claims are for those persons improperly searched between April 2002 and January 2004. Formerly, all new detainees, whether or not arrested for (or with past arrest histories of) narcotics, weapons or violence, or probation violations, were searched under the blanket policy. Others included those arrested outside San Francisco, in transit to another jail, going into the general jail population, or those being placed in "safety cells." The plaintiff class comprises the many arrestees who did not have such prior records or case factors enumerating concerns for dangerousness, but who were arbitrarily strip-searched anyway.

The district court ruled that under the Fourth Amendment's "reasonable-person" standard, maintaining "safety and security" in the jails would not support such indiscriminate strip searches. Rather, individualized suspicion must be ascertained first. Although Sheriff Hennessey was able to demonstrate isolated cases of smuggling of contraband by low-risk arrestees, those rare incidents could not operate so as to swallow the Fourth Amendment. The district court even found that blanket searching of all persons put in "safety cells" was unconstitutional, because the reason for such placement might well be one not foretelling dangerousness (e.g., medical isolation).

Hennessey moved for summary judgment on grounds of qualified immunity because he alleged he was not on notice of such liability per *Saucier v. Katz*, 533 U.S. 194, 206 (2001). The court denied the mo-

tion, finding that existing precedent (*Giles v. Hay*, 361 F.3d 1134 (9th Cir. 2004)) was dispositive, except as to the subset of "safety cell" strip-searches.

Hennessey's final defense, that as Sheriff he was immune from "municipal" liability established under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), was rejected because the policy was an official written policy of the "City and County of San Francisco," and thus fell squarely under *Monell*. Accordingly, the court permitted the case to go to trial to determine damages for violation of the plaintiff class' Fourth Amendment rights. See: *Bull v. City and County of San Francisco*, U.S.D.C. (N.D. Cal.) Case No. C 03-01840 (September 2005).

Note: The district court later issued an Amended Memorandum and Order Re: Motions for Summary Judgment, in which it made various revisions. The plaintiff's motion for partial summary judgment was granted in part and denied in part, and Sheriff Hennessey's motion for summary judgment on qualified immunity grounds was granted in part and denied in part. See: *Bull v. City and County of San Francisco*, U.S.D.C. (N.D. Cal.) Case No. C 03-01840 (Feb. 23, 2006) (2006 WL 449148). ■

Wisconsin Prison Psychiatrist's License Suspended After Prisoner's Death

by Gary Hunter

Yoges Pareek, had his medical license suspended by the Wisconsin Examining Board in October 2005. Pareek is a former psychiatrist at the Waupun Correctional Institution (WCI). He was found guilty of negligence in the death of a prisoner under his care.

In spite of his patient's bizarre behavior, Pareek allowed the man to discontinue his psychotropic medications. Records indicate that Pareek was fully aware of his patient's psychotic episodes. The doctor also failed to notify guards that the prisoner was off his medication and they should be on alert for irrational behavior.

From March to July 1998 the WCI prisoner demonstrated incidents of destructive behavior and self mutilation. At one point he required stitches after he repeatedly beat his head against a wall. On July 29, 1998 the prisoner committed suicide in his cell.

Pareek's defense was that, by law, he could not require the prisoner to take

medication. He maintained that this option was left solely to the patient.

On March 11, 2003 the U.S. District Court for the Eastern District of Wisconsin rejected Pareek's reasoning and held that treatment of a mentally ill prisoner is properly the doctor's duty.

At the time of this report Pareek was employed at the Fond du Lac County Department of Community Programs. Fond du Lac County Executive Allen Buechel said he was not aware of Pareek's legal problems.

The judgment against Pareek included the payment of \$6,000 in court costs, 20 hours of continuing education in institutional psychiatry and suicide prevention. Pareek's license to practice medicine and surgery was suspended for 2 years. ■

Source: *The Reporter*

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Alabama Guards Liable in Killing a Prisoner

The Eleventh Circuit Court of Appeals has reversed an Alabama federal district court's grant of summary judgment to guards in a civil rights suit stemming from the killing of a prisoner by guards during a struggle.

Following a successful escape attempt at Alabama's Mt. Meigs Youth Facility, seventeen-year-old Mario Haggard was transferred to the Montgomery County Detention Facility (MCDF) in August 1999. Upon arrival at MCDF, Haggard was housed in cellblock 4E, which was reserved for escape risks and other high-risk prisoners.

Sometime between 4:15 and 4:45 a.m. on October 11, 1999, guards were called to Haggard's cell, which was flooded with toilet water; urine and feces were on the floor and water was running off the top tier to the first floor. Haggard was naked, pacing his cell, yelling religious phrases, and drinking the water from the toilet and spitting it toward the guards. After Haggard was unresponsive to the guards' attempts to calm him, the water to his cell was shut off.

Haggard vomited several times after continuing to drink the water, and made a futile attempt to hang himself with a string in his cell. Guards told Haggard that if they had to come in the cell they would "kick his ass," and Haggard would be "in for a rude awakening." Guards Silas Orum III, James Thrift, Darryl N. Wood and Jeffrey Sanderson then entered Haggard's cell about 5:45 a.m.

Because Haggard was "greased up," he was hard to hold onto. Finally, Haggard was slammed to the bed, and a guard asked, "Is that all you've got?" Prisoner Joe Falls testified that Haggard continued to struggle with the guards even after he was shackled. Guards had him facedown on the bed and finally Haggard said, "I've had enough." A guard responded, "oh, we don't think you've had enough." As the guards continued to "lay on" Haggard, Falls said he heard a "sound like ... the wind went out" of Haggard.

After twenty minutes of being in Haggard's cell, the guards carried Haggard out with a blanket draped over him. Orum repeatedly said, "damn, damn, damn," while his fellow guards looked panicked. Other prisoners stated Haggard appeared to be lifeless, as he made no movements and his body hung and flopped in an uncontrolled manner. The

guards then walked to a holding cell carrying Haggard, which took 14 minutes. When they called a nurse, Haggard felt cold to the touch.

Paramedics arrived but resuscitation efforts ceased at 7:28 a.m. An autopsy concluded asphyxia was the cause of death. Haggard's estate sued alleging excessive force and deliberate indifference to serious medical needs.

The Eleventh Circuit held that "there is no room for qualified immunity" when guards continually used force in a manner severe enough to render Haggard, at the very least, unconscious *after* he had

surrendered. Additionally, the evidence revealed that Haggard was unconscious the entire time guards carried him. Yet, they "failed for fourteen minutes to check Haggard's condition, call for medical assistance, administer CPR, or do anything else to help." Because of the urgent nature of the medical need in this case, a delay of fourteen minutes was determined to be actionable.

Accordingly, the district court's grant of summary judgment to the guards was reversed and the matter remanded for further proceedings. See: *Bozeman v. Orum*, 422 F.3d 1265 (11th Cir. 2005). ■

California Sheriff's Authority to Fire Rogue Guard is Validated

by Marvin Mentor

The California Court of Appeal held that the San Diego County Civil Service Commission abused its discretion when it overturned the Sheriff's firing of a deputy who lied to cover-up his physical abuse of a prisoner. The Sheriff had complained that the Commission had effectively interfered with his right and duty to manage his department. This case is important because civil service review boards typically excuse guards from egregious misbehavior against prisoners. For example, in the California Department of Corrections and Rehabilitation (CDCR), the State Auditor found that 62% of all guard firings were reversed with full back pay awarded after civil service board reviews. (See, e.g., *PLN*, March, 2005, p.1.)

Sheriff's deputy Timothy Berry signed the "Recruit Honor Code" when he joined up, avowing "I will not lie, cheat or steal. I will not tolerate those who do. I will treat everyone fairly and respectfully.... I will tell the truth and ensure that the full truth is known. I do not lie." However, Berry's oath didn't even survive his probationary period (during which he was subject to termination without cause).

At the George Bailey Detention Center in September, 2002, a prisoner became disorderly and belligerent towards Deputy Alfonso Padilla. Berry aided Padilla in removing the prisoner from the housing area, observing Padilla yell at and forcefully hold the prisoner. Then Padilla dismissed Berry, whereupon Padilla banged the prisoner's head against

the wall, causing serious injuries. When the Sergeant reviewed the prisoner's subsequent grievance, Berry lied at Padilla's request and stated that Padilla had simply taken the prisoner to medical. Berry later came clean, but Sheriff Kolender fired Berry for his initial dishonesty.

Berry appealed his termination to the County Civil Service Commission, stipulating to his dishonesty but asking for leniency. Notwithstanding that the Commission found a "code of silence" existed in the department, and that Berry "ran with" a team of "rogue" deputies who told him to forget everything he learned at the Academy and "go along to get along," the Commission found that termination was "excessive."

The Sheriff petitioned the Superior Court via administrative mandamus (Calif. Code of Civil Procedure § 1094.5), but was denied. On appeal to the Fourth District Court of Appeal, the denial was reversed and the trial court was ordered to vacate its earlier ruling and issue the writ. The appellate court based its ruling on a harmonizing of civil service regulations and regulations authorizing the Sheriff to run his department. The appeals court found that the Commission had abused its discretion in denying the Sheriff his authority to exact employee discipline, where there was no dispute that Berry had violated his oath. "The public is entitled to protection from unprofessional employees whose conduct places people at risk of injury and the government at

risk of incurring liability.... Dishonesty is incompatible with the public trust.” Berry’s acts had led to wanton corporal injury of a prisoner, whose very safety he was charged to protect. He was not “entitled to one [free] lie” before having

to suffer a penalty. Moreover, eventually “coming clean” at a second Sergeant’s inquiry did not cure his contumacious transgressions.

In sum, rogue cops who lie to cover-up their criminal acts under color of authority

and who are fired upon a finding of good cause may no longer assert “leniency” as a defense on appeal. See: *Kolender v. San Diego County Civil Service Commission*, 132 Cal. App. 4th 716, 34 Cal.Rptr.3d 1 (Cal.App. 4 Dist., 2005). ■

Ninth Circuit: Total Exhaustion-Dismissal Rule Not Required Under PLRA

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals held that a prisoner’s 42 U.S.C. § 1983 suit against prison officials should not be summarily dismissed under the Prison Litigation Reform Act (PLRA) 42 U.S.C. § 1997e(a) for containing both exhausted and unexhausted claims, but rather should be dismissed with leave to amend to allow the prisoner an opportunity to excise the unexhausted claims, except where no amendment to the complaint could cure its defects.

Ernesto Lira is a California prisoner who for years was housed in a Security Housing Unit (SHU) after prison officials “validated” him as being affiliated with the Northern Structure gang. Lira denied this, and steadfastly fought his endless SHU lock-up via administrative appeals. After three appeals, and an intervening change in prison regulations on how officials “validate” such gang affiliation, Lira sued under 42 U.S.C. § 1983 claiming, inter alia, denial of due process of law. Upon examining his claims, the U.S. District Court (N.D. Cal.) observed in the administrative appeal history that it was apparent Lira had fully exhausted some, but not all, of his claims. The question was, in light of the PLRA’s requirement to fully exhaust all

claims prior to filing suit, whether the court should outright dismiss the action (meaning closing the case with prejudice) or dismiss the complaint while permitting leave to amend.

The state defendants argued that § 1997e(a) required a dismissal of the whole action upon any defect in exhaustion below. But the appeals court, noting a split on this question in four other circuits, finally agreed with the Second Circuit (*Ortiz v. McBride*, 380 F.3d 649 (2nd Cir. 2004) [see: *PLN*, Sept. 2005, p.33]) that such a “total exhaustion-dismissal” rule was not mandated by § 1997e(a). The court examined other sub-sections of § 1997e to ascertain the meaning of “action” and “complaint,” noting that self-consistency of any such interpretation within the same statute was mandated by rules of statutory construction (citing *Dep’t of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). The court found inescapable the conclusion that the state’s proffered interpretation would render the meaning of sister subsection § 1997e(c) at best redundant, and at worst, meaningless.

A parallel argument drawn from habeas corpus exhaustion requirements in *Rose v.*

Lundy, 455 U.S. 509 (1982) was of no help to the state, because the underlying statute (28 U.S.C. § 2254) had different policy considerations than those underlying the PLRA.

The appeals court then considered how to deal with “mixed” § 1983 complaints containing both exhausted and unexhausted claims. It held that when mixed claims are made, a district court should dismiss the complaint with leave to amend per Fed.R.Civ.Proc 15(a), except in an instance where it appears that “the pleading could not possibly be cured by the allegation of other facts.” Because Lira’s complaint was based upon a “constellation of due process violations,” it did not embrace just a single due process claim. To dismiss his action below was therefore error by the district court, and the Ninth Circuit reversed and remanded. It ordered that if the district court finds that Lira’s due process complaint contains both exhausted and unexhausted claims, it should permit Lira to amend his complaint so that it only refers to his fully exhausted grievances and then adjudicate the surviving due process claims, if viable. See: *Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005). ■

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Seventh Circuit Rejects “Total Exhaustion” Rule for § 1983 Complaints

by Bob Williams

The United States Court of Appeals for the Seventh Circuit vacated the dismissal of a prisoner's amended complaint, finding prior exhaustion putting the state on notice was sufficient to pass muster under the Prison Litigation Reform Act (PLRA).

Illinois state prisoner William Cannon, Jr. was transferred to the Centralia Correctional Center on June 12, 1996. Refusing two anal cavity searches that day, he was twice beaten and twice forcibly searched. The following day, June 13, there was a repeat performance and he was then transferred to the Shawnee Correctional Center for another round of the same. On June 14 Cannon suffered one more forcible anal cavity search and was transferred to Menard Correctional Center. He received disciplinary reports for disobeying orders, insolence and assault. Cannon was convicted of all but the assault, demoted in credit-earning class and transferred to a maximum security unit.

Waiting until the last minute of the six-month grievance filing period then required in Illinois (now 60 days), Cannon mailed a grievance on December 13 but it was returned for insufficient postage and re-mailed on December 14. Although denied as untimely, the grievance board invited Cannon to resubmit with an explanation for his untimeliness. Instead, Cannon wrote the DOC director, ignoring procedure and specific board instructions.

In May 1998 Cannon was beaten by Menard guards and his legal materials confiscated, purportedly over his lawsuit preparations. He then filed a 42 U.S.C. § 1983 complaint in June 1998, but only over the original searches. He waited until March 2001 to amend the complaint to include the 1998 incident which he had grieved in November 1998.

After granting a \$1,000 damage award against one defendant in a default judgment, the federal district court dismissed the suit for failure to exhaust administrative remedies required by the PLRA. See: 42 U.S.C. § 1997e(a).

On appeal, the Seventh Circuit found Cannon's original grievance untimely even with the mailbox rule applied, since the mailbox rule also requires sufficient pre-paid postage. Cannon's December 14 re-mailing was therefore untimely for the

June 12 and 13 incidents. Though timely to the June 14 incident and subsequent disciplinary report challenge, the appellate court still found the grievances untimely because Cannon had failed to follow the grievance board's instructions to resubmit after their denial. While the November 1998 grievance over the May 1998 incident appeared timely, the district court dismissed the claim as unexhausted at the time the original June 1998 complaint was filed.

Siding with the Second Circuit, the Seventh Circuit ruled that a district court may consider exhausted claims even when

dismissing unexhausted claims. This rejects the “total exhaustion” rule mandating only exhausted claims be presented as held by the Sixth, Eighth and Tenth Circuits. The appellate court noted that Cannon's amended complaint was filed after responsive pleadings were filed on the original complaint, and thus leave of the district court was required, which could have been denied on many grounds including undue delay. See: *Cannon v. Washington*, 418 F.3d 714 (7th Cir. 2005).

This case underscores the need for all pro se prisoners to plan ahead, file early, and never wait until the last minute. ■

Sixth Circuit Reverses Dismissal of ETS/Retaliation Claims

The Sixth Circuit Court of Appeals reversed a 28 U.S.C. § 1915A(10)(1) dismissal of an environmental tobacco smoke (ETS) claim filed by a Tennessee prisoner, concluding that the plaintiff alleged sufficient facts to state a cognizable Eighth Amendment claim. The appeals court also found that the prisoner's retaliation claim had not been addressed.

Tennessee prisoner Lutfi Shaqf Talal (a.k.a. James Taylor) is allergic to tobacco smoke and was housed in a non-smoking unit of the Turney Center Industrial Prison (TCIP).

In 2003, Talal brought suit against the Tennessee Department of Corrections (TDOC) and more than forty individual officials. Talal alleged guards violated the Eighth Amendment when they smoked in non-smoking housing areas; allowed prisoners to smoke in non-smoking areas and gave them tobacco; placed smoking and non-smoking prisoners in the same cells; and permitted smoking in the general areas of the prison. He also claimed guard Polly Marchen retaliated against him “by refusing to enforce the prison's no-smoking policy and deliberately exposing him to high levels of smoke.” The district court dismissed the suit pursuant to § 1915A(b)(1) for failure to state a claim prior to service upon the defendants.

Citing *Hunt v. Reynolds*, 974 F.2d 734, 736 (6th Cir. 1992) and *Steady v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991), the Sixth Circuit observed “that

forcing a non-smoking prisoner with a serious medical need to share a cell with a prisoner who smokes violates the Eighth Amendment's objective prong.” The appellate court then found that Talal had satisfied both the objective and subjective prongs of *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475 (1993). “The allegations made by Talal reflect not only knowledge but ‘obduracy and wantonness’ on the part of corrections officials ... contrary to the district court's opinion, the mere existence of non-smoking pods does not insulate a penal institution from Eighth Amendment liability where, as here, a prisoner alleges and demonstrates deliberate indifference to his current medical needs and future health.” Accordingly, “[t]he district court's dismissal of this claim was erroneous.” The appeals court also noted that the district court had failed to address Talal's retaliation claim and remanded for the court to address that claim. Finally, the Sixth Circuit ordered that counsel be appointed to represent Talal on remand. See: *Talal v. White*, 403 F.3d 423 (6th Cir. 2005). ■

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Sixth Circuit Upholds \$34,000 Retaliation Verdict; New Trial & No Recusal Not Abuse of Discretion

The Sixth Circuit Court of Appeals affirmed a lower court's order granting a new damages trial on a prisoner's retaliation claim. The appellate court also upheld the district judge's refusal to recuse himself.

Ernest Bell, Jr., was a prisoner at the Southern Michigan State Prison who was held in administrative segregation (ad seg) because he was diagnosed with AIDS and had engaged in consensual sex with another prisoner. Bell was paroled in 1994 "but was returned to Jackson's ad seg unit when he violated parole."

Prisoners in ad seg are confined in single cells twenty-three hours per day. In April 1994, Bell sought legal assistance from a jailhouse lawyer named Thaddeus-X who was housed in a nearby cell. On April 20, 1994, Bell and Thaddeus-X signed a legal assistance agreement, which was approved by a deputy warden. With Thaddeus-X's assistance, Bell filed a lawsuit against "numerous prison staff," alleging "a number of claims, including a challenge to his placement in" ad seg.

"Before the lawsuit was filed ... guards assisted Bell by providing him with writing materials and by passing papers and legal materials between Bell and Thaddeus-X." But once the suit was filed, "guards began refusing to provide Bell with writing supplies or to pass legal materials between Bell and Thaddeus-X." Guards also moved Thaddeus-X away from Bell, "making it very difficult for Bell to communicate with him about the lawsuit."

According to Bell, two of the defendant guards threatened him on separate occasions, stating that "if [he] knew what was good for him, ... [he] better write the courts [and] have the litigation dismissed," and that Bell "'was going to pay' for filing the lawsuit."

The same defendant guards also searched Bell's cell twice, confiscating some of his legal papers during each search.

Bell amended his complaint to add a retaliation claim. The district court subsequently dismissed all but the retaliation claim and Bell appealed. The case was held in abeyance pending the Sixth Circuit's decision "in a related case ... involving a separate claim by Bell and 'his jailhouse lawyer, Thaddeus-X'." See: *Thaddeus-X v. Blatter*, 110 F.3d 1233 (6th Cir. 1997), vacated on grant of rehearing en banc and affirmed in part by en banc court, *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999).

On remand, the district court held a two-day trial on the retaliation claim. The court granted the defendants' motion for judgment as a matter of law, but the Sixth Circuit reversed. A second jury trial was held, and one of the defendant guards was found liable; the jury awarded \$1,500 in compensatory damages and no punitive damages.

The district court granted Bell's motion for a new damages trial, finding that the award "was against the great weight of the evidence at trial" and "[the guard]

should have been punished for his conduct. Clearly, the jury found that [he] not only retaliated against Bell for filing a lawsuit, but also that he tried to cover up his misconduct by telling falsehoods."

At a subsequent status conference, according to defendants, the judge indicated he "would try the ... case as many times as necessary until a jury reached a verdict of at least \$9,000."

Defendants moved to recuse the judge but he denied the motion, stating that his comments "were not intended to be taken literally ... but rather were an attempt, perhaps a bit heavy-handed, to resolve the case short of a third trial. Rhetorical promiscuity is not the same as bias."

The case went to a third jury trial, resulting "in a verdict of \$6,000 in compensatory damages and \$28,000 in punitive damages"

The Sixth Circuit rejected the defendants' appeal, finding that "the district judge did not abuse his discretion in granting a new trial," or "in declining to recuse himself pursuant to [28 U.S.C.] § 455." See: *Bell v. Johnson*, 404 F.3d 997 (6th Cir. 2005). ■

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News in Brief:

Arizona: On July 10, 2006, Kevin Peltier, 30, was sentenced to 10 years in state prison for participating in the fatal beating of Mojave county jail prisoner Peter Deakin. Jerome Cosby, the alleged leader of the beating was sentenced to life in prison for the beating. Mark Morton, 26, Daniel Nelson, 36, Tony Pamula, 37, and Adam Martin, 30, were jail prisoners who had also been initially charged in the assault and murder of Deakin, who was in jail on charges of raping his girlfriend and failing to register as a sex offender, but they cut deals agreeing to testify against Cosby and Peltier and received no additional jail time.

Arizona: On July 12, 2006, Phoenix police officers Michael Coleback, Hain Price and Richard Ruff were indicted on aggravated assault charges in state court for assaulting jail prisoner Thomas Schuster on November 11, 2005, in the intake area of the Fourth Avenue jail and assaulting prisoner German Diaz on May 1, 2005 in the same area. The police union is providing lawyers to the accused criminal cops.

California: In late March, 2006, Manuel Ramos, 20, was arrested and charged with trying to smuggle drugs into the Fresno county jail. A state parole agent spotted Ramos tying straws filled with tobacco, marijuana and methamphetamine to strings hanging from prisoner cells. Apparently the jail prisoners used heated shower rods to punch and burn holes through the jails plastic windows and then use the holes to receive drugs. Jail officials said they were in the process of placing metal covers over the windows.

Florida: On June 30, 2006, Jarrett Hodges, 36, a guard at the Nassau county

jail, was arrested on assorted charges stemming from playing sexually explicit videos in front of a jail prisoner and then offering to perform oral sex after grabbing and fondling the victim's genitals. Alas for Hodges, the would be victim was wearing a wire and had been cooperating with police. The attempted sexual assault took place in the sheriff department's evidence room.

Georgia: On April 22, 2006, Telfair State Prison guard Jimmy Clance handed a pistol belt to fellow guard Fred Hulett while the two were guarding a prisoner at the Medical Center of Central Georgia, when Hulett sat down the gun discharged lodging a bullet in a hospital wall. Hospital officials announced they were reconsidering their policy of allowing armed prison guards in the facility. Both guards are employed by Corrections Corporation of America.

Illinois: On July 7, 2006, Kane county jail guard Albert Jackson, 43, was sentenced to 24 months of conditional discharge after pleading guilty to theft. He was initially charged with felony theft and accused of stealing thousands of dollars in jewelry from jail prisoners. Those charges were dropped in exchange for the guilty plea for making copies and using plastic bags bought by the county for his personal landscaping business. Jackson was ordered to pay \$300 in restitution to the county; the prisoners he robbed get nothing. Jackson was turned in after his estranged wife was arrested on drug charges. Jackson had worked in the booking section of the jail for 16 years. If he completes the terms of his conditional release he will have no criminal record.

Louisiana: On July 28, 2006, James Leslie, the head of the state prison system's farm operations was charged with witness tampering in federal court as part of an FBI corruption investigation that Louisiana State Penitentiary warden Burl Cain demands kickbacks from prison contractors. Leslie pleaded not guilty and was released on bond.

Malawi: On July 3, 2006, nine prisoners attempted to escape from the maximum security Zomba central prison. Guards opened fire and shot and killed two prisoners. One successfully escaped and the remaining six were recaptured.

Michigan: On April 9, 2006, 35 prisoners at the Ojibway Correctional

Facility refused to leave a prison dayroom as part of a protest. The prisoners resisted when guards attempted to forcibly remove them and a prison spokesman claimed that 14 guards were "injured", none seriously enough to warrant medical attention.

New Jersey: On October 28, 2006, Merrimack county jail prisoner Gary Eames, 21, died while huffing a can of Pam cooking spray into a plastic bag over his head while working in the jail kitchen. Eames was awaiting trial on domestic violence charges when he died.

New Mexico: On July 10, 2006, Marcus Furious, a guard at the Metro Detention Facility in Albuquerque was arrested and charged with attempting to smuggle heroin into the facility in exchange for a \$150 bribe. At least two prisoners have died of heroin overdoses at the jail in recent months, including one in April.

Ohio: At least 45 prisoners were transferred from the Clark county jail in early July, 2006, after flooding put over three inches of water and raw sewage in the jail. The fecal flood was caused by a burst sewage pipe. Sheriff Gene Kelly speculated that overcrowding in the jail may be taxing the jails antiquated plumbing and sewage system.

Ohio: On June 28, 2006, Anjanette Castonguay, 33, a guard at the juvenile detention center in Xenia was arrested on charges of child endangerment, marijuana possession, entrusting her car to an unlicensed youth and having a beer party with juvenile boys. She resigned her job as a juvenile jail guard upon her own imprisonment. Her prior convictions include a drunken driving conviction in 2005 and in 1999 she was disciplined for bringing her son to work, dressing him in jail clothes and detaining him against his will in a jail cell.

Texas: On July 5, 2006, Juan Garcia, 47, a cook in the Bandera county jail, was charged with fondling and groping the genitals of a male prisoner at the jail. When confronted by jail investigators Garcia, a 16 year jail employee, admitted to the allegations.

Utah: In July, 2006, officials at the Cache county jail banned the Spanish language television channel Univision from jail televisions after guards complained about "raunchy" shows on the channel and jail sheriff Lt. Brian Locke claimed

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"It was dividing the inmates." It supposedly resulted in fights among Spanish speaking prisoners who wanted to watch the channel and non Spanish speaking prisoners who did not. To protest the elimination of Univision at least 25 prisoners refused to return to their cells until a police SWAT team threatened them and at least one prisoner still refused and was tasered into submission. The jail was then locked down. Weber county jail sheriff Captain Kevin Burton said "I think the issue wouldn't be a raunchy, seedy TV show. That might appeal to most people. The issue is the non Hispanics can't understand what's going on. It's a language they don't understand." Since at least 40% of the

Cache county jail population is Hispanic one could say that is exactly the issue with having only English language TV shows: It's a language they don't understand. The jail also prohibits prisoners from purchasing their own magazine and newspaper subscriptions and PLN has sued the jail over its ban on PLN.

Vietnam: On November 1, 2006, the government released 1,022 prisoners in a general amnesty. In August the government gave amnesty to more than 5,300 prisoners to celebrate the country's National Day. Outside the United States massive prisoner amnesties are a regular occurrence by governments that show mercy to their citizens. 🇻🇳

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Seventh Circuit Discusses Administrative Exhaustion

The Seventh Circuit Court of Appeals has held that a prisoner's amended complaint was the functional equivalent of a new complaint, and that new claims that were administratively exhausted after the original complaint was filed satisfied the Prison Litigation Reform Act's (PLRA) exhaustion requirement.

This action was filed by Joseph Barnes, a prisoner at Illinois' State Correctional Facility. In 1999 the Centers for Disease Control (CDC) was conducting a study, under contract with Stateville, to determine the amount and severity of communicable diseases among the prisoner population. Barnes, being concerned he had contracted hepatitis, asked to be tested in August 1999. His request was not answered.

In October 2000, Barnes filed a prose complaint against the CDC under the Federal Tort Claims Act. He alleged he had been exposed to hepatitis as a result of poor sanitation in prison and being housed with infected prisoners. He also alleged that CDC knew prisoners infected with HIV and hepatitis were entering Illinois prisons, that a significant risk existed that those pathogens could be transmitted

between prisoners, that CDC had failed to identify and isolate infected prisoners, and that the agency had provided no treatment for those affected.

The Illinois District Court appointed Barnes counsel, who determined the circumstances underlying the FTCA claim gave rise to a different set of claims against certain Stateville administrative and medical personnel. Barnes then initiated the grievance process to exhaust those claims. His first attempt resulted in an untimely filing. On his second try, Barnes was granted relief and given a hepatitis test, which came back positive, for which he has yet to receive treatment.

Barnes then moved to dismiss his claims against the CDC and filed an amended complaint to substitute a claim for violations of 42 U.S.C. § 1983 against Stateville defendants. The amended complaint alleged that the defendants had displayed deliberate indifference to his medical needs by ignoring his grievances, by refusing to test him for hepatitis, and by failing to provide him treatment after

he tested positive for the virus. The district court held the PLRA required dismissal for failure to exhaust administrative remedies prior to filing the original complaint. An appeal was taken.

The Seventh Circuit found the original complaint alleged exhausted claims, and the action later raised new § 1983 claims. The appellate court held the district court's rationale demanded an impossible task — to exhaust remedies not yet pertinent to the allegations of the filed complaint. When Barnes sued CDC, he alleged no cause of action against the state defendants and thus had no reason to exhaust remedies. After exhausting remedies against state defendants, Barnes filed an amended complaint, which was the functional equivalent of a new complaint. As such, Barnes satisfied the PLRA by exhausting the new claims administratively before bringing them in federal court.

Accordingly, the district court's dismissal order was reversed. See: *Barnes v. Briley*, 420 F.3d 673 (7th Cir. 2005). ■

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procedural aspect of litigating a disciplinary guilty finding in that particular state court. The DSHLM was recently denied a grant that would have provided free copies to prison law libraries because it **speaks the truth** of how the prison disciplinary process works.

Even though the DSHLM was first printed in February of 2004, a supplement was done to explain the recent United States Supreme Court decision in *Muhammad v. Close*. There is no additional cost for this supplement.

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The *Disciplinary Self-help Litigation Manual* is written by Daniel E. Manville, Co-Author of the Prisoners' Self-Help Litigation Manual (3rd edition). The DSHLM has 332 pages of text. It is sold only in paperback. The price of \$34.95 to prisoners includes the price of postage. The price of \$64.95 to non-prisoners includes the price of postage.

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